“SETTLEMENT SMARTS” FOR SELF-REPRESENTED LITIGANTS

How To Use Settlement Processes Knowledgeably and Effectively

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This primer is designed to help you to be effective in settlement processes and to learn to how to be "settlement smart", whether there is another self-represented litigant ("SRL") on the other side of your case, or a legal representative.

1. Why consider settlement?

Almost all (in many courts more than 95%) of family and civil cases settle before a final trial. Often this occurs just before a trial is scheduled to begin, when an enormous amount of time and effort has already been put out. Going to trial means another big increase in costs and of course there is always uncertainty about the outcome.

Family and civil courts now offer a number of different programs that are intended to encourage settlement. If almost every case is eventually going to settle, it seems logical that it would be better for everyone if this happened sooner – when you have used up less time, money and energy.

It may seem far-fetched at the outset for you to think about an agreement with the other side, especially if you think that their demands are very unreasonable. But you will probably - eventually - settle.

There are some clear advantages to reaching an agreement rather than asking a judge to decide for you. Settlement gives you control over the outcome – and agreements can be more detailed and specific to your situation than what a judge will decide – for example parenting plans or ways to set up support that factor in tax implications.

As a SRL, the timing of settlement should reflect your needs. Litigants who are represented by lawyers are often told to wait until later in their case to propose negotiating or 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 in the case, when they are 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.

As a SRL, just as any other litigant, you are encouraged to

"(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." (Coping with the Courtroom: Essential Information and Tips for SRLs, NSRLP 2014).

2. Settlement basics

2.1 Settlement must be your decision

Any agreement you reach to settle your case must be voluntary. You cannot be forced or coerced into making an agreement and if you are, it can be challenged in court. This does not mean that you will be thrilled with every aspect of your decision to settle – but you must be willing to live with it (see 2.5 below)

2.2 Settlement should be an informed decision

Talk over any settlement proposal with a friend who understands what is important to you, or if possible with a lawyer who may be willing to provide this service on an "unbundled" basis[1]. Give yourself time to consider all the implications of the agreement, both immediate and longer-term. And no matter what advice you receive, remember that the final decision must rest with you.

2.3 Settlement agreements should be put into writing

A settlement agreement should be put into writing. This will allow you to check that what you agreed to verbally has been recorded properly and will help avoid future disputes over the content of the agreement.

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[1] That is, by charging you an hourly rate for specific tasks using a "limited scope retainer". For further information see http://www.cba.org/Alberta/main/pdf/limited%20scope%20retainers_FINAL.pdf

2.4 Court recognition of settlement agreements

If you agree on terms that can be enforced by a court (e.g., payment of money, distribution of property, custody and access arrangements), a settlement agreement can be brought to court and 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.

2.5 Ways to think about settlement

Here are four settlement "reality checks" from the data in the National SRL Study (2013) (for further advice from other SRLs, see section (7)):

2.5.1 Many litigants believe that their case is "different" – because of course it is unique and personal to them – and that a judge will "obviously" side with them. Unfortunately, legal outcomes are never certain, which is why so many cases settle before trial when the risks and costs of proceeding become more real and immediate. This primer encourages you to think about settling earlier, even if you are convinced a judge would rule in your favor.

2.5.2 Bear in mind that a settlement agreement will rarely give you – or the other side – everything you want. This may sound obvious, but it is worth repeating that there is no incentive for anyone to settle by agreeing to everything the other side wants – they might as well go to trial and let the judge decide.

2.5.3 Many litigants adopt a strategy of "waiting it out". They hope that if they persevere, the other side will eventually give up. This may work out – or it may not. In the meantime, you will be stuck in a process that will cost you time and money and sap your patience.

2.5.4 Getting angry, however understandable, is usually counter-productive. You will achieve more if you can express yourself in a calm and reasoned manner that suggests confidence and competence.

3. Process choices

When family and civil cases settle, as most of them will do before trial, they usually do so as a result of one of three types of procedures.

3.1 Judge-led settlement conferences (sometimes called case conferences or trial management conferences)
3.2 Mediation
3.3 Negotiation and formal Offers to Settle.

