NSRLP

The National Self-Represented Litigants Project

Settlement smarts

Tips on effectively using negotiation, mediation and judge-led settlement processes

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THE CANADIAN BAR ASSOCIATION

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About the *Settlement Smarts* primer

Is it ever too early to think about settlement? We don't think so. Eventually, most cases (about 95% settle before a trial. It is very likely that yours will too.

To get you ready for this, we've created the Settlement Smarts primer to help you prepare and navigate the settlement processes you may encounter during your time as an SRL. This primer contains both personal and strategic tips specific to the process. We hope that it will provide you with a helpful starting point.

If you have comments or suggestions for ways to improve this primer, let us know at representingyourself@gmail.com.

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Using this primer

Is it ever too early to think about settlement? We don't think so.

More than 95% of family and civil cases settle before a final trial. Often this occurs right before trial, after an enormous amount of time and effort has already been spent. This is why we're suggesting that you get "settlement smart" sooner rather than later. And that as your case evolves, you remain open to the possibility of settlement.

There are a variety of settlement processes that you may encounter as an SRL.

You may find yourself considering all of the settlement processes at different times. You may be the one who initiates a settlement offer, or you may be the one who responds. You may also be *required* to participate in one or more of these processes, depending on the court and jurisdiction.

At the beginning of your journey as an SRL you may not know which settlement process you'll be using or responding to. For this reason, it may be helpful for you to read through this whole primer to get familiar with the processes so you can get up to speed when the time comes.

By the time you're finished reading these primers, you'll be able to engage any of the settlement processes strategically – and with confidence.

How this primer will help you

Whether you're facing another SRL on the other side of your case, or a lawyer or legal representative, this primer will help you to:

- Understand the difference between **judge-led (in-court) settlement**, **negotiation**, **formal offers to settle**, and **mediation**, and how and when to use each;
- Confidently navigate and be prepared for each process; and
- Get in (and stay in) a settlement mindset that will not only help you make clear-headed decisions, but help you with the inevitable stress.

Here are some personal tips that will help you be effective, regardless of which settlement process you are in.

Keeping your emotions in check

The negotiation process can feel as if there's new light at the end of the tunnel. If you succeed, it represents the possible end of your legal ordeal. But during negotiations, you'll need to keep your wits about you, and your emotions in check.

Reading this primer will give you a leg up, whether you initiate a settlement process yourself, or you are responding to a settlement proposal from the other side.

Deciding what's right for you

Coming to a legal settlement is a highly personal decision. You'll need to know when it's right for you to settle. Or when you should hold out for an agreement you can live with long-term.

Most importantly, being "settlement smart" can help you to use the legal system to resolve your legal challenges – and get on with your life.

Let's begin with some effective ways to view the negotiation and settlement process.

Part 1: Getting into a settlement mindset

In this section, we focus on 8 attitudes you can adopt to make the settlement process easier to accept and integrate into your overall strategy.

8 settlement attitudes to adopt

1. Considering settlement is not a sign of weakness

Do you feel as if making a settlement proposal or suggesting negotiation is seen as a sign of weakness? Or an admission that the position of the other party, your opponent, has some merit?

If this is how you're feeling, you're not alone. This is a major emotional hurdle for many SRLs.

However, if you feel that "settling" violates your sense of justice, or "lets the other guy get away with it" (quote from an Ontario SRL), this can seriously interfere with achieving a resolution.

Settlement is not a sign of weakness. On the contrary, experience suggests that taking the lead and setting the terms and timing for negotiation *gives* you power. Because 95% of cases will settle before trial, if you take charge early on you can reduce the time and stress of getting to a resolution.

2. Keep your eye on the prize: resolution

At times, you may find yourself becoming fixated on an aspect of settlement and be very reluctant to give way on an issue.

It's natural to feel emotional, even angry at times. But as your case unfolds, constantly **reassess** your position. Your reluctance to give way on something – because it feels like the other side is then "winning" – may get in the way of you getting on with your life.

Remember that in a legal dispute, no one party is ever going to get everything they want. Even if your case goes all the way to trial, there is no guarantee that you will win.

3. Choose your battles

Here's what other SRLs have told us:

> **"I had been told that most divorces end in settlement. So of course I did everything I could to come to a settlement with my ex… (L)et settlement be your mantra." (Alberta SRL)**

> **"I don't want to play these silly lawyers games of back and forth. ….I just want this settled in good faith." (British Columbia SRL)**

4. Continually (re)assess the possibility of settlement

Be smart about considering settlement options early in the process. Balance the pros and cons:

- **If you don't settle before trial**, you may get more in the final judgement. But you also risk "losing" at trial, being awarded less than an earlier settlement offer, and even having to pay the other party's legal costs!
- **If you do settle before trial**, you may not get everything you want. But you may get enough to make it worthwhile. And, you may avoid a long, exhausting battle and months of uncertainty with potentially greater costs.

So keep an open mind. And don't be surprised if your ideas about settlement change over time – this is natural and a common experience for anyone involved in a legal dispute.

Whatever you initially choose, **it's important to continually revisit the possibility of settling**. This also includes assessing whether or not you think the other party will accept an offer to settle from you.

5. Be pragmatic

Taking a pragmatic approach to settlement will not only reduce your stress, but potentially get you to a settlement more quickly.

The Miriam Webster dictionary defines pragmatic in the following way:

> *Relating to matters of fact or practical affairs often to the exclusion of intellectual or artistic matters:* ***practical as opposed to idealistic****.*

Many SRLs have described beginning the legal process with a belief that the legal system would deliver a "just" outcome. But as they continued through the process, they realized they needed to be less idealistic and more practical.

