



THE 2016 BCAMI SYMPOSIUM

May 30th & 31st

At The **Morris J Wosk** Centre for Dialogue
at Simon Fraser University

The Lawyer's Role in ADR

Practical and Ethical Considerations

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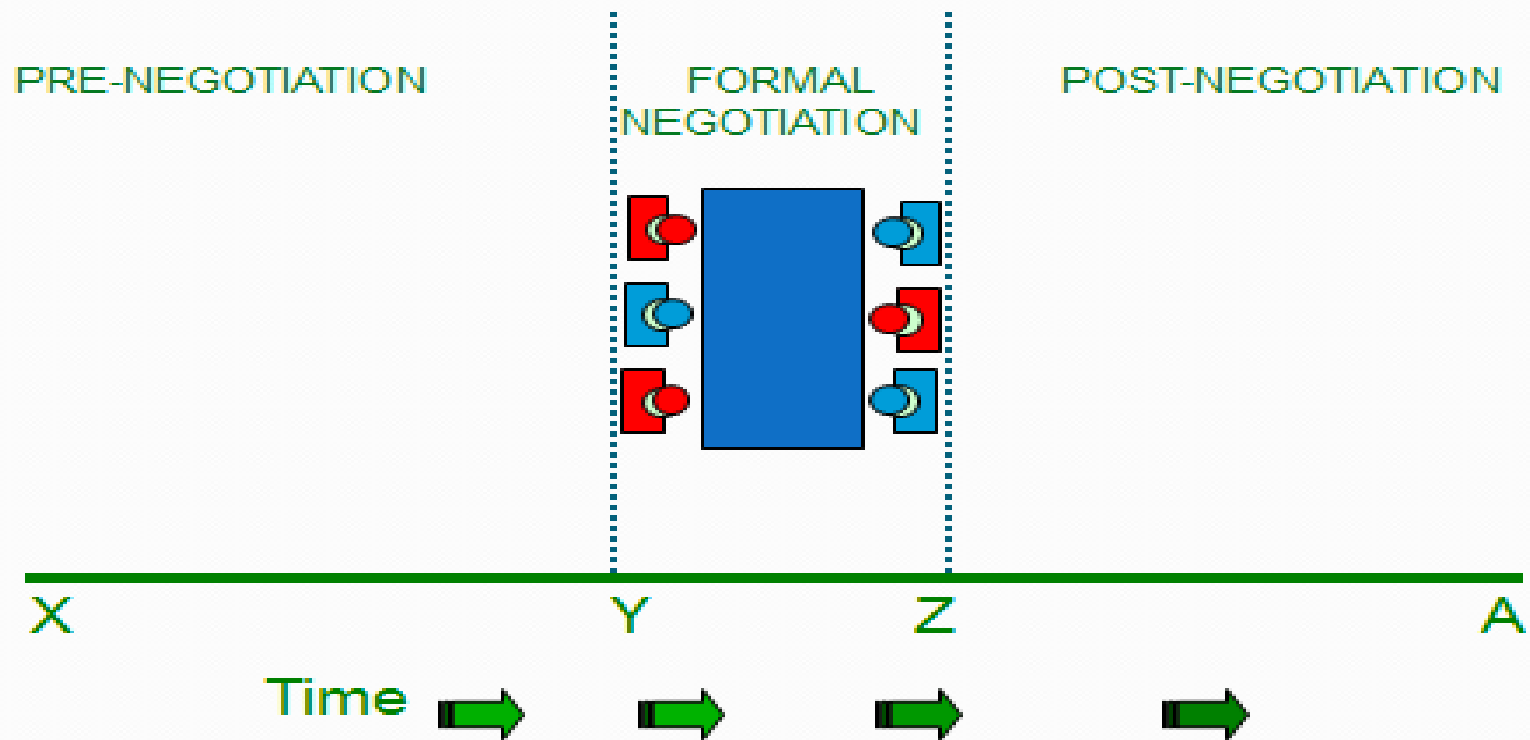
- Topics

- What is your negotiation style?
- Preparation for ADR
- Mediation strategies/winning ways
- Ethical considerations
- Questions and Answers

The Lawyer's Role in ADR

Practical and Ethical Considerations

NEGOTIATION TIME LINE





**What is your
Negotiation Style?**



"A 98% civil settlement rate and the increasing use of negotiation, mediation, and collaboration in resolving lawsuits have dramatically altered the role of the lawyer. The traditional conception of lawyer as 'rights warrior' no longer satisfies client expectations, which centre on value for money and practical problem solving rather than on expensive legal argument and arcane procedures."

