The Dangers of Rule 49 of the *Rules of Civil Procedure*

Jordan Nichols, Unit Director & Counsel at LAWPRO

Consider the following scenario: You act for a plaintiff in a Superior Court matter. On your client's instructions, you send the opposing counsel an informal email in which you offer to settle the litigation for $100,000. You do not include an expiry date for the offer. The opposing counsel promptly rejects the offer by email and makes an unacceptable counteroffer. A month later, you obtain new evidence that establishes that your client's claim is worth far more than previously realized. You immediately phone the opposing counsel to advise of the situation and you indicate that your client is no longer willing to settle for $100,000. Ten minutes after you hang up the phone, you receive an email from opposing counsel purporting to accept the old $100,000 offer.

Was the $100,000 offer still available to be accepted notwithstanding that the opposing counsel had rejected the offer in writing and made a counteroffer and notwithstanding that you advised the opposing counsel over the phone that your client was no longer willing to settle for $100,000? Believe it or not, due to the application of Rule 49 of the *Rules of Civil Procedure,* the answer could possibly be yes.

The Dangers of Rule 49

Rule 49 is probably best known for being the Rule that provides incentives for making strong settlement offers. Specifically, under sub-rule 49.10, plaintiffs who beat (or tie) their settlement offers at trial can be rewarded with costs on a substantial indemnity basis (rather than on a partial indemnity basis) from the time that the settlement award was served. Conversely, where a plaintiff obtains judgement at trial that is as favourable or less favourable than the terms of a settlement offer made by the defendant, the defendant can be awarded with partial indemnity costs from the time that the offer was served. In order for sub-rule 49.10 to apply, certain requirements set out under Rule 49 must be met including that the offer must be made at least seven days before the commencement of trial and cannot be withdrawn or expire before the commencement of trial. Significantly, sub-rule 49.02(2) provides that Rule 49 (including Rule 49.10) applies to motions with necessary modifications.

The cost implications set out in sub-rule 49.10 can occasionally trip up lawyers. For example, claims can arise due to allegations that a lawyer: a) failed to adequately advise clients of the importance of making reasonable settlement offers; b) failed to adequately advise of the consequences of failing to accept a reasonable offer; c) failed to make a settlement offer on a timely basis after having been instructed to do so; or d) failed to ensure that a settlement offer was structured in a way that would trigger the cost consequences set out in sub-rule 49.10.

Unfortunately, sub-rule 49.10 is not the only sub-rule that trips up lawyers and may not even be the most dangerous sub-rule. Rather, some of the most dangerous Rule 49 pitfalls are caused by some of the other, lesser known sub-rules. Specifically:

- Sub-rule 49.04(1) provides that "An offer to settle may be withdrawn at any time before it is accepted by serving written notice of withdrawal of the offer on the party to whom the

offer was made." This sub-rule has been interpreted as providing that settlement offers can only been withdrawn in writing (See: Hashemi-Sabet Estate v. Oak Ridges Pharmasave Inc., 2018 ONCA 839 (CanLII); York North Condominium Corp. No. 5 v. Van Horne Clipper Properties Ltd. *(C.A.)*, 1989 CanLII 4375 (ON CA)).

- Sub-rule 49.07(2) provides that a settlement offer remains open for acceptance even if the opposing party rejects the offer or makes a counteroffer.
  Sub-rule 49.07(5) provides that where a settlement offer is silent about costs, the plaintiff is entitled to have its costs assessed (either up s to the date that the offer was served or the date the offer was accepted, depending on whether the offer was made by the defendant or the plaintiff). Accordingly, if a defendant offers to a agree to a dismissal of a meritless claim for $0 or in exchange for an economic settlement but the offer makes no mention of costs, a plaintiff who accepts the offer can rely on sub-rule 49.07(5) to try to argue that it is entitled to its costs.

All of these sub-rules have resulted in claims against lawyers. These sub-rules are dangerous because they alter very basic principles of contract law that lawyers tend to rely on almost instinctively.

But Doesn't Rule 49 Only Apply to Formal Settlement Offers?

Some lawyers assume that the Rule 49 only applies to formal settlement offers made in the offer form provided in the Rules (Form 49C). This assumption runs contrary to the case law. Specifically, the courts have held that it is presumed that the parties in question intended for Rule 49 to apply even if Form 49C was not used and even if the offer was made through correspondence, unless, perhaps, the party making the offer made it clear at the time of the offer that the offer was not intended to be subject to Rule 49 (see: *Magnotta et al. v. Yu* et al., 2020 ONSC 1049 (CanLII); *Miller v. Parkway Rental Ltd.,* [1997] O.J. No. 3108 (Div. Crt.)).

Getting Tripped Up by Rule 49 is Not Always Fatal

Lawyers who get tripped up by Rule 49 have a potential escape hatch: they can seek to have a judge apply his or her discretion to not enforce the settlement in question. This discretion is reflected in the use of the word "may" in Rule 49.09 which provides (emphasis added):

> FAILURE TO COMPLY WITH ACCEPTED OFFER
>
> 49.09 Where a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may,
>
> (a) make a motion to a judge for judgment in the terms of the accepted offer, and the judge **may** grant judgment accordingly; or
>
> (b) continue the proceeding as if there had been no accepted offer to settle.

While judges have discretion to not enforce a settlement, the courts have made it clear that this discretion should be reserved for rare cases where compelling circumstances establish that the enforcement of the settlement is not in the interests of justice (ie: cases involving fraud or unconscionability) (See, for example, Srebot v. Srebot Farms Ltd., 2013 ONCA 84 (CanLII)).

LAWPRO has had some success convincing judges to apply their discretion to not enforce a settlement. However, LAWPRO has not been successful in all cases.

Keeping Out of Trouble

Fortunately, errors arising from Rule 49 tend to be avoidable provided that lawyers adopt good practices.

As a starting point, lawyers involved in litigation retainers should regularly consider whether settlement offers ought to be made, withdrawn or amended. It is a good practice for lawyers to advise clients at an early stage regarding the costs implications of settlement offers and warn clients if at any point it seems unlikely that the client will be able to beat the opposing party's offer at trial. All significant discussions with clients regarding settlement should ideally be confirmed in writing.

When making a settlement offer, a lawyer should consider advising the client (and confirming in writing) that: a) the offer will remain open for acceptance until it expires or is withdrawn; and b) if the client's views regarding settlement change at any point, it is imperative that the client promptly advise the lawyer.

Where lawyers are attempting to trigger the costs implications set out in sub-rule 49.10, lawyers should try to ensure that the settlement offer is structured in a way that will allow the trial judge to later assess whether the offer was beaten at trial. If the court is unable to make an "apples to apples" comparison between the terms of the offer and the relief granted at trial, the court may decline to impose the cost implications set out in sub-rule 49.10. It can therefore be problematic to make offers that include non-monetary consideration (beyond the exchange of basic releases) if the court would be unlikely to award comparable non-monetary relief at trial.

Lawyers should give thought to the issue of costs any time a settlement offer is made or accepted. If the intention is for there to be no costs, this should be clearly stipulated.

Lawyers should also ensure that all settlement offers have expiry dates unless there is a very good reason not to include one. If an offer is intended to trigger the costs implications set out in sub-rule 49.10, then the offer should not normally expire until the commencement of trial.

Lawyers should be aware that settlement offers will normally remain open for acceptance even if they have been rejected or a counteroffer has been made and that if an offer needs to be withdrawn, the withdrawal should be done in writing.

Lawyers should ideally have a system in place for keeping track of open settlement offers. Any time a lawyer transfers a file within a firm or externally, the transferring lawyer should ideally advise the new lawyer about any open settlement offers. If the transferring lawyer does not do this, the new lawyer should ideally make appropriate inquiries. While failure to do this may not necessarily constitute negligence, it is nonetheless a good practice.

lawpro.ca
Tel: 416-598-5800
or 1-800-410-1013
Fax: 416-599-8341
or 1-800-286-7639
Email: practicepro@lawpro.ca