In the words of other SRLs:

"In an adversarial system, the settlement comes about as a *risk-benefit analysis*." (Ontario SRL)

"I was prepared to pay a lot more for the *certainty of settlement* because I know how bad the judges can be." (Ontario lawyer/SRL)

"I was trying to lower the cost for everybody by looking for opportunities for settlement." (Ontario SRL)

6. Take your time

Contemplating whether or not to settle is a very important decision. It is easy to feel pressured or rushed when you are looking at proposals from the other side. Always give yourself time to reflect, and if possible to talk to a friend who can help you to assess whether this works for you or not.

Remember: you are not going to get everything you want in a settlement. There is no reason for the other side to give you everything you want – they may as well wait for a trial. The real question for you to answer is: is it enough?

7. Stay open to opposing counsel

It's increasingly common for family and civil cases to involve representation on one side, but not the other. If this is the case for you, stay open to opposing counsel: they aren't the enemy. In fact, they can help you resolve your case.

Some SRLs have even told us that their relationship with opposing counsel became as significant to resolving their case as their relationship with the other party.

Though opposing counsel is working for the "other side", they also have a duty to treat you fairly. And they should be open to finding common ground. Consider taking the time to build a constructive working relationship. It may be an important factor in the progress and resolution of your case.

Over the years, we've gathered a great deal of information from both SRLs and opposing counsel about the difficulties they experience working together, and how to overcome them.

We've summarized what we've learned in *Working with opposing counsel*: *Building constructive working relationships between self-represented litigants and opposing counsel*. You might want to add this to your reading list.

8. Insist on being "in the loop" at every step

Some SRLs have told us that they believe they were excluded from conversations about settlement between the lawyer on the other side and the judge. That they were presented with a settlement agreement to sign, without being able to give their input. Of course, this situation is very disempowering. You do not need to accept this.

You should definitely seek advice on your settlement options. For example, ask friends or family for a second opinion.

And if you can, hire a lawyer on an "unbundled" or hourly basis to assess your settlement options from the perspective of the courts (see NSRLP's Directory of Professionals Assisting SRLs).

But make sure you are included and in charge of settlement discussions – and decisions.

You – and the person you are in dispute with – are the most important players in any settlement process.

4 attitudes that will hinder settlement

(And the "reality checks" that'll keep you moving forward.)

Representing yourself in court is stressful and may be one of the hardest things you ever do. Being emotional is entirely natural. But to get through this experience, and get to a reasonable settlement you can live with, you'll need to be clear-headed and grounded – and not get caught up in the emotion.

Here are 4 common responses to considering a settlement that you may want to keep in check, in order to stay grounded and effective. Use the corresponding "reality checks" to keep yourself on track. These are from our National SRL Study of 2013.

1. "But my case is different…"

The study reports that many SRLs believe that their case is "different" – and that a judge will "obviously" side with them. Of course, your case is unique and personal to you. For now, it's a big chunk of your emotional, financial, and physical life.

Reality-check: judges won't necessarily see it your way. And legal outcomes are never certain. This is why so many cases settle before trial, when the potential risks and costs become more real to both sides. So even if you are convinced a judge will rule in your favor, do a reality check. Without emotion, weigh the risks of going to trial, and decide from there.

2. "I'm angry and I have good reason to be!"

Feeling frustrated and even angry in the legal process is understandable when you feel the odds are stacked against you. Work out your anger by exercising, or talking to a caring friend or counselor.

Reality-check: Expressing anger in a settlement (or any legal) process, however understandable, is counter-productive. You will achieve more if you can express yourself in a calm and reasoned manner that suggests confidence and competence.

3. "I'll just 'wait it out' until the other side gives up"

Our 2013 study revealed that many SRLs adopt a strategy of "waiting it out". They hope that if they persevere, the other side will eventually give up.

Reality-check: This may work out – or it may not. In the meantime, you'll be stuck in a process that will cost you time and money, and sap your patience and energy. Take charge!

4. "I'll be happy when justice is done"

This is a dangerous illusion because it sets up your emotional expectations, and many SRLs feel let-down as they get further into the legal process.

Reality-check: a settlement agreement is not a "win-lose" proposition. It's not a world where the virtuous "winner" is emotionally validated and takes all financially, while the (in-the-wrong) "loser" crawls away with nothing.

Instead the reality is that a settlement agreement will rarely give you – or the other side – everything you want. This may sound obvious, but it is worth repeating: there is no incentive for anyone to settle by agreeing to everything the other side wants. Both of you will need to compromise.

Compromising is key, and without considering it, trial may be your only option.

Almost every case is eventually going to settle – and so will yours

It may seem far-fetched at the outset for you to think about an agreement with the other side. Especially if you're angry with them. And especially if you think that their demands are unreasonable. But the fact is, you will probably eventually settle before trial. Remember, 95% of civil and family cases do.

You can settle after spending a great deal of energy, money, and time – or you can do it sooner, and save both dollars and grief.

If you settle, you have more control over the outcome

There are some clear advantages to reaching an agreement rather than asking a judge to decide for you. **Settlement gives you more control over the outcome**. And agreements can be more detailed and specific to your situation than what a judge will decide. This may be especially important in parenting agreements. Or setting up support that factor in tax implications, for example.

If you settle, you relieve stress and frustration

Litigants represented by lawyers are often told to wait until later in their case to propose negotiation or offer settlement terms. That may be good advice – sometimes more information comes out as the case moves forward. And sometimes people are able to think more concretely about settlement later, when they become more aware of the costs of continuing with litigation.

But sometimes waiting longer to think about possible settlement just makes everyone angrier and more frustrated. By staying open to settlement early on, you can compare the pros and cons of settling, and potentially shorten that timeline.

"Been there" advice from a fellow SRL:

> **"(B)e smart about considering settlement options early in the process. If you settle you will not get everything you wanted – but you may get enough to make it worthwhile, avoiding a long and exhausting battle, with an uncertain outcome. This is a very personal decision and your ideas about settlement may change over time. It is important to continually revisit this question and assess the possibility of the other side accepting a proposal from you to settle."**

Part 2: An overview of the settlement process

Here's a summary of the differences between the settlement processes you may encounter as an SRL.