*Dr. Julie Macfarlane,
The New Lawyer: How Settlement
is Transforming the Practice of Law*

Cooperative vs. Aggressive Negotiation Styles

- Cooperative style usually is more successful, except against a very aggressive style
- Don't abandon the cooperative approach
- The reverse is also true, don't be too compliant – at some point, you may have to react and be aggressive
- If you make concessions too soon or too often, you may get exploited by the aggressor
- Be adaptable to other approaches
- Protect your reputation – who do you want to be?

Aggressive/ Competitive

- Withholds information
- Inflexible/demanding
- Positional (wants to win at all cost)
- Little or no interest in the opposing party's positions/interests/needs
- Focused on short term gains and not the long term

Cooperative/ Problem Solver

- Open with information
- Ask questions/listens
- Realistic requests
- Shows interest in the opposing party's positions/interests/needs
- More focused on the long term

“TO INCREASE COOPERATION ONLY
TWO PARACHUTES WILL OPEN”



Preparation for ADR

~~UNPREPARED~~

A hand holding a red marker is shown crossing out the word "UNPREPARED" written in black capital letters. The red marker is positioned over the first few letters of the word, and a red 'X' is drawn over them.

- Is this case right for ADR?
- Which ADR option is most appropriate in these circumstances?
 - Mediation?
 - Arbitration?
 - Med/Arb?

Questions to Ponder

Mediation

- When to mediate (timing)?
- Choosing your mediator
- Who should attend?
- What do I need to prepare?

Arbitration

- What is being arbitrated (issues)?
- Choosing your arbitrator
- Contract terms and conditions
- Pre-arbitration orders

Preparation for ADR – Questions to ponder

Is this case right for Mediation?

There are a number of factors to consider:

- Safety of the parties;
- Power imbalance;
- Mental health concerns;
- Substance abuse concerns;
- Significant legal issues;
- Unrealistic expectations;
- Lack of disclosure.

Is this case right for Arbitration?

There are a number of factors to consider:

- Confidentiality;
- Lack of “teeth” in arbitral orders (enforcement/contempt);
- Precedential value of decision;
- “All or nothing” or piecemeal;
- Cost

When to Mediate

- **Don't go too early:**

- Are the parties emotionally ready to settle?
- Are both parties willing to attend and open to settlement?
- Has there been proper disclosure?
- Are there documents missing?

- **Don't go too late:**

- Too close to trial the parties may become entrenched and have too much invested emotionally and financially.

Preparation for Mediation-Counsel

- It is essential that you are prepared.
- Prepare a Mediation Brief - this is helpful for you, the parties, opposing counsel and the Mediator.
- Have a thorough knowledge of all the relevant facts.
- Take all relevant documents to the mediation – financial records, expert reports, appraisals, etc.
- Also take any relevant legal research (just in case);
- Prepare your client.

Preparation for Mediation - Client

- Make sure your client completely understands the mediation process and the Mediator's role;
- Know your client's interests;
- Make sure the client has reasonable expectations;
- You and your client should understand the strengths and weaknesses of his/her case, as well as the best and worst alternatives to settlement;
- Prepare your client to speak to the other party and counsel – this can be very effective;
- Brainstorm with the client in advance and review various options for settlement;
- Answer any questions and alleviate any concerns.

Counsel's Role in the Mediation

- Help define the issues (not just legal);
- Help your client articulate their interests;
- Listen and identify the other party's interests;
- Acknowledge the other side's perspective (warn your client in advance);
- Help your client hear the opposing party;
- Support your client and any real or perceived power imbalance (monitor throughout the day);
- Assist with any missing information or documents;
- Ask questions but **do not** cross-examine the other party.

Counsel's role in the Mediation (cont'd)

- Monitor any obstacles to the negotiations;
- Suggest a break if you think your client is getting upset;
- Try to diffuse any difficult situations;
- Suggest caucus if you need or want to speak to the Mediator;
- Let the Mediator know if something is not working or upsetting to you or your client;
- Help with brainstorming and consider non-legal alternatives;
- