

Civil Procedure
Fall Term 2026

Lecture Notes No. 2

I. INTRODUCTION (cont'd)

Professionalism: What role do lawyers play in litigation?

Lawyers are obligated to act competently and in the best interests of clients. For advocates, this means putting forward a client's case to the best of the lawyer's ability and using all available procedures and evidence. There are limits, however, imposed by the Law Society's [Rules of Professional Conduct](#). Some organizations provide "best practices" guideline; for example, see the Advocates Society's [publications](#) on point and their [Principles of Civility and Professionalism for Advocates](#).

Law Society of Ontario v. McCallum
2024 ONLSTH 29 (OLSTHD)

This was a disciplinary proceeding against a lawyer. The conduct at issue related to the representation of the defendant CAS in a tort action in negligence brought by the plaintiff respecting an historical sexual assault when plaintiff was a 14-year-old foster child who was assaulted by her foster father. The litigation became quite acrimonious, extending to communications between counsel. In the introduction to the decision, the Chair provided an overview:

[2] Mr. McCallum swore an affidavit in a civil action involving alleged sexual abuse of a girl in a foster home by her foster father. The affidavit was for the purpose of a status hearing at which the issue was whether the action should be dismissed for delay.

[3] Mr. McCallum accused the plaintiff's lawyer of misrepresentation for saying that the sexual abuse took place while the plaintiff was "in childhood". Mr. McCallum testified that the plaintiff was "a sexually mature young woman, not a 'child' as conventionally understood". This statement gave rise to this conduct application.

[4] Mr. McCallum now says that he intended to observe that the plaintiff was sexually mature in a biological sense and that his concern was that plaintiff's counsel intended to evoke disgust by impliedly alleging pedophilia in referring to "childhood".

[5] The Law Society alleges that Mr. McCallum failed to act honourably and with integrity in making the statement.

[6] This is something of an unusual case. Many cases address professional conduct rules that are much more specific. In contrast, Rule 2.1-1 is general in nature. Mr. McCallum acknowledges that his statement was ill-advised. However, his position is that Rule 2.1-1 is not breached absent morally blameworthy conduct, which he says is not the case here. As a result, we are required to interpret and apply Rule 2.1-1. The Tribunal's jurisprudence does not much address the interpretation of Rule 2.1-1. Following the hearing, we asked the parties to provide written submissions as to the appropriate interpretation of Rule 2.1-1.

[7] There are a number of issues that arguably arise in respect of Mr. McCallum's statement. The Law Society's position was that the impugned statement was not made in the interests of Mr. McCallum's client's interests and caused harm to his client's interest. The Law Society characterized the statement as being impulsive and irresponsible.

[8] The Law Society further submitted that the statement caused harm to the plaintiff, being another participant in the justice system. The Law Society also emphasized harm caused to the public's confidence in the legal professions and the administration of justice. The Law Society submitted that the statement tended to cause particular harm on members of the public who are minors and have been abused by people in positions of trust and power on victims of sexual abuse.

[9] These submissions by the Law Society raise quite different issues. The first submission invokes the lawyer's duty of commitment to the client cause, which is a fundamental aspect of the duty of loyalty. The second submission invokes difficult questions about lawyers' obligations as advocates, particularly in the context of allegations of sexual abuse and, even more particularly, in the context of allegations of sexual abuse of girls by people in positions of trust.

...

[17] The plaintiff's counsel and Mr. McCallum both swore affidavits for the status hearing. In his affidavit, Mr. McCallum responded to the affidavit for the plaintiff saying that:

To aid her purpose the plaintiff has undertaken two stratagems:

- (a) she has engaged in a process that can only be called a surreptitious ad hominem attack on the Society's lawyer (namely, me);
- (b) she misrepresents facts.

[18] Mr. McCallum did not merely challenge the evidence of plaintiff's counsel. He alleged that her affidavit was a "surreptitious ad hominem attack" on him personally. He alleged that plaintiff's counsel misrepresented the facts. Mr. McCallum's affidavit was a personal attack on plaintiff's counsel.