You may find yourself considering all of these approaches at different times in your case. Depending on the court, you may be required to participate in one or more of these processes, or it may be your choice. This primer can help you decide whether and how to participate.

4. Judge-led settlement conferences

4.1 Purpose and structure

Settlement conferences are offered in many family and civil courts. In some jurisdictions they are mandatory and in others the parties must request a settlement conference.

A settlement conference is *not a trial*. The settlement judge will not review evidence presented by either side. There will not be a ruling or an order made by the judge. A settlement conference is conducted by a judge who acts more like a mediator – trying to find areas of agreement between the parties. Note that if your case goes to trial in the future, the settlement conference judge cannot conduct it and cannot be called as a witness.

The settlement conference is designed to "flush out" the potential for a settlement, or a partial settlement of some of the issues in dispute. For example, you may be disputing both child support and access arrangements, and the settlement conference judge may explore whether one of these issues could be agreed and resolved, leaving the case to focus on what remains unsettled.

A settlement conference usually takes place in a boardroom in the court or a courtroom and is scheduled for between thirty minutes and an hour.

The following is a helpful general description of the goals of a settlement conference.

"The purpose of your settlement conference is to:

a. Resolve some or all of the issues in the action.
b. Encourage settlement of the action.
c. Help you get ready for trial.
d. Provide full disclosure among the parties of all the relevant facts and evidence."[2]

4.2 How to prepare for a settlement conference

A good place to begin is to review the material you have received from the other side that may be relevant to settlement. A settlement conference is also an opportunity to ask for any further documents that will help you make a proposal or assess the fairness of an offer from the other side.

You should also consider what the other side might want from you if they are going to be willing to settle. Are there further documents that they have asked for which are important to them and you can bring with you? Is there something you might offer to them that might set up a more productive interchange?

It is important to remember that you are not going to be presenting your evidence and arguments at a settlement conference as you would in a trial. The focus here is on exploring settlement. When you prepare what you will say to the judge, ask yourself what s/he needs to know and to understand about your case to help you make a reasonable settlement – not how to convince him or her that you have the best legal arguments. Your best preparation for a settlement conference is not reading lots of cases and rules, but thinking about your most important *interests and concerns* and what you need to meet your goals – as well as what motivates the other side and what they might need in order to settle.

4.3 Some advice on strategy

It is important to show the judge that you are serious about exploring settlement. Even if you feel skeptical – for example, if you have

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[2] Ontario Superior Court of Justice, Office of the Chief Justice 2012

approached the other party before and they have dismissed the idea - the judge will be much more supportive and helpful towards you if you state your commitment to trying to find a fair settlement.

Your opening statement to the judge is a good opportunity to describe your commitment to a fair settlement, to explain your settlement goals, and why these are important to you. Try to acknowledge in a respectful way the other side's goals as well. Try to frame what you want to accomplish as goals – which you can express clearly and firmly - rather than as demands or entitlements.

For example, rather than saying "I am entitled to more access to my kids and there must be no last minute changes" say instead "I want to reach agreement on an access schedule that can enable me to plan ahead and avoid the anxiety of last minute changes". Or, rather than "I demand payment before I complete work on the deck", instead try "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."

You should also mention any previous efforts you have made to reach an agreement - for example making an offer, producing documents, offering to compromise on something - even if the other side did not respond or dismissed your efforts.

It is also constructive for the other side to hear you say that if a fair settlement can be reached, you are committed to following these terms e.g. committing to following an agreed access schedule for co-parenting, or agreeing to completing a job for a customer.

You want to show the judge and the other side that you are "settlement smart."

4.4 Reaching an agreement

If you are successful in resolving all or some of your dispute through a settlement conference, an agreement will be drafted to record the terms of that agreement. It is very important that you see this draft agreement before it is sent back to the settlement judge, because at this point it will become a formal order, just as in a trial.

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, and then felt that the order was inaccurate and wanted to contest some of the terms. Try to avoid getting into this situation. If you are representing yourself but the other side has a lawyer, the settlement judge may ask the lawyer on the other side to draft the agreement. In this case, make sure that you make it clear to the judge and counsel for the other side that you want to be able to review the draft agreement before it is turned into an order. You may want to consider asking someone else to look at the draft agreement with you, and/or considering purchasing some limited advice services from a litigation coach or a lawyer who offers "unbundling" (service by the hour or a flat fee).[3]

4.5 No agreement

If you do not resolve the dispute through the settlement conference, you can continue in the legal process. Nothing said or proposed by in the settlement conference can be used at a trial.