	NEGOTIATION	MEDIATION	(Case management conference, settlement conference, or JDR – judicial dispute resolution) JUDGE-LED SETTLEMENT
Where it takes place	• Between the parties, outside the courthouse	• May be a private mediator outside the courthouse, or a mediator appointed by the court who works in a court-based mediation program	• In the courthouse
Who you work with	• Directly with the other party, or with the lawyer on the other side • No mediator or judge involved	• A mediator is not a judge, and is a neutral third party • A mediator may or may not be legally trained: you can ask	• A judge, who is excluded from hearing your case if you go to trial
Goal of process	• You and the other party reach an agreement • A successful agreement can be brought to court and turned into a consent order	• Help you and the other party explore how to reach an agreement • A successful agreement can be brought to court and turned into a consent order	**Case or trial management conference** • Gauge how likely settlement is • Set a timetable to get you into a position where you are ready to negotiate (for example, exchanging documents, or other prep work) **Settlement or family conference, JDR** • Bring parties closer to an agreement • Judge may help you draft an agreement

Part 3: Unpacking judge-led settlement processes

Over the last 15 years, the judge's role has evolved as courts struggle with backlog and delays.

The role of the judge has evolved into someone who not only "adjudicates" (makes a decision about a case), but who may also help the parties reach an agreement during a judge-led settlement process.

The precise mechanisms and what they are called varies among courts. The most common terms for these processes are:

1. **Settlement conferences** – the most common process, explicitly about achieving settlement.
2. **Case conferences** – set a timetable to move the case forward and narrow the issues, if possible.
3. **Trial management conferences** – assess trial readiness and make a final effort at settlement (these usually come later in the process than a "case management" conference, but note that these terms are sometimes used interchangeably).

In some provinces, judge-led processes are mandatory, and in other jurisdictions, you'll need to request one. **To find out what's available in your jurisdiction**, ask duty counsel at your courthouse and/or the registry staff.

Judge-led settlement conferences

In Quebec, these are often called "judicial mediation".

Whereas trial and case management conferences can help the parties set a timetable to move towards settlement, it is **settlement conferences that are most important for you** in trying to develop a resolution for your case.

Settlement conferences go further than simply setting a timetable for the case, and focus explicitly on trying to find a settlement.

What is a judge-led settlement conference?

It is not a trial – A judge-led settlement process (a case or settlement or trial management conference) is *not* a trial. The judge will *not* review your evidence, or the evidence of the other side, and will *not* make a ruling or order.

It is a face-to-face meeting – a scheduled meeting between you, the other side, and a judge. The meeting usually takes place in the courtroom, or a boardroom in the courthouse, and will generally last from 30 minutes to an hour.

It is intended to help "flesh out" settlement (or partial settlement), resolving *some* of the issues in dispute. For example, you may be disputing both child support and access arrangements. So the settlement conference judge may explore whether one of these issues could be agreed upon and resolved, leaving the case to focus on what remains unsettled.

The judge is like a mediator – Even if your judge-led process is not actually called "judicial mediation" (as it might be in Quebec, or formerly "judicial dispute resolution" in Alberta), the judge will behave like a mediator. In other words, they'll try to find areas of agreement between you and the other party. Keep in mind that if you go to trial in the future, your settlement conference judge cannot conduct your trial, and cannot be called as a witness.

It will help you focus your case – Even if you're unable to settle all of your issues, you should leave the conference with a very clear understanding of the issues remaining. You and the other side will get all of your issues, facts, and evidence clearly on the table. And if you do go to trial, this will help you get ready.

How to prepare

It's important to prepare for a settlement conference just as thoroughly as you would for a formal court appearance. Come with some idea of the type of decisions you are prepared to make now. And consider what the other side might want as well.

Review documents from the other side – A good place to begin is to review the material you have received from the other side that may be relevant to settlement.

Make a list of what you still need from the other side – A settlement conference is also an opportunity to ask for any further documents you need from the other side. Examples include documents that'll help you make a proposal, or assess the fairness of an offer.

Bring documents you know the other side wants – Consider what the other side might want from you before they'll consider settlement. Are there other documents they've asked for which are important to them and that you can bring with you? Is there something you could offer them that might set up a more productive interchange?

Prepare what you want to say – While you're not going to be presenting your evidence and arguments at a settlement conference as you would in a trial, we do suggest that you take some time to prepare what you want to say.

Remember, the focus here is on *exploring* settlement. So don't spend lots of time reading cases and rules to persuade the judge you are "right". The judge is not making a decision here. You can say that you feel you have a good legal argument if you wish – but you will not be presenting it here. Instead, think about your most important *interests* and *concerns* and what you *need* to make an agreement. At the same time, keep in mind what motivates the other side and what *they* might need in order to settle.

Tips and strategies for preparing an effective opening statement for a settlement conference

When you're thinking about what you'll say, ask yourself what the judge needs to know and understand about your case to help you come to a settlement.

State that you're committed to a fair settlement – It's important to show the judge that you're serious about exploring settlement. Even if you've approached the other party before, the judge will be much more supportive and helpful toward you if you state your commitment.

Mention your previous efforts to settle – Also mention any previous efforts you've made to reach an agreement. This might include: making an offer, producing documents, offering to compromise on something – even if the other side did not respond to or dismissed your efforts.

Express your commitment – It's helpful for the other side to hear you say that you are committed to following the terms of your agreement. For example, that you'll follow an agreed access schedule for co-parenting, or agree to complete a job for a customer.

Communicate what you want clearly and respectfully

- Frame what you want to accomplish as *goals* – expressed clearly and firmly,
- Explain your settlement goals, and why these are important to you,
- Acknowledge in a respectful way the other side's goals as well, and
- Do not describe what you're looking for as demands or entitlements.

