LYON
FAMILY LAW

MEMORANDUM ON OFFERS TO SETTLE

1. **What is an Offer to Settle?**
2. **Why Make an Offer to Settle?**
3. **How Can it Help to Make an Offer to Settle?**

The purpose of this memorandum is to assist you in understanding the purpose of making an **Offer to Settle**.

An Offer to Settle can do two things. First, it can influence the Court when the question of "costs" is dealt with after everything else has been determined – and only then. If you have made an Offer to Settle that is as good as or better than what the Court orders then the Court will likely (though never guaranteed) order the other side to pay some or possibly most of your legal costs. Second, the Offer to Settle may settle the matter if the other side agrees and accepts your Offer.

Please remember that there is no real mystery to Offers to Settle. An Offer to Settle is your proposal to settle the litigation.

It is usually better to settle on terms acceptable to you as opposed to having the matter decided by a judge. The outcome of litigation is always uncertain. There are no guarantees in litigation, and controlling your "risk" by offering to settle is usually the best and most rational way to proceed.

Offers to Settle also help you to focus on what is important to you and what minimums you are prepared to accept. This is important as often people lose sight of their goals and what it will take to settle the matters in issue.

Offers to Settle may be made at any time prior to the Judge making a determination, but the most common occasions are:

- after the exchange of any necessary disclosure (or Questioning, if applicable) because the respective lawyers will have had an opportunity to review the opposite party's case;

- before a Settlement Conference, in preparation for such a Conference;

- after a Settlement Conference if the judge renders his or her view of the case; and

- just before trial when the weaknesses of a party's case and the reality of losing control over the outcome hits home.

There are technical timeframes which should be met in order to obtain the maximum impact from an Offer to Settle and we would be happy to discuss these with you.

Offers may be accepted until they expire or are withdrawn. Offers may be withdrawn at any time prior to acceptance. An accepted offer may be enforced as a judgment.

As noted above, Offers to Settle have two purposes:

(1) On the one hand an offer may be directed toward negotiations leading to settlement so that the other side will accept the Offer to Settle and bring the litigation to an end;

(2) On the other hand, if the matter does not settle but rather proceeds to judgment, having a reasonable Offer to Settle on the table may influence a Court to award costs in your favour.

At the end of a legal proceeding (or a step in a legal proceeding, *e.g.*, a motion) the Court has a discretion to award costs. The most common award to a successful party is an Order of costs on a percentage of the total costs you have incurred or, alternatively, a partial indemnity basis (formerly "party and party basis"), which requires an unsuccessful party to pay the successful party his or her costs in accordance with the Tariff scale set out in the *Ontario Rules of Practice*. This Order for "partial indemnity" often results in the successful party receiving approximately 50% of his or her total legal bill for fees and disbursements.

In order to encourage settlement of disputes, the *Ontario Rules of Practice* and the *Family Law Rules* reward those who make reasonable Offers to Settle and penalize those who fail to accept such Offers. Indeed, the practice is developing of penalizing anyone who doesn't make an Offer to Settle. Where possible, we invariably recommend making an Offer to Settle and have gone so far as to prepare this memorandum to assist our clients in drafting an appropriate Offer to Settle

With respect to Offers to Settle, the *Family Law Rules* are subject to the absolute discretion of the Judge and are not easily applicable to those in which non-monetary relief is claimed.

The Court's analysis in awarding costs can be very complex. Parties can be presumptively entitled to costs on two bases:

1. Being the successful party; and/or

2. Obtaining an Order that is as favourable or more favourable than their Offer to Settle.

For example, if the Applicant brings a motion for interim spousal support and successfully obtain an Order for same, he or she is entitled to costs for the motion. However, if the Respondent has offered to settle the motion on the basis of spousal support in the amount of $1,500.00 *per* month, but was only ordered to pay $1,000.00 *per* month, he or she would also have an entitlement to costs.

The timing of any Offers and the general reasonableness of the parties in the course of negotiations are two of the various factors that can impact who will get costs and how much.

Having a good Offer to Settle on the table can minimize your exposure to paying costs if you are the unsuccessful party and it can help maximize your degree of recovery if you are the successful party.

Offers to Settle are strictly "without prejudice", meaning that the Judge deciding the matter will not know anything about any Offers to Settle (even whether or not one has been made) until after the he or she has rendered a decision. For this reason, no mention of any Offers to Settle may be made in any Court proceeding save for Settlement/Case Conferences (note: the Judge presiding at such Conferences will be disqualified from acting as Trial Judge). Only after the trial of the matter (or the motion is heard) will the deciding Judge learn of any Offers to Settle. At this time the parties' solicitors are usually invited by the Court to make further submissions with respect to the cost entitlement of the successful party.

Virtually all family law litigations settle before trial (*i.e.* roughly 90% to 95%). Therefore, making an Offer to Settle should not be seen as a sign of weakness or admission that your position in the litigation is not a worthy one. Offers are strategic tools for negotiation, and indeed, they are often used tactically to obtain a greater recovery of legal costs at trial. If you go to trial, you want to show that it is only because the other party was being unreasonable.

Any advice received regarding making an Offer to Settle should be seen as both a tactical instrument to apply pressure to the other side to settle this case or risk the cost consequences set out above as well as an assessment of the evidentiary strength of your case.

A lawyer's advice concerning making or accepting an Offer to Settle is also based on his or her assessment of what a Judge may do based on the available, admissible evidence that would appear at a trial, in addition to the relative costs of taking this matter to trial (and perhaps the appeal) versus settling the matter now and eliminating any further legal expenses, uncertainty and the stress of litigation.

Please note that costs are awarded to the party litigant (*i.e.* you) to reimburse you for your legal fees. Your obligation to honour accounts with our firm is a separate obligation. We can assist you in the collection of these costs awards but that is a separate matter, and unpaid costs does not relieve you of your obligation to pay your accounts.

If, after reading this, you have any questions concerning Offers to Settle, their acceptance, withdrawal or enforcement please raise them with me.

What follows is the actual wording of Rule 18 which governs Offers to settle in family law proceedings in Ontario.

RULE 18: OFFERS TO SETTLE

DEFINITION

18. (1) In this rule,

"offer" means an offer to settle one or more claims in a case, motion, appeal or enforcement, and includes a counter-offer. O. Reg. 114/99, r. 18 (1).

APPLICATION

(2) This rule applies to an offer made at any time, even before the case is started. O. Reg. 114/99, r. 18 (2).

MAKING AN OFFER

(3) A party may serve an offer on any other party. O. Reg. 114/99, r. 18 (3).

OFFER TO BE SIGNED BY PARTY AND LAWYER

(4) An offer shall be signed personally by the party making it and also by the party's lawyer, if any. O. Reg. 114/99, r. 18 (4).

WITHDRAWING AN OFFER

(5) A party who made an offer may withdraw it by serving a notice of withdrawal, at any time before the offer is accepted. O. Reg. 114/99, r. 18 (5).

TIME-LIMITED OFFER

(6) An offer that is not accepted within the time set out in the offer is considered to have been withdrawn. O. Reg. 114/99, r. 18 (6).

OFFER EXPIRES WHEN COURT BEGINS TO GIVE DECISION

(7) An offer may not be accepted after the court begins to give a decision that disposes of a claim dealt with in the offer. O. Reg. 114/99, r. 18 (7).

CONFIDENTIALITY OF OFFER

(8) The terms of an offer,

(a) shall not be mentioned in any document filed in the continuing record; and

(b) shall not be mentioned to the judge hearing the claim dealt with in the offer, until the judge has dealt with all the issues in dispute except costs. O. Reg. 114/99, r. 18 (8).

ACCEPTING AN OFFER

(9) The only valid way of accepting an offer is by serving an acceptance on the party who made the offer, at any time before,

(a) the offer is withdrawn; or

(b) the court begins to give a decision that disposes of a claim dealt with in the offer. O. Reg. 114/99, r. 18 (9).

OFFER REMAINS OPEN DESPITE REJECTION OR COUNTER-OFFER

(10) A party may accept an offer in accordance with subrule (9) even if the party has previously rejected the offer or made a counter-offer. O. Reg. 114/99, r. 18 (10).

COSTS NOT DEALT WITH IN OFFER

(11) If an accepted offer does not deal with costs, either party is entitled to ask the court for costs. O. Reg. 114/99, r. 18 (11).

COURT APPROVAL, OFFER INVOLVING SPECIAL PARTY

(12) A special party may make, withdraw and accept an offer, but another party's acceptance of a special party's offer and a special party's acceptance of another party's offer are not binding on the special party until the court approves. O. Reg. 114/99, r. 18 (12).

FAILURE TO CARRY OUT TERMS OF ACCEPTED OFFER

(13) If a party to an accepted offer does not carry out the terms of the offer, the other party may,

(a) make a motion to turn the parts of the offer within the court's jurisdiction into an order; or

(b) continue the case as if the offer had never been accepted. O. Reg. 114/99, r. 18 (13).

COSTS CONSEQUENCES OF FAILURE TO ACCEPT OFFER

(14) A party who makes an offer is, unless the court orders otherwise, entitled to costs to the date the offer was served and full recovery of costs from that date, if the following conditions are met:

1. If the offer relates to a motion, it is made at least one day before the motion date.

2. If the offer relates to a trial or the hearing of a step other than a motion, it is made at least seven days before the trial or hearing date.

3. The offer does not expire and is not withdrawn before the hearing starts.

4. The offer is not accepted.

5. The party who made the offer obtains an order that is as favourable as or more favourable than the offer. O. Reg. 114/99, r. 18 (14).

COSTS CONSEQUENCES — BURDEN OF PROOF

(15) The burden of proving that the order is as favourable as or more favourable than the offer to settle is on the party who claims the benefit of subrule (14). O. Reg. 114/99, r. 18 (15).

COSTS — DISCRETION OF COURT

(16) When the court exercises its discretion over costs, it may take into account any written offer to settle, the date it was made and its terms, even if subrule (14) does not apply. O. Reg. 114/99, r. 18 (16).