If no settlement is reached, the settlement judge may still make an order regarding procedure (for example, for the production of materials) that she or he believes will speed the case up and get your case closer to final resolution at trial. You can always open up negotiation or the possibility of mediation again before you go back to court (see (5) & (6) below).

4.6 Case conferences and trial management conferences

In some provinces, these terms are applied to events that look a lot like settlement conferences but have a slightly different purpose and focus (although each can also be used to try to settle). A *case conference* is often the first of a series of settlement conferences, and tries to get the initial procedural issues (for example disclosures and the exchange of documents) dealt with, as well as identify any urgent matters that need to be addressed immediately.

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[3] See note 1 above

One Ontario judge offers the following advice about preparation to SRLs coming to a 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."

A *trial management conference* anticipates a trial, and so is usually scheduled later in the case. It aims to identify the issues that the litigants need the court to decide at a trial, what witnesses each 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.

5. Mediation

5.1 Purpose and structure

In mediation an impartial third party (the mediator) helps the parties to negotiate with one another over the issues in dispute, and if possible to come up with a deal that they can both live with. Unlike a settlement conference, the mediator is not usually a judge, but a trained professional with relevant experience.

Some provinces (for example Ontario) now offer free mediation to any family litigant. Ask in your court about this.

Mediation may take place in a specially set aside private room in the courthouse (but not in a courtroom). Or it may take place in the mediator's offices or another neutral location. Most mediations are scheduled for between one and three hours, and there may be more than one session. That may sound like a long time, but you will probably need at least an hour or more to really get into the issues, break the ice and begin to explore the details of a possible settlement.

The mediator will not make any decisions for you, and you should not allow yourself to be pressured into making an agreement unless you are clear that this is what you want. With the OK of the mediator and the other side, you can usually take someone with you to mediation, either a lawyer or simply a friend or ally (see also below at 5.3).

In most mediations, anything that is said is confidential and "inadmissible" in a future trial. While you can always repeat anything you have said or proposed, you cannot refer to any proposal that the other side made if you go to trial. In addition, normally the mediator cannot be called as a witness. The purpose of this rule is to encourage frankness and openness in mediation. Less commonly, the rule is the opposite to the above – that is, anything that is said in mediation can be used in a future trial. You should always clarify by asking "is this mediation process 'open' (the latter) or 'closed' (the former)?"

5.2 How to prepare for mediation

It is important that you prepare thoroughly for mediation, just as you would take the time to prepare for a more formal court appearance or settlement conference. You will get more out of mediation if you approach it with some concrete ideas for the type of deal you might be willing to accept. It is also important in preparing to think about what the other side might be looking for and might accept.

5.2.1 Goals and interests

A good first step is to write out your goals and interests. Rather than simply a laundry list of what you want, use this as a way of thinking about what is really important to you - and why. In mediation it will be important for you to talk not only about what you want, but why you want it and what is most important to you. If you can get the other side to share the same information with you, you will have a much better idea of what is motivating them, and of the particular challenges that need to be overcome in order to reach an agreement.

Next, review the list you have created and try to identify (1) your priorities and (2) any "bottom lines" that you feel are essential to a fair settlement. Your "bottom lines" are not your desired outcomes – they

should be what you think you cannot settle without. Try to separate these two things if you can. Try to anticipate the other side's desired outcomes and bottom lines as well.

Try to assess which items you could be more flexible on. If you make each one of your proposals non-negotiable, it is unlikely that the other side will be interested in making an agreement. Any agreement you reach is probably going to be a set of trade-offs and compromises and this is a chance for you to begin to think about this in your own time and space. If you have someone who knows you and your case well who can help you to do this, it would probably be useful to review your list with them, and to ask them to help you think about your priorities and bottom lines.