Here are two examples of goals, expressed clearly and respectfully:

INSTEAD OF SAYING THIS...	SAY IT THIS WAY...
"I am entitled to more access to my kids, and there must be no last minute changes…"	**"I want to reach agreement on an access schedule that can enable me to plan ahead and avoid the anxiety of last minute changes."**
"I demand payment before I complete work on the deck…"	**"I need to be paid for my time and materials in order to be able to move forward with my commitment to finish the job."**

What to do if you reach an agreement

Some SRLs have reported very good experiences with settlement conferences, especially once they demonstrate their knowledge.

> **"In the settlement conference…initially I was treated as though I didn't understand anything, until I showed I knew a lot. Then I was treated as an equal. One needs to not give in to an emotional agenda – that causes a problem for the self-represented person. … (T)he settlement conference felt good. It was a good ending to the process and having the judge help us solve it."**

If you're successful in resolving all (or some) of your disputes through a settlement conference, an agreement will be drafted to record the terms.

Get it in writing – If you're representing yourself, but the other side has a lawyer, the settlement judge may ask the lawyer on the other side to draft the agreement. Make sure to make it clear to the judge and lawyer for the other side that you want to be able to review the draft agreement before it goes to the judge.

Ask to review the draft agreement – If the other side's lawyer drafts the agreement, make sure you look at it and agree with it in its draft form. This step is very important. Once you agree, it will be sent to the settlement judge, who will make it "official" (as a formal order, just like in trial). Once this happens, you can't make any changes to it.

The National SRL Study (2013) came across a number of instances in which SRLs did not see the draft agreement before it was returned to the court. Then afterwards, SRLs felt that the order was inaccurate and wanted to contest some of the terms. Try to avoid getting into this situation by asking for the draft from opposing counsel before it goes to the judge.

How to review the draft agreement – To review the draft agreement, consider asking someone else to look at it with you. You might also consider purchasing some advice services from a litigation coach or a lawyer who offers "unbundled" services, either hourly, or a specific task for a flat fee.

If you're unable to reach an agreement

If you do not resolve some or all of your disputes through a settlement conference, you can continue in the legal process. Nothing said or proposed in the settlement conference can be used at a trial. This is called settlement privilege.

Even if you don't reach an agreement, the settlement judge may still make an order regarding procedure. For example, she or he might order that you or the other side produce documents or materials that she or he believes will speed up the case and move it closer to a final resolution when you go to trial.

You can always re-open negotiation or the possibility of mediation before you go back to court. We explain more about these options a bit later.

Judge-led case conferences

A second type of settlement process is a judge-led case conference. Depending on your province or territory, you may be able to schedule or be required to attend a judge-led case conference. These are very much like settlement conferences, but with a slightly different purpose.

A *case conference* is often the first of a *series* of settlement conferences. Its objective is to get the initial procedural issues dealt with up front and address any urgent matters immediately. This might include disclosure and the exchange of documents, for example.

One Ontario judge offers the following advice to SRLs preparing for their first case conference:

> **"(Make) a list of all information and documents that they believe they need from the opposing litigant in order for them to decide what outcome would be acceptable to them. If the judge has this list from them, it can be incorporated into an order requiring the other side to produce the information or documents within a set time."**

Judge-led trial management conferences

A third type of settlement process is a judge-led trial management conference. You might be offered a trial management conference later in your case, as you're heading toward a trial.

A trial management conference aims to identify:

- the issues that the litigants need the court to decide at trial,
- what witnesses each party will call to prove their position on those issues,
- the time required to present the witnesses' evidence, and
- a summary of the arguments that will be presented.

6 tips to help you negotiate like a pro

Here are 6 tips you can use to prepare, whether you're in a negotiation, formal offer to settle, or mediation process:

1. Make a list of what you want and why

Mediation isn't just about making a laundry list of what you want. Do some deeper reflection on not only *what* you want – but *why*.

If you can get the other side to share the same information with you, you'll have a much better idea of what is motivating them. And you'll be able to more easily identify any particular challenges that you'll need to overcome to reach an agreement. Remember: knowing how the other side is thinking is a very powerful tool for *you*.

Before the mediation, make notes. List your goals for the mediation in advance, and your proposal to settle. This should be an agreement you could live with.

2. Prioritize your list

Next, rank each proposed outcome on your list in order of priority for you. You can also think about which outcomes are "desired" and which seem to you to be "essential" – things that you cannot settle without. And it is highly recommended that you take some time to anticipate the other side's priorities, their "desired" and "essential" outcomes, as well. The more you understand about how the other side is thinking, the more effective you will be.

3. Identify what you could be more flexible on

It's human nature to want everything to go your way. But negotiating a court case doesn't work like that. If you make *all* of your proposals non-negotiable, it's unlikely that the other side will be interested in making an agreement.

The fact is, any agreement you reach is probably going to be a set of trade-offs and compromises for both sides. So take some time before mediation to think deeply about where you *could* be flexible if needed.

4. Brainstorm alternatives to your "essential" items

You're going to have issues that seem non-negotiable. But try to brainstorm 2 or 3 other ways you might achieve each outcome. Having these ideas in your "back pocket" during negotiation or mediation can be a very useful strategy, and you only have to pull them out when you are ready.

5. Get another opinion as a reality check

Do you know someone who knows you and your case well? Someone who'd be willing to help you with your preparation? It may be useful to review your list with them and ask for their thoughts on your desired outcomes, bottom lines, and alternatives.

6. Assess what may happen if you don't reach an agreement

Another step that you may find helpful before your mediation is assessing your "**BATNA**", or your *Best Alternative to a Negotiated Agreement* (Fisher & Ury, 1991). To be realistic, you may also want to speculate about your "**WATNA**" or *Worst Alternative*.

To assess your **Best Alternative** and **Worst Alternative**, take a realistic look at:

- how likely it is that a judge will agree to give you what you are asking for,
- how long the decision might take, weighed against
- how much it will cost to go to trial.

This is speculative of course. But you can make some informed best guesses.

Consider this a bit like scenario planning. Getting clear on your BATNA and WATNA will give you a benchmark. And get you ready to efficiently assess and compare offers from the other side.

Part 4: Navigating negotiations and offers to settle

The most common way lawsuits are settled is both sides simply negotiating with one another directly.

Let's get one thing out of the way. Making an offer to settle in a negotiation isn't about admitting fault. Rather, it's a way of trying to settle a dispute based on what you think would be **fair**, **practicable**, and **reasonable**.

As someone representing themselves, you have the same opportunity to negotiate and make an offer to settle as someone who's represented by a lawyer. You can decide to open up negotiations over one issue – or all of them – at any point in your case.

Negotiating a settlement can take place *informally*. Or it can take place formally using the "Offer to Settle" **process**. You may decide to initiate negotiations. Or you may be called to respond to a negotiation from the other side.

Informal negotiations

Informal negotiations take place between you and the other side directly.

When to use it

You may wish to consider initiating an informal negotiation when:

- There's an immediate issue that needs to be resolved. This includes temporary measures while other issues are worked out. Examples might be the payment of child support, or child access arrangements.
- You believe that you can make a proposal to settle the entire matter, including the question of costs.

How to initiate an informal negotiation

You can initiate an informal negotiation in a couple of ways:

- *Draft and submit a proposal* and send it to the other side, or
- *Arrange a meeting* by calling the lawyer (or party, if they are also an SRL) on the other side and suggesting a meeting to discuss a possible settlement. This might be more effective in opening up the discussion: starting with an offer (above) means that you will find the negotiations now focus on that offer and may ignore other ideas.

Tips and strategies

Always state that your proposal is "without prejudice" – This means that nothing in your proposal can be raised by the other side in a trial as something you have proposed earlier. This opens up informal discussions without having to worry about the other side bringing up your offer, if you end up in court (you can always bring it up yourself).

Document all discussions – Make sure that whether you conduct negotiations at "arm's-length" (by written communication), by phone, or face-to-face in a meeting, you document each step.

Be prepared for counter-offers – Research on how lawyers negotiate shows some common patterns. An important one is the likelihood that there will be several offers exchanged – for example an offer followed by a counter-offer – before an agreement is reached.

3 tips to confidently navigate the "back and forth" of negotiation:

- Think about possible counter-offers in advance
- Put together your preferred "Plan A"
- Think about what you could be flexible on, and create a "Plan B" or even a "Plan C"

Make sure to read the *mediation* section of this primer for additional tips.

Formal offers to settle

Formal offers to settle take place within the Rules of Civil Procedure in your province or territory. If you are using the formal offer to settle procedure, you should consult the relevant rules in your province or jurisdiction.

Here is an example of a form that can be used to make a formal offer to settle in Ontario: http://ontariocourtforms.on.ca/static/media/uploads/courtforms/scc/14a/rscc-14a-e.pdf

When to use negotiations

Typically, a formal offer to settle can be made at any time after a lawsuit has begun. Most of the time it's made in writing and physically delivered to the other party (or parties). It's generally valid, or "live", until the offer is expressly withdrawn. Or, if there's a time period stipulated for acceptance of the offer, until the time period expires.

How will you know the difference between an informal offer, and an Offer to Settle?

A formal Offer to Settle must reference the relevant *rule of civil procedure* in your jurisdiction.

The risks of refusing a formal Offer to Settle

Unlike informal negotiations or the other procedures we discuss, there are significant risks to refusing a formal offer.

The difference between informal "without prejudice" negotiations, and formal offers to settle, is that refusing a reasonable formal offer to settle may cost you *a lot* more if you lose in court.

To illustrate this critical distinction, here's what could happen if you receive an offer to settle and refuse it. Of course, it also works the other way around, if the other side refuses *your* offer.

- Imagine the other side makes you a formal Offer to Settle.
- You think you can do better, refuse it and your case goes to trial.
- At trial, the court makes an order that's similar to the offer you turned down.
- Actually, the order is even *less* favourable to you than the original offer (ouch) and *not only that*…
- Because you were the one who refused a reasonable offer, the court may *also* order that you pay some of the other side's costs (calculated from the time the offer to settle was made).
- Depending on which jurisdiction you live in, you may even be ordered to pay *double their* costs.

This is an ugly and painful scenario. But sadly, it does happen.

The fact is that the courts much prefer that the parties settle before a case goes to trial. In fact, the goal of this offer to settle rule is to *penalize* a party who failed to accept an offer "that should have been accepted".

What you can do to avoid this unfortunate situation is consider all formal Offers to Settle seriously. Take some time to analyze the offer and carefully weigh the risks of turning it down.

Unsure about an offer you're considering?

You may want to hire a lawyer on an "unbundled" or hourly basis to give you advice and help you realistically assess the offer. You'd want them to help you determine if the offer is reasonable. And if you turn it down, how likely it would be considered by the court as "should have been accepted".

Tips and strategies

Review the tips below – and in the section on mediation that follows – on how to put together an offer that will be more likely to be appealing to the other side.

Start out by stating your intentions – In your offer, you might add something like: "this is an opening proposal and I am open to counter-offers". If you're dealing with a legal representative on the other side, suggest that they take a week to consider your offer and meet with their client to discuss.

Remove the pressure – Think about how to make the offer attractive to the other side, without putting unnecessary pressure on them.

***Open* the door**… rather than breaking it in with a hammer – Make sure your proposal is something that the other side may be open to and will *seriously* consider. For example, hitting them with your biggest demands and describing them as "non-negotiable" is unlikely to get serious consideration.

Consider how you think the court would rule – Remember: the purpose of the offer to settle rule is to *penalize* a party who refuses a reasonable offer that's close to what a court will rule. So make sure your proposal is taken seriously. If it is very different from the likely legal outcome at trial, the other side can easily dismiss it without any cost consequences for them.