[19] In support of his claim of factual misrepresentation by plaintiff's counsel, Mr. McCallum testified that her affidavit was "rife with errors, imprecisions, and misrepresentations, most of which are minor and for that reason neither will I dwell on them. I will however present a few instances before proceeding." With respect to one of these instances, Mr. McCallum testified that (emphasis added):

she states that the alleged assaults took place while the plaintiff was "in childhood". The plaintiff was born in March 1967. The alleged abuse took place in 1981-82. A fourteen or fifteen girl is a sexually mature young woman, not a 'child', as the term is conventionally understood; ...

[20] The Law Society alleges that the making of the statement that "A fourteen or fifteen girl is a sexually mature young woman, not a 'child', as the term is conventionally understood" (the impugned statement) is a failure to act honourably and with integrity, contrary to Rule 2.1-1 of the Rules.

[21] Mr. McCallum's position is that he did not say what he meant to say and that, for reasons discussed below, he intended to address what he took to be allegation of pedophilia as plaintiff's counsel intended to evoke disgust in referring to childhood and thereby suggesting pedophilia.

The tension in the case is in respect of the lawyer's obligation to act in a client's best interests but to do so "honourably and with integrity." Thus,

[106] The Law Society submitted that the impugned statement was offensive, insensitive and amounted to victim-blaming. It submitted that Mr. McCallum breached Rule 2.1-1 because making the impugned statement was not in his client's interests, given its legislative mandate as a children's aid society, because Mr. McCallum did not have instructions from his client to make the impugned statement and because of the offensive nature of the impugned statement and its impact on the plaintiff. The Law Society submitted that making the impugned statement did not inspire the confidence, respect and trust of his client and the community, and did not reflect favorably on the legal professions and the administration of justice, as required by Rule 2.1-1[4].

[107] Mr. McCallum acknowledged to the investigator that his impugned statement was "extraordinarily stupid" as he was

representing a children's aid society. He conceded that he wouldn't "object terribly" to the terms "shocking, outrageous or deeply concerning" being applied to his statement. However, his position is that his statement was correct in fact and that making the statement was not morally blameworthy. On this basis, his submission is that making the statement was not in breach of Rule 2.1-1.

[108] In support of his submission, Mr. McCallum relied on the definition of "professional misconduct" in Rule 1.1-1, Rule 2.1-1 and its commentaries and Rule 5.1-1 and its commentaries. Mr. McCallum did not submit any cases that applied or interpreted Rule 2.1-1.

[109] Mr. McCallum submitted that the definition of professional misconduct in Rule 1.1-1 requires at least some form of wrongdoing and, focusing on subsections (b) to (g) of the definition of professional misconduct, seriously morally culpable wrongdoing. Focusing on Rule 2.1-1, Mr. McCallum submitted that there could be no breach of Rule 2.1-1 absent moral blameworthiness. His submissions treated acting honourably and acting with integrity as largely having the same meaning in Rule 2.1.1. Mr. McCallum also submitted that Rules 2.1-1 and 5.1-1 should be interpreted together given the common reference to acting honourably and that the requirement to act honourably must be understood in the context of the requirement of resolute representation.

After a lengthy consideration of the Rule 2.1, the decision continued:

[177] We interpret Rule 2.1-1, in its requirement to act honourably, to generally prohibit professional conduct that is contrary to the professional and legal obligations of a lawyer, or which is contrary to applicable law, which tends to bring discredit on the legal profession. Conduct that breaches the requirement to act honourably is not only conduct that is morally blameworthy or involves moral turpitude. That said and referring back to Mr. MacKenzie's text, Rule 2.1-1 is not an invitation to "nit-pick."

...

[238] Making the impugned statement was contrary to his client's interests, without authority, and irresponsible. While Mr. McCallum carefully did not agree at his interview with the investigator that he had been irresponsible, he acknowledged that he got sidetracked, that he lost track of the main issue, that it was extraordinarily stupid of him to refer to the plaintiff as a sexually mature young woman, that he should not have written the impugned statement at all, and that he would not object terribly to the description of his statement as being shocking or outrageous or deeply concerning.

...

[241] This is one of the unusual cases in which, in our opinion, a specific professional conduct rule does not apply but where there is professional misconduct. As a result, Rule 2.1-1 was cited. The Law Society could have simply relied on the general definition of professional misconduct in the Rules, which is “conduct in a lawyer’s professional capacity that tends to bring discredit upon the legal profession”.

[242] As said above, our interpretation of Rule 2.1-1 is that it is a general rule that requires proper professional conduct and compliance with applicable law in support of the goals of legal services regulation. Said another way, Rule 2.1-1 can be breached by conduct contrary to a lawyer’s client or other professional obligations. As discussed above, we do not accept that moral blameworthiness is required. While “honour” may have this implication in other contexts, these Rules are not about chivalry or similar matters but rather are about ensuring the professional conduct required to make a legal system in a free and democratic society work.

[243] We agree with Mr. McCallum’s assessment of his own conduct as detailed above. He did not serve his client’s cause. He did not seek instructions when he should have. He acted unnecessarily and irresponsibly. Mr. McCallum’s only real disagreement with the allegation is that he says that his conduct was not morally blameworthy, in the sense of not being inherently wrongful or involving some sort of moral culpability. But we do not agree that this is a necessary element for there to be a breach of Rule 2.1-1. We also do not agree that this is a mere error in judgment as was submitted. We find that Mr. McCallum’s conduct breached Rule 2.1-1.

[244] In any event and alternatively, we are not constrained strictly by the invocation of Rule 2.1-1. The notice of application is not to be treated as an indictment.[24] Mr. McCallum’s impugned statement, his rationale for making the impugned statement, his client obligations, and his client’s interests have been well canvassed in the hearing of this application. For the same reasons that we have concluded that Mr. McCallum’s conduct breached Rule 2.1-1, we conclude that his conduct tended to bring discredit upon the legal profession and is therefore professional misconduct as defined in Rule 1.

[245] In respect of these findings, we do not see the duty of resolute representation being relevant in the sense that it was in Groia. Our findings are primarily about a failure of proper client representation, considering the interests of the client rather than protection of the administration of justice.

We also do not see expressive freedom to be much engaged. Mr. McCallum's speech was on behalf of his client. While advocates have their own expressive freedoms as in Doré,[25] at issue here was expression on behalf of the client. Mr. McCallum was not speaking for himself. He spoke for his client, in a manner that was inconsistent with his client's legislative mandate, and he did so without his client's knowledge and instructions.

[246] Having considered the importance of resolute representation and having weighed the importance of expressive freedom in this context against the importance of ensuring proper professional conduct, we find that Mr. McCallum engaged in professional misconduct by breaching Rule 2.1-1 by failure to comply with his client obligations in making the impugned statement. In context, making the impugned statement tended to bring discredit upon the legal profession and that Mr. McCallum acted dishonourably in doing so.

A note on "Champerty & Maintenance"

At common law,

"maintenance" refers to a wrong whereby one person aids another in bringing meritless litigation for an improper purpose;

"champerty" occurs where the wrongdoer receives, or will receive, a share of the damages or award.

At common law, these were crimes as well as torts.

The concepts are simple and these torts rarely arise. However, the principles are challenged by two contexts: contingency fees, and, partial settlements to fund the litigation itself.

McIntyre Estate v. Ontario (Attorney General) 2002 CanLII 45046 (Ont. C.A.)

This case dealt with contingency agreements. O'Connor ACJO surveyed the law at large and held:

78 I want to address three other matters that were touched on during the arguments of counsel. The first relates to the criteria that should be used in assessing the reasonableness and fairness of fees in a contingency fee agreement. Contingency fee agreements have been expressly permitted by statute in many jurisdictions. Often, the authorizing legislation has also provided for a regulatory regime that addresses the manner in which the propriety of contingency fees may

be determined. See for example, the Class Proceedings Act, s. 33(1).

79 Ontario, of course, does not have legislation specifically directed at regulating non-class action contingency fee agreements. Until such legislation is passed, **the regime in the Solicitors Act for assessing lawyers' accounts will apply. When assessing a contingency fee arrangement, the courts should start by looking at the usual factors that are considered in addressing the appropriateness of lawyer-client accounts.** See *Cohen v. Kealey & Blaney* (1985), 10 O.A.C. 344 (Ont. C.A.), at 346.