5.2.2 Disclosure

Some mediators require you to bring specific documents (e.g. financial records) with you to the mediation session in order that both sides can have the necessary information to be able to settle. Check with your mediator in advance what they expect you to bring and what information you need the other side to bring.

5.2.3 Assessing your BATNA

Another tool that many people find helpful before negotiating is to assess your BATNA, or your Best Alternative to a Negotiated Agreement (Fisher & Ury, 1991). In other words, what is likely to happen if you do not reach an agreement in mediation? This assessment should include a realistic look at how likely it is that a judge will agree to give you what you are asking for, as well as how long this might take and how much it will cost to go to a trial. This is speculative of course, but you can make some informed best guesses here. It is also important to consider your WATNA (the worst alternative…) to get a realistic balance here and achieve an honest assessment.

Your BATNA and WATNA will give you an important benchmark against which you can compare any offer the other side makes.

5.2.4 Preparing an opening statement

It is a good idea to prepare a statement that you can make at the beginning of mediation. This may be no more than 3-4 minutes long, and should focus on what you hope to talk about in mediation. Avoid beginning with a specific demand (see below) – try to focus instead on what is really important to you and why. If possible, include something in your opening statement that tells the other side clearly and directly that you really want to explore the potential for resolution. Experienced mediators will tell you that stating a sincere desire to try to find a resolution at the start of mediation – and if possible acknowledging how difficult the conflict has been for both parties - makes it much easier for the other side to respond in kind, and participate in good faith.

You may have specific 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 you have these concerns you should raise them privately with the mediator before the mediation session. Often a mediator will ask to meet with you privately (sometimes called an "intake" or "screening" meeting) before the session in order to discuss any special challenges in your case (many mediation programs use this meeting to identify such problems in advance of a joint session). This is your chance to ask questions and raise concerns you might have about mediation in a confidential private meeting.

This is also a good time to check with your mediator that you can bring someone with you to the mediation session for support. Think about who might be a good person to accompany you to mediation. This could be a friend or a family member, or a legal representative. Consider who would help you to feel calm and supported in the meeting, rather than who can speak for you. It is likely that the mediator will ask you to speak for yourself, but bringing an "ally" into the room is nonetheless an important source of support.

5.3 Some advice on strategy

Mediation is a chance for you to learn more about what the other side wants in order to settle and to explain what is most important to you, and why. As Steven Covey suggests in The Seven Habits of Effective People (1989) "Seek to understand before being understood." You may

feel more powerful when you are talking, but experienced mediators will tell you that listening and asking questioning is often much more effective in achieving a settlement that works for you – because it helps you to understand what is really important to the other side.

Telling the other side that you think they are a terrible person is not going to get you a settlement. You might think this, but saying it out loud, however justified you may feel, will make it impossible for the mediation to continue constructively. Expressions of anger are likely to alienate the other side and make "selling" your position more difficult.

Try not to open with a big demand that the other side will probably reject. Instead wait to hear what the other side has to say about what is important to them and spend time making sure you each really understand their concerns before moving on to discuss solutions. After all, if there were easy or obvious answers, you would have already found them by now.

Even if you feel that the other side is not treating mediation as seriously as you are, try not to react too quickly. If you feel the conversation is no longer productive, you can ask for the session to be over. But don't jump the gun – the first 30 minutes of mediation are often very tense. Try to be patient and keep asking questions to get as much information as possible from the other side.

Mediation is primarily about talking to the other side, rather than presenting your case to the mediator. However if you feel that a private conversation with the mediator would be helpful, or if you simply need a short break from the discussion, you can ask the mediator for a "caucus" at anytime during the session. This gives you a private opportunity to refine your proposals and discuss with the mediator how realistic they are.

All these strategies require you to be calm and centered and you will need to prepare yourself emotionally. Mediation can be challenging and sometimes stressful. You will probably hear the other side make statements that you believe to be unfair, inaccurate, or hurtful. If you can anticipate some of this, it will be easier for you to stay calm and not allow yourself to be thrown off. Think in advance - what is going to be hard for you? What will push your buttons? How might you push the other'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 more confrontational and rigid as a result. Try to stay focused on what you want and need (above), and control how emotional your reactions are.

5.4 Reaching an agreement

If you reach an agreement in mediation – on all or some of the issues in dispute – you should consider taking 24 hours to review the proposed terms and perhaps talk to your significant other or friends before signing . This "time to reflect" is quite common, so you should not be afraid to ask for this. You want to be sure that you are comfortable with what you are agreeing to before you commit to the precise terms.

Whoever you talk the agreement over with – a friend, your partner, even a lawyer on an "unbundling" basis[4] - the most important consideration should be how fair and practical the proposal is. Be sure you understand all its implications before you commit.

An agreement reached in mediation can be written up and submitted to the court to be turned into a court order. Any terms that can be legally enforced – for example, an agreement to pay support, but not an agreement to make an apology - will then have the same force as any other court order, e.g. there will be consequences for breaking the agreement. You may decide that you would like a lawyer to draft an agreement for you, or to review an agreement that has been developed in mediation, in order to give you an assessment of how close it is to what a court might decide at a trial[5].

5.5 No agreement

If mediation is unsuccessful in resolving any of the issues in dispute, you may continue in the legal process.

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[4] See note 1 above

[5] Note also that Legal Aid Ontario now offers a certificate for independent legal advice from a lawyer before during and after mediation. There may be a similar program in your province.

6. Negotiation and Offers to Settle

6.1 Purpose and structure

The most common way that lawsuits are settled – even with the introduction of settlement conferences and mediation – is still by lawyers negotiating with one another.

As a SRL you have the same reasons to consider negotiation as a represented party. You may decide that you want to open up negotiations with the other side over a possible settlement, partial or full. This may be because there is an immediate issue that needs resolution, even if this will be a temporary measure while other issues are worked out (for example, payment of child support or access arrangements). Or you may believe that you can make a proposal to settle the entire matter, including the question of costs.

Making an offer to settle in a negotiation does not admit any fault. Rather, it is a way of trying to settle a dispute based on what you think is fair, practicable, and reasonable.

Negotiating a settlement can take place informally, and/or using the Offer to Settle process. The difference is that an Offer to Settle is governed by rules of civil procedure in each province, and has cost consequences if the offer is refused and there is a trial.

6.1.1 Informal negotiations

Research on how lawyers negotiate shows some common patterns, including the likelihood that there will be several offers exchanged – for example an offer followed by a counter-offer – before an agreement is reached. Negotiation is usually conducted at "arms-length", that is by letter or other written communication. Sometimes negotiations may be conducted by phone, especially where the lawyers know one another from previous cases and feel comfortable communicating this way.

As a SRL, you can initiate informal negotiations in a number of ways. You can draft a proposal and send it over to the other side "without prejudice". This means that nothing in the offer will be used in a trial, and it is a way of opening up informal discussions without risk (much as

in mediation, above at 5.2). Or you could try calling the lawyer on the other side and suggesting a meeting to discuss a possible settlement.

6.1.2 Formal Offer to Settle procedure

All courts allow parties to make formal Offers to Settle to the other side under their Rules of Civil Procedure[6]

The difference between an Offer to Settle, and an informal negotiation with "without prejudice" offers going back and forth, is that an Offer to Settle has cost consequences if it is refused. If there has been a formal Offer to Settle and this was refused – only to have the court make an order at trial that looks very similar or even less favourable than the Offer to Settle – the party who turned the offer down *may*[7] have to pay some of the other side's costs (calculated from the time the offer to settle was made). In some jurisdictions, the costs payable by the party who turned down the Offer to Settle may be doubled.

The goal of the Offer to Settle rule is to penalize a party who failed to accept an offer "that should have been accepted"[8] and to encourage parties to settle before a trial.

Because of the potential costs consequences, you should seriously weigh an offer to settle and consider whether or not it is one you should accept. You may want to ask a lawyer to give you some advice on this on an "unbundled" basis[9].

6.2 How to prepare an offer

Review the suggestions above at 5.2 in relation to preparing for mediation. The same advice is relevant to how you would think about and prepare an offer to settle.

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[6] See Rule 49 in Ontario, Supreme Court Civil Rule 9-1, Supreme Court Family Rule 11-1 in British Columbia, Saskatchewan – *Queen's Bench Rules* – Division 5 – Settlement using court processes, Alberta – *Rules of Court* – Division 5 – Settlement using court processes, Manitoba – *Queen's Bench Rules* – Rule 49, New Brunswick – *Rules of Court* – Rule 49, Nova Scotia – *Civil Procedure Rules* – Rule 10, Newfoundland and Labrador – *Rules of the Supreme Court, 1986* – Rule 20A

[7] *(K.(K.) v. G.(K.W.)* 2008 ONCA 489

[8] *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25; see also *Giles v. Westminster Savings and Credit Union,* 2010 BCCA 282 at para. 74

[9] Note 1 above

If you are using the formal Offer to Settle procedure, you should consult the relevant rules in your province or jurisdiction[10]. An Offer to Settle is typically made in writing and delivered to the other party (or parties) at any time after a lawsuit has begun. It is generally valid or "live" until it is expressly withdrawn or if a time period is stipulated for acceptance of the offer, until it expires.

6.3 Some advice on strategy

If you decide to prepare a settlement proposal, you want to think about how to make it attractive to the other side, without putting unnecessary pressure on them. You want to propose something that they will seriously consider - so setting out your maximum demands and describing them as "non-negotiable" is unlikely to get serious consideration. For example, you could say that this is an opening proposal and you are open to counter-offers. If you are 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.

If you decide to use the formal Offer to Settle procedure, remember that the purpose of this rule is to penalize a party who refuses an offer that is reasonable and/or close to what a court will rule. Your proposal then should reflect what it is likely that a court would order. If it is very different to what is the likely legal outcome, the other side can easily dismiss it and there will be no cost consequences for them.

If there is a lawyer representing the other side, you may find that they are initially uncomfortable about negotiating with a SRL. Lawyers sometimes complain that if they communicate directly with a SRL they may ask them for legal advice. They may feel more comfortable if your initial contact with them is via email. You can explain that you are preparing a settlement proposal/ Offer to Settle, or just raising the possibility of an informal discussion and exploring some initial ideas. You should be polite and courteous, and expect your suggestions about negotiation to be taken seriously and responded to appropriately.

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[10] See note 6 above.

6.4 Reaching an agreement

If an offer is accepted, written acceptance and the original offer may be filed in court (see above at 4.4 & 5.4).

6.5 No agreement

If a formal Offer to Settle is not accepted, this can affect costs awards at trial after all the other issues in a case, have been addressed (see above at 6.1).

7. Advice from other SRLs

Finally, here is some of the collected wisdom of other SRLs that we collected in their interviews for the National SRL Study (2013).

7.1 Keep your eye on the prize – resolution

Sometimes we can become fixated on an aspect of settlement and very reluctant to give way on this. Try to constantly reassess. 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.

"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." (BC SRL)

7.2 You are the final decision-maker

Some SRLs described being excluded from conversations over settlement with the other side or with a judge – and then presented with a settlement to sign. Of course this felt very disempowering.

You should seek as much advice as possible on settlement options, and listen to it – but make sure you stay in charge of settlement decisions

and strategy. You - and the person you are in dispute with - are the most important players in any negotiation process.

7.3 Considering settlement is not a sign of weakness

Making a settlement proposal or suggesting negotiation is sometimes seen "…as a sign of weakness, or an admission that the opponent's position has some merit. This is a major emotional hurdle for SRLs. It violates their sense of justice in settling/negotiating. They see it as 'letting the other guy get away with it.'" (Ontario SRL)

On the contrary, experience suggests that taking the lead and setting the terms and timing for negotiation gives you power.

7.4 Be pragmatic

Many SRLs described beginning with a belief that the legal system would deliver a just outcome, but coming to the realization that their strategy had to be a lot less idealistic and a lot more pragmatic than this. For example,

"In an adversarial system, the settlement comes about as a risk-benefits analysis not on any basis as to what is appropriate in the particular case." (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)

7.5 Using mediation

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

However there were also some stories of significant satisfaction with mediation. For example, one (Alberta) SRL shared the 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."

7.6 Using settlement conferences

SRLs described very mixed experiences with judge-led settlement conferences. However, where this process was effective it drew plaudits. For example,

"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 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. "