Get a second opinion – Ask friends or family for a second opinion on how reasonable (or "yesable") your offer is for the other side. If you can, hire a lawyer on an "unbundled" or hourly basis to assess your offer from the perspective of the courts.

How to win over the lawyer on the other side…

If there's a lawyer representing the other side, you may find that they are initially uncomfortable about negotiating with you.

There may be many reasons for this. But sometimes lawyers tell us that when they communicate directly with an SRL, the SRL asks them for legal advice.

The other side's lawyer cannot do this for you; they are retained by the other side. Instead, consistently look for ways to build rapport and trust with the other side:

- *Communicate by email at first* – The other side's lawyer may feel more comfortable with email at first. Briefly explain that you are preparing a settlement proposal or an offer to settle. Or just raise the possibility of an informal discussion and exploring some initial ideas.
- *Always be polite and courteous* – Always be polite, courteous, and professional. You should also expect your suggestions about negotiation to be taken seriously and responded to appropriately.

What to do if you reach an agreement

Well done! Briefly, here are the main steps to help you make your agreement official and enforceable in court.

1. Put the agreement in writing

Make sure you have put all your terms of settlement into a clear written agreement.

2. Review the agreement

Never sign an agreement before reviewing it carefully! Share it with friends and family. You could also hire a lawyer on an "unbundled" or hourly basis (you can check in the NSRLP's Directory of Professionals Assisting SRLs for someone who you could approach for in-person or remote service).

3. Sign the agreement

To make an agreement official, you and the other side will need to write it out and to sign it. After you both sign, it can be written up and submitted to the court, where some parts may be turned into a court order. This means that there will be legal consequences if you or the other party don't follow the terms.

If you're unable to reach an agreement

If your formal offer to settle is refused, and you ultimately end up at trial, the judge will take this into consideration when making a decision about costs.

At trial, if the court decides that a formal offer that was refused was actually fair and "should have been accepted", it may require the party who refused the offer to pay additional costs to the other side.

Part 5: Making the most of mediation

Mediation before trial is an option that's available in many family courts across Canada. Some provinces (for example, Ontario) now offer free mediation to any family litigants. Family mediation is never mandatory and there are efforts to "screen out" unsuitable cases (for example, those involving domestic violence).

In some jurisdictions, mediation for civil cases is mandatory. In others, you'll need to make a proposal for mediation to the other side, and find a local mediation service provider.

You can find your local mediation program or service providers by asking:

- The court registry in your courthouse
- Duty Counsel in your courthouse
- The courthouse offices of local *pro bono* organizations and family information centres

What is mediation? (and what is it not)

It is not a trial

Mediation is *not* a trial. The mediator will not review your evidence or the evidence of the other side, and will *not* make a ruling or order.

It is a face-to-face meeting

Mediation doesn't take place in the courtroom. But it may take place in a private room in the courthouse. It may also take place in the mediator's offices or another neutral location.

It is intended to help you work through challenging issues

In mediation, an impartial third party (the mediator) will focus on the issues that you and the other side have had difficulty settling, and help you work through them.

The mediator is not usually a judge

Unlike a settlement conference, the mediator is not usually a judge, but is instead a trained professional with relevant experience. The mediator cannot make any decisions for you, and should not pressure you into agreeing to any particular outcome.

It may be more than one meeting

Most mediations are scheduled for between one and three hours, and you may choose to have more than one mediation. This may sound like a lot of time. But you'll probably need at least an hour to break the ice and really get into the issues. Plus it'll take some time to explore the many details of a possible settlement.

Mediation is confidential

In most mediations, anything that's said or proposed is confidential. That means that in court, while you can repeat anything you have said or proposed during mediation, you cannot refer to anything the other side has said or proposed in mediation.

While this is the general rule, there are sometimes exceptions allowing what is said in mediation to be used in a future trial. **So whenever you go into mediation, always clarify by asking the mediator, "is this mediation process 'open' (can be used at trial) or 'closed' (cannot be used at trial)?"**

Normally, a mediator cannot be called as a witness in a future trial (the only exception relates to situations where there may be danger to a minor). This is designed to encourage both you and the other side to be frank and open.

Mediation is a voluntary choice

You should not allow yourself to be pressured to take part in private mediation if you do not wish to participate. You must clearly and freely consent to participate in mediation. However there is this exception: some courts require you to attend an initial mediation meeting to at least explore settlement.

How to prepare

It's important that you prepare for mediation just as thoroughly as you would for a more formal court appearance or settlement conference. Come to a mediation with some concrete ideas about the type of deal you might be willing to accept. And think about what the other side might be looking for and might accept.

Prepare intellectually – and emotionally, too

Mediation can be challenging and stressful. To be "settlement smart", you'll need not only to know the rules of the game, but also be calm and centered when you're in it. Be prepared to hear the other side make statements that you believe to be unfair, inaccurate, or hurtful. The more you can anticipate what may happen, the easier it will be for you to stay calm and not allow yourself to be thrown off.

Bring someone with you

With the OK of the mediator and the other side, you should be able to bring someone with you to mediation. This could be a friend or family member, or a legal representative. If you're meeting with the mediator in advance, it's a good time to check whether or not you can do this. We discuss meeting with the mediator privately in the next section.

The mediator will ask you to speak for yourself. But they'll also likely understand that bringing an "ally" into the room with you is an important source of support for you. If you're able to bring someone, choose a person who can help you feel calm and supported in the meeting, rather than someone who can speak for you.

Prepare an opening statement

As with a settlement conference, it's a very good idea to prepare a statement that you can make at the beginning of mediation. Here's what you want to keep in mind.

Creating a constructive atmosphere from the beginning – Experienced mediators will tell you: telling the other side clearly and directly that you really want to explore the potential for resolution makes it much easier for the other side to respond in kind, and participate in good faith.

Some tips:

- Keep your opening statement focused and no more than three to four minutes long;
- State your sincere desire to find a resolution at the start of mediation;
- Acknowledge how difficult the conflict has been for both parties;
- Focus on what's really important to you and why;
- If possible, include something in your opening statement that tells the other side clearly and directly that you sincerely want to explore ways to resolve your differences; and
- Avoid beginning with a big demand. *You know the one*. The one that the other side will balk at, probably reject on impulse, and then put a wall up. Starting your mediation like this is a surefire way to bring negotiations to a screeching halt.

Being "settlement smart" also means being strategic about how and when you communicate your proposed solutions. The truth is, if there were easy or obvious answers between you, you would have already found them.

So when you're sitting face-to-face in mediation, consider proceeding this way:

1. Listen to what the other side says about what's important to them and why;
2. Explain to the other side what's important to you and why;

3. Make sure you *both* understand one another's specific concerns; then
4. Proceed to discuss possible solutions.

Tips and strategies

How to raise private concerns in difficult cases – You may have real concerns about mediating with the other side. They may have pressured you into a decision in the past. Or there may be a history of domestic violence. If this is your situation, you may want to speak with the mediator privately *before* your mediation session.

You can ask the mediator for a private meeting, where you can raise your concerns. In some cases, mediators will ask you to meet privately for an "intake" or "screening" session. Many mediation programs use this private meeting to identify any special challenges in advance of a joint session.

If you get such a meeting, it's your chance to ask questions and raise concerns you might have about mediation, in a confidential setting.

Confirm with your mediator the documents you must bring – Some mediators will require you to bring specific documents (like financial records) with you to the mediation session. This is a good thing, because the more fully you and the other side can disclose information and get all your cards on the table, the quicker you can potentially settle. So make sure to ask your mediator in advance what they expect you to bring. Mediation is also an opportunity to ask for the documents or information you need the other side to bring.

Anticipate what will be toughest for you in advance – What's going to be hard for you? What will push your buttons – and the other side's buttons? What will help you to stay focused and calm in the mediation? It is easy to be reactive to the other side and to become confrontational and rigid as a result. Try to stay focused on what you want and need (and why), and control your emotional reactions. It's okay to be emotional, just save it for later.

Talk to each other, not the mediator – This is a subtle point, but important. Mediation is not a court case. You're not trying to convince the mediator of anything. Mediation is primarily about talking and negotiating with the other side. It's a dialogue. So even if it's difficult, make your discussions direct. This is likely to be more productive.

Practice patience – Be aware! The first 30 minutes of mediation are often tense. But now you know in advance. So you can be prepared to calmly push through it, even if you feel that the other side is not treating mediation as seriously as you are. Hold back and give the other side a chance to settle down and open up to discussion. Keep an open mind and don't react too quickly.

If you've been very patient and feel the conversation is not (or is no longer) productive, you can ask for the session to be over. But don't jump the gun. Try to be patient. And ask the other side questions, so you understand where they're coming from.

Actively listen, *really* listen – Mediation is the place where you'll express what's most important to you – and why. But it's also a chance to learn more about what the other side needs in order to settle. You may feel more powerful when you're talking. But experienced mediators will tell you that **listening and asking questions is much more effective in achieving a settlement**.

As Steven Covey suggests in *The Seven Habits of Effective People* (1989) "Seek to understand before being understood." So put on your Sherlock Holmes hat, and get curious about the other side's position. When the other side feels understood by you, they can potentially get their own emotions out of the way more easily – and work with you on resolving your differences.

Avoid displays of anger (even if you feel it's warranted) – This may sound obvious. But telling the other side that you think they are a terrible person is not going to get you a settlement. And expressions of anger are more likely to alienate the other side, and make "selling" your position more difficult. It's completely understandable that you're emotional. You may even have a very good reason to be angry! But venting out loud during mediation (however justified you may feel) will make it impossible for the mediation to continue constructively.

Ask for a "caucus" to get a time out, or to talk with the mediator privately – If during mediation, you feel that a private conversation with the mediator would be helpful, you can ask the mediator for a "caucus" at any time. This gives you a private opportunity to refine your proposals and discuss with the mediator how realistic they are. You can also ask for a "caucus" if you simply need a short break from the discussion.

Actively take care of your stress – If you've been reading our primers, that's a good first step. You'll now have a good sense of what to expect on the journey of representing yourself – at every stage. As we've said in other primers,

this is kind of like training to run a marathon with an unclear finish line. Do prepare, anticipate to avoid surprises, and take care of yourself physically and emotionally during this process.

You might want to take a look at our ***Mindfulness Primer***. And for more self-care ideas, take (another?) look at *So you're representing yourself* – our first primer in this collection.

What to do if you reach an agreement

You've thrown yourself into mediation. Prepared, anticipated, held back, expressed. You've now reached a full or partial agreement.

It's the light at the end of a dark tunnel. *It's almost over*, you think. *And it is. Almost* being the key word. You may feel like celebrating. But a few things first.

Here are some tips to help you successfully make it to the finish line:

Get clear on the steps that make an agreement official – There are a number of steps to make an agreement between you and the other side official and enforceable in court.

Make sure to confirm the process with your mediator. But here are the three general steps that will make an agreement official:

1. Put the agreement in writing

Always put your agreement in writing. It may be you or the other side who drafts the agreement, if you're representing yourself. In some circumstances the mediator may help with the drafting process. Or you may both decide that you would like a lawyer to draft the agreement for you.

2. Review the agreement

Never sign an agreement before reviewing it carefully! Make sure that you are truly comfortable with all the terms of the agreement. Share it with friends and family. Or consider hiring a lawyer on an "unbundled" or hourly basis to review the agreement and assess how close the agreement is to what a court might decide at a trial (you can check in the NSRLP's Directory of Professionals Assisting SRLs for someone who you could approach for in-person or remote service) .

3. Sign the agreement

To make an agreement official, you and the other side will need to write it out and sign it. After you both sign, it can be submitted to the court, where the agreement (or parts of it) may be turned into a court order. This is often called a "consent order". In this way any breach of the agreement in the future can be referred back to the court. This means that there will be legal consequences if you or the other party don't follow the terms.