80 In addition, **I see no reason why courts should not also consider compensation to a lawyer for the risk assumed in acting without the guarantee of payment. This is, of course, where the discussion becomes controversial. Some argue that allowing a lawyer to be compensated for the risk assumed increases the concerns about the abuses that historically the law of champerty aimed to prevent. However, I do not think that that needs to be the case. The emphasis here should be on the reasonableness and fairness of the compensation to the lawyer for assuming the risk.** Many jurisdictions that have expressly approved contingency fee agreements have set out the criteria for addressing the amount of compensation that will be permitted.

Indeed, Ontario has done so in the Class Proceedings Act. In these instances, one element giving rise to compensation is often the acceptance of risk and an assessment of the level of risk involved.

81 That said, **I want to sound a note of caution about the potential for unreasonably large contingency fees. It is critical that contingency fee agreements be regulated and that the amount of fees be properly controlled. Courts should be concerned that excessive fee arrangements may encourage the types of abuses that historically underlay the common law prohibition against contingency fee agreements and that they can create the unfortunate public perception that litigation is being conducted more for the benefit of lawyers than for their clients. Fairness to clients must always be a paramount consideration.**

82 Notwithstanding my conclusion that contingency fee agreements should no longer be absolutely prohibited at common law, I urge the government of Ontario to accept the advice that it has been given for many years to enact legislation permitting and regulating contingency fee agreements in a comprehensive and co-ordinated manner. There are obvious advantages to having a regulatory scheme that is clearly and specifically addressed in a

single legislative enactment. There is no reason why Ontario, like all the other jurisdictions in Canada, should not enact such a scheme. Again, I wish to make clear that this comment is not intended to apply to family law matters, where different factors apply.

83 The second matter I wish to briefly address is the effect of the Solicitors Act of Ontario on the disposition of this appeal. I start by noting that the underlying application does not raise the question whether the proposed agreement breaches the Solicitors Act and, strictly speaking, it is not necessary to comment on the effect of that Act on the issues raised in this case. However, for completeness, I think a few comments are warranted.

84 Section 28 of the Solicitors Act reads as follows:

28. Nothing in sections 16 to 33 gives validity to a purchase by a solicitor of the interest or any part of the interest of his or her client in any action or other contentious proceeding to be brought or maintained, or gives validity to an agreement by which a solicitor retained or employed to prosecute an action or proceeding stipulates for payment only in the event of success in the action or proceeding, or where the amount to be paid to him or her is a percentage of the amount or value of the property recovered or preserved or otherwise determinable by such amount or value or dependent upon the result of the action or proceeding.

85 I agree with the applications judge and others who have observed that this section and other similarly worded sections do not prohibit contingency fee agreements. See Bergel & Edson at 791-92; and Thai Trading, supra, at 785. The section says nothing more than contingency fee agreements are not permitted by the Solicitors Act if they are not otherwise permitted.

86 Finally, I want to address the Rules of Professional Conduct of the Law Society of Upper Canada. Again, the application that underlies this appeal does not call for a determination whether the proposed agreement contravenes these Rules. Because this argument was not fully developed on the appeal, I think the issue of the application of those Rules is better left for another occasion. That said, the Rules of Professional Conduct and the complaints and disciplinary regimes of the Law Society clearly have a role to play in ensuring that lawyers who enter into contingency fee agreements follow the ethical and professional standards set out in the Rules, so that the abuses feared in the past do not become a reality in the future.

II. WHO PAYS FOR THE LITIGATION?

“The Costs Rules”

- **Costs** = money paid by the unsuccessful party to the successful party in litigation, adjusted for offers to settle, bad behaviour, and proportionality.
- **Goal** = compensation for the costs of litigation; encourage settlement.
- **Scale** = ‘Partial indemnity’ is the norm (expect 60% of reasonable costs at best), ‘substantial indemnity’ (90% of reasonable costs) are exceptional and usually based on offers to settle, and ‘full indemnity costs’ are rare.

The ***Courts of Justice Act*** provides the Court’s substantive jurisdiction to order costs:

131 (1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding **are in the discretion of the court**, and the court may determine by whom and to what extent the costs shall be paid.

(2) In a proceeding to which Her Majesty is a party, costs awarded to Her Majesty shall not be disallowed or reduced on assessment merely because they relate to a lawyer who is a salaried officer of the Crown, and costs recovered on behalf of Her Majesty shall be paid into the Consolidated Revenue Fund.

It is important to note the **discretionary nature** of costs, which makes anticipating an award of costs really difficult.

Procedurally, two Rules are important: **Rule 49** (dealing with the costs consequences attached to settlement offers) and **Rule 57** (costs generally). **Please read these two rules carefully.**

Plaintiff’s Offer

49.10 (1) Where an offer to settle,

(a) is made by a plaintiff at least seven days before the commencement of the hearing;

(b) is not withdrawn and does not expire before the commencement of the hearing; and

(c) is not accepted by the defendant,

and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise.

Defendant's Offer

(2) Where an offer to settle,

(a) is made by a defendant at least seven days before the commencement of the hearing;

(b) is not withdrawn and does not expire before the commencement of the hearing; and

(c) is not accepted by the plaintiff,

and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.

...

57.01 (1) In exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

- (i) improper, vexatious or unnecessary, or
- (ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

- (i) commenced separate proceedings for claims that should have been made in one proceeding, or
- (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and
- (iii) any other matter relevant to the question of costs.

Barlow v Citadel General Assurance Co.
2008 CanLII 3215 (Ont. S.C.J.)

Here the plaintiff was awarded \$100,000 in damages and sought \$250,000 in costs; costs in the amount of \$90,000 were awarded (the trial judge held that the claim was 'outlandish' and seemed to have been made under the assumption that the defendant insurer should be punished for vigorously defending the claim).

Aside from illustrating the general method by which costs are assessed, this case considers whether a lawyer may seek a premium from the losing party to assure that the lawyer's bill is paid fully (that is; that the shortfall between actual costs and the costs ordered are paid by the losing party where the winning party has insufficient funds).

Lalonde J.:

4 Counsel for the plaintiff seeks a \$50,000.00 premium on the basis that he took on the plaintiff's case on the basis that he would not recover any fees or disbursement unless the plaintiff was successful in a settlement or at trial. He states that his client had no financial ability to retain his services.

...

10 It is not my role in fixing costs to engage in another piece of litigation. I find that the argumentative supplementary costs submissions of plaintiff's counsel were not helpful. Counsel can find any number of costs decisions that, if improperly applied, can support outlandish positions.

11 The plaintiff claimed a premium of \$50,000.00 basically because she did not have the financial means to retain counsel (paragraph 3 of the plaintiff's submissions on costs)... In.. Ward v. Manufacturers Life Insurance Co., [2007] O.J. No. 4882 (Ont. C.A.)... In that case, Manufacturers Life froze Mr. Ward's vested commission account. Weiler J.A... states at paras. 69-71 that:

¶ 69 The concerns underlying the decision in Walker apply equally to the new language of Rule 57.01. **First, the new factors, like the old ones, are neutral in character and can apply equally to plaintiffs or defendants. Second, although the new factors do not specifically relate to the nature of the case or the conduct of the parties, they serve to uphold the principles of transparency and predictability that should govern costs awards. The two new factors merely make explicit the fact that, in the absence of a costs grid, there should be fairness and consistency in the amount that can be charged for lawyers' time across similar pieces of litigation involving similar conduct and counsel.**

¶ 70 I would note that the phrase "the principle of indemnity" in the new legislation is qualified. The listed considerations are the experience of the lawyer, the rates charged, and the hours spent. While the clause is phrased inclusively, a risk premium is not of like kind to these considerations.

¶ 71 **Clause (0.b) confirms this interpretation by insisting that costs be what the unsuccessful party could "reasonably expect to pay." This engages the other concern about risk premiums explicit in Walker: that the defendant is not aware of his potential cost exposure because the premium is a private agreement between the plaintiff and his counsel.** As noted in Walker, this is particularly important where, as here, a Rule 49 offer to settle has been made, and the defendant must be aware of the risk of refusing the plaintiff's offer.

12 Weiler J.A. cancelled the \$50,000.00 premium award. For the same reasons, I dismiss the plaintiff's claim for a \$50,000.00 costs premium in this case.

Clarington (Municipality) v. Blue Circle Canada Inc.
2009 ONCA 722 (Ont. C.A.)

Epstein J.A. held:

[30] The same principle was expanded upon in *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1 (C.A.), at p.23, where Robins J. A., speaking for the court, set out the restricted circumstances in which a higher costs scale is appropriate with reference to *Orkin* at para. 219.