"Must dos" before you sign

Know what's enforceable in court, and what is not – Before signing, get clear about what can potentially be enforced in court and what cannot. For example, you can take someone to court for not making the required support payments, not distributing property as agreed, or not following child custody and access arrangements. But you can't take someone to court for not making an apology you agreed upon, or treating you discourteously.

Ask for some time, and sleep on it – If you've reached an agreement in mediation, on all or some of the issues in dispute, it's a milestone. Be proud! And consider asking for 24 hours to make your final decision and sign. **Don't be afraid to ask for this "time to reflect"**, it's quite common. You want to be absolutely sure that you are comfortable with what you are agreeing to before you commit to the precise terms.

Review line-by-line and seek opinions – You're very close to your case. At times, perhaps too close. So before you commit to signing an agreement, be sure you understand all its implications. Though the final decision is up to you, it might be helpful to get an objective eye. Consider talking to your significant other or your friends about it. Or perhaps hire a lawyer who works on an "unbundled" or hourly basis. The most important consideration should be how **fair and practical** the proposal is.

Imagine living it – As you're letting the proposed agreement settle, imagine: what would your day look like, your week, month, year if you agreed to it? Notice how your body feels. Do you feel more stressed? Still angry and frustrated? Or tired, but relieved and ready to move on?

If you're unable to reach an agreement

If you go through mediation and you're unable to resolve all the issues in dispute, you may continue in the legal process.

Sometimes successful mediation is a matter of timing – so you might consider proposing mediation again before trial, especially if you managed to resolve some, but not all, of your issues in the first mediation.

Other SRLs' experiences with mediation

Mediation only works when both parties are willing to try it in good faith. Some SRLs have said that they wanted to do mediation, but could not persuade the other side to participate.

Some SRLs have reported significant satisfaction with mediation. For example, one Alberta SRL shared the following outcome of a mediation in which he represented himself:

> **"(The defendants) have agreed to pay the amount of my claim and provided a very nice apology. … This is my second experience with mediation, and in each case the process was very fair. The ability to be heard without restrictions is so helpful, and healing. The positive outcomes for my side are a bonus. I feel so strongly about the fairness and potential success from mediation that we recently included a conflict resolution clause in our new client contracts that now provide for professional mediation."**

Part 6: 8 important reminders to take away

Are you feeling clearer about negotiation and mediation processes? We hope so. This primer has a lot of information and is worth reading more than once.

Whatever settlement process you're engaged in, here are 8 important reminders to take away:

1. 95% of family and civil cases settle – and so will yours

Do your best to come to a settlement, instead of going to trial. You'll please the court. And likely save time and money – not to mention stress.

2. You cannot be forced to make an agreement

Reaching a settlement must be voluntary. If you are coerced, the agreement can be challenged in court. This does not mean that you will be thrilled with every aspect of your final decision to settle. But you must agree and be willing to live with it.

3. Stay in control of the process

Do not let the other party or any legal representative cut you out of the process. Ask questions, ask for time to review, do not be rushed. It's your right.

4. Get crystal clear on what can be enforced in court

Some of the terms you agree to may be enforceable by a court and some may not. Generally, the payment of money, distribution of property, child custody, and access arrangements can be enforced by a court order. An apology cannot.

5. Always put settlement agreements in writing

However you get to settlement, always put it in writing. This will allow you to check that what you agreed to verbally has been recorded properly. And it will help avoid future disputes over the content of the agreement.

6. If possible, take time to decide

Before signing, give yourself time to consider all the implications of the agreement, both immediate and longer-term. This way, you can sleep on it, consult others for an objective opinion, and imagine how it will be for you to live with the agreement, long-term.

7. Get a second opinion

Talk over any settlement proposal with a friend who understands what's important to you, or if possible with a lawyer who is willing to provide this service on an "unbundled" or hourly basis.

8. Ultimately, settlement is your decision

It's helpful to get the opinions of people you trust. But no matter what advice you receive, remember that the final decision rests with you.

If you have comments for us, or suggestions for ways to improve this primer, let us know at representingyourself@gmail.com.

A list of the primers we offer

Here are the primers we currently offer

They're free for you to download here: https://representingyourselfcanada.com/our-srl-resources/

Step 1: Getting ready and starting the legal process

- **So you're representing yourself:** A primer to help you get ready to represent yourself in family or civil court
- **A guide for SRLs with disabilities:** Understanding your rights and requesting the assistance you need
- **A Courtroom Companion (McKenzie Friend)**
- **The McKenzie Friend: Canadian cases and additional research**
- **Considering Mindfulness:** How you can use Mindfulness to increase your focus and relieve the stress of representing yourself

Step 2: Doing your research and preparing your arguments

Doing Your Research

- **Part 1:** Understanding precedent and navigating the CanLII legal database (available in English and French)
- **Part 2:** Assessing CanLII case reports, and using them to build your legal argument
- **Reference Guide:** Legal definitions, court abbreviations and Canada's court systems-at-a glance
- **Critical Judicial Decisions for Self-Represented Litigants:** Using important case law that establishes rights for self-represented litigants and how the justice system should protect you from bias
- **Settlement Smarts** Tips on effectively using negotiation, mediation and Judge-led settlement processes
- **What you need to know about affidavits**

Step 3: Presenting your case in court

- **Coping with the courtroom:** A primer to help you navigate the written (and unwritten rules) of the courtroom
- **How to order a court transcript**
- **Working with opposing counsel:** Building constructive working relationships between self-represented litigants and opposing counsel
- **Tips from the bench:** Advice for SRLs, and the judges who work with them

To keep up with what's happening at the National Self-Represented Litigants Project (NSRLP), visit **RepresentingYourselfCanada.com**.

If you have comments for us, or suggestions for ways to improve our primers, let us know at representingyourself@gmail.com.