An award of costs on the solicitor-and-client scale, it has been said, is ordered only in rare and exceptional cases to mark the court's disapproval of the conduct of a party in the litigation. The principle guiding the decision to award solicitor-and-client costs has been enunciated thus:

[S]olicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement.

[31] The narrow grounds justifying a higher costs scale were further reinforced by Abella J.A. in *McBride Metal Fabricating Corp. v. H. & W. Sales Co.* (2002), 59 O.R. (3d) 97 where, at para. 39, she said:

Apart from the operation of Rule 49.10 (introduced to promote settlement offers), only conduct of a reprehensible nature has been held to give rise to an award of solicitor-and-client costs. In the cases in which they were awarded there were **specific acts or a series of acts that clearly indicated an abuse of process, thus warranting costs as a form of chastisement.**

...

[45] Of course, a distinction must be made between hard-fought litigation that turns out to have been misguided, on the one hand, and malicious counter-productive conduct, on the other. The former, the thrust and parry of the adversary system, does not warrant sanction: the latter well may. In *Apotex v. Egis Pharmaceuticals* substantial indemnity costs were justified as a means "to discourage harassment of another party by the pursuit of fruitless litigation...particularly where a party has conducted itself improperly in the view of this court." For other examples of abuses of process leading to elevated costs, see *Dyer* at pp.184 - 85.

[46] Here, there is no finding or evidence in the record of "harassment...by the pursuit of fruitless litigation". The settling defendants were entitled to advance their position; they were not required to settle. **In**

the end, the trial judge did not agree with their position but the settling defendants did nothing to abuse the process of the court. In short, there was no wrongdoing on the part of the settling defendants that warranted a rebuke from the court.

Clarington is difficult in that the Court does not provide much insight into the level of fault that is required other than to repeat certain traditional characterizations of conduct (such as ‘reprehensibility’) that are not related to values, except for one: abuse of process. and the administration of justice is prejudiced by vexatious or oppressive conduct.

**1086289 Ontario Inc. (Urban Electrical Contractors) v. Welland (City)
2026 ONCA 352 (Ont. C.A.)**

Sorry – this is a bit complicated.

Sometimes an action features multiple parties and is very complicated and expensive. Ontario law has, over time, accepted some American approaches as acceptable – approaches to litigation that allow some parties to achieve a partial settlement and usually stay in the litigation. Suppose that the plaintiff sues a number of defendants, one of whom wishes to settle but also wishes to assert that another defendant should be held liable to pay more damages. In such a case, the ‘settling defendant’ may enter into a partial settlement with the plaintiff featuring a transfer of money by the settling defendant to the plaintiff pending final judgment, remain in the litigation as a defendant, and make common cause with the plaintiff against another defendant. In essence this allows the defendant to cap its exposure and the plaintiff to fund its litigation against other defendants. For example, in a tort action brought by the driver of a car against a number of defendants, the defendant driver (or his or her insurer) may wish to settle the action but join the plaintiff in asserting that faulty maintenance of a roadway was the dominant cause of the accident and the plaintiff’s injuries (rather than the defendant’s driving).

One principal way of proceeding is through a “Mary Carter agreement” – named for [*Booth v. Mary Carter Paint. Co.*, 202 So. 2d 8 \(Fla. 2d D.C.A. 1967\)](#) - and features a number of elements in its original form:

- the contracting parties agree that the plaintiff will receive a minimum amount of damages, regardless of the outcome of the trial;
- the liability of the settling defendant is capped at the amount agreed;
- the settling defendant remains in the litigation;
- the plaintiff agrees to limit its claims against the other defendants to a set amount (which protects the settling defendant from claims for contribution from other defendants);

- the settling defendant's liability is decreased as agreed based on the plaintiff being awarded damages in excess to that received to be paid by the non-settling defendants' liability (i.e. damages ordered above the amount agreed upon).

The issue in this case was the nature of the obligation on the contracting litigants. The background to the decision was the rule in [*Handley Estate v. DTE Industries Limited*, 2018 ONCA 324 \(Ont. C.A.\)](#) which held that failure to disclose the fact of the agreement to the Court would result in the litigation being stayed. Once disclosed, the Court would direct how much of the agreement had to be revealed to the other parties.

The Rules were amended in 2025 to change the approach. Thus, sub-rule 49.14 provides in part:

Partial Settlement Agreements

49.14 (1) In this rule,

“partial settlement agreement” means a settlement agreement in a proceeding, whether written or unwritten, where,

- (a) at least one plaintiff and at least one defendant are parties to the agreement,**
 - (b) at least one defendant is not a party to the agreement,**
 - (c) the agreement does not settle the proceeding in its entirety, although it may be settled in its entirety as between some parties, and the parties to the agreement intend that the proceeding will continue to some extent, and**
 - (d) the agreement is binding on the parties to the agreement, subject to the requirement for judicial approval under rule 7.08 if applicable.**
- O. Reg. 50/25, s. 9.**

...

Obligation to Promptly Disclose

(4) Subject to subrule (8), a plaintiff who is a party to a partial settlement agreement shall disclose the terms of the agreement, other than the monetary value of the settlement, if any, to every other plaintiff and defendant who is not a party to the agreement,

- (a) immediately after the agreement is reached, if the hearing of the proceeding has commenced; or**

(b) if the hearing of the proceeding has not commenced, no later than the earlier of,

(i) seven days after the agreement is reached, and

(ii) the taking of any further step in the proceeding by any party to the agreement. O. Reg. 50/25, s. 9.

(5) Subject to subrule (8), as soon as possible after the disclosure, and in any event no later than seven days before the next date on which the parties are scheduled to appear in court, the plaintiff shall,

(a) record the terms of the partial settlement agreement, other than the monetary value of the settlement, if any, in Form 49E; and

(b) serve a copy of Form 49E on every other party to the proceeding and file it, with proof of service. O. Reg. 50/25, s. 9.

(6) The disclosure obligations in subrules (4) and (5) prevail over any agreement respecting confidentiality or non-disclosure between the parties to the partial settlement agreement. O. Reg. 50/25, s. 9.

(7) If a plaintiff fails to comply with subrule (4) or (5), the court may, on any other party's motion,

(a) make an order for costs, regardless of the outcome of the proceeding;

(b) order or permit further examinations for discovery, to be conducted at the plaintiff's expense;

(c) order additional disclosure or production of documents;

(d) strike out all or part of a party's evidence, including any affidavit made by the party;

(e) adjourn a hearing or other step that permits or requires the attendance of the parties;

(f) stay the proceeding; or

(g) make such other order as is just. O. Reg. 50/25, s. 9.

...

The Court of Appeal has reversed Handley Estate in favour of an approach that is discretionary. Thus, the Court held:

[1] These appeals require the court to reconsider the framework governing the disclosure of partial settlement agreements in multi-party civil litigation, and, in particular, the continued validity of the rule articulated in *Handley Estate v. DTE Industries Limited*.^[1] The appeals were heard together because they raise common issues of law concerning the characterization of non-disclosure as an abuse of process, the appropriate remedial response to such conduct, and the interaction between the common law and the recently enacted r. 49.14 of the Rules of Civil Procedure.^[2]

[2] The judgment is divided into two parts. In the first, we address the common issues. In the second, we apply the principles arising from that analysis to the individual appeals.

[3] At the centre of the common issues is the rule set out in *Handley Estate*, which provides that where parties enter into a partial settlement agreement that changes the adversarial landscape of the litigation, the agreement must be disclosed immediately to the non-settling parties and to the court; failure to do so constitutes an abuse of process; prejudice need not be shown; and a stay of proceedings is the only available remedy. The automatic and exceptionless nature of this rule is squarely in issue in these appeals.

[4] For the reasons that follow, we conclude that *Handley Estate* was wrongly decided. In our view, the rule departs from the fundamental principles that govern the doctrine of abuse of process. That doctrine has long required a contextual and discretionary assessment, directed to whether the impugned conduct results in unfairness, prejudice, oppression, or otherwise undermines the integrity of the administration of justice. These governing principles also require that any remedy be proportionate to the nature and consequences of the abuse. The *Handley Estate* rule, by contrast, mandates both a finding of abuse of process and the imposition of the most severe remedy, without regard to the circumstances of the case.

[5] Having determined that Handley Estate was wrongly decided, we must consider whether it should nonetheless be maintained in the interests of certainty and stability in the law. Applying the governing principles, we conclude that the advantages of overruling the decision outweigh any disadvantages. The rule has proven to be unduly rigid, capable of producing disproportionate outcomes, and a source of uncertainty and satellite litigation. The continued application of this rule would impede the principled development of the law governing abuse of process.

[6] We, therefore, overrule Handley Estate and restore the application of ordinary abuse of process principles to cases involving the non-disclosure of partial settlement agreements. Under this framework, the determination of whether there has been an abuse of process, and the selection of an appropriate remedy, are matters for the informed discretion of the court, to be exercised in light of all of the relevant circumstances.

[7] We also address the relationship between this common law framework and r. 49.14 of the Rules of Civil Procedure, which came into force after the events giving rise to these appeals. In our view, the rule reflects and reinforces the discretionary and proportionate approach that properly governs this area. Rule 49.14 clarifies the scope and timing of disclosure obligations and provides for a range of remedial responses, thereby avoiding the rigid consequences associated with the Handley Estate rule.

[8] Finally, we address the implications of this revised framework for appellate jurisdiction. We conclude that orders granting a stay of proceedings remain final and appealable to this court, while orders imposing remedies short of a stay, as well as orders declining to grant a stay in this context, are generally interlocutory and appealable to the Divisional Court, with leave.

...

[46] Rule 49.14 was created to address the concerns that have been identified. It differs from the Handley Estate rule in three key ways.

[47] First, the rule expands the scope of available remedies. Under r. 49.14(7), when a party fails to disclose a partial settlement agreement, the court has a number of remedies to choose from to address any prejudice caused by the non-disclosure. These approaches include ordering costs, ordering or permitting further examinations for discovery, ordering additional disclosure or production of documents, striking out all or a part of a party's evidence, adjourning a hearing, staying the proceedings, or making any other order as is just.

[48] Second, the rule expands the scope of the disclosure obligation. Rule 49.14 is not limited merely to partial settlement agreements that “entirely” change the litigation landscape and “significantly” alter the dynamics of the litigation. Instead, the rule applies whenever there is a partial settlement agreement. This change avoids litigation surrounding whether or not the agreement needs to be disclosed.

[49] Third, the rule clarifies the disclosure obligation, both in terms of what must be disclosed and when disclosure must occur. The rule clarifies that all terms other than the monetary value of the settlement must be disclosed – a much clearer standard than all terms which “change the adversarial orientation of the proceeding”.^[53] The rule also provides for a defined time limit for disclosure: in most circumstances, the settlement must be disclosed by the earlier of seven days after the agreement is reached or the taking of any further step in the proceeding. If the partial settlement requires court approval, the new rule sets out a specific procedure for the timing of the disclosure, tied to the filing of the motion record and the approval by the court.

[50] By clarifying the timing and extent of the disclosure obligation, expanding its scope, and making available a broader range of remedies, r. 49.14 empowers the court to address any type of prejudice arising from non-disclosure of partial settlement agreements in a fair manner, tailored to the facts of a particular case. It removes the mandatory stay of an action which has resulted in unfair outcomes and provides certainty to counsel concerning their obligations. It also removes the incentive for litigants who might be inclined to take advantage of minor inadvertent delays in disclosure. This will bring the law relating to partial settlement disclosure in line with the broader abuse of process framework.

C. The new rule and the common law abuse of process

[51] This discussion demonstrates that the substantive elements of r. 49.14 reflect what we believe is the nuanced position that the common law on abuse of process would have reached, in this narrow area of partial settlements in civil actions, had the Handley Estate rule not curtailed its development. The parties addressed whether r. 49.14 could or should be applied retrospectively. On close examination, this issue falls away because, having reversed Handley Estate, the rule and the common law are consistent with one another. While r. 49.14 adds technical details as to when a partial settlement agreement must be disclosed, a breach of the timelines in the rule does not automatically entail a finding that an abuse of process has occurred. It is a strong indicator, but under r. 49.14, both the finding of an abuse of process and the resulting remedy remain in the discretion of the judge. This approach is consistent with the common law abuse of process principles set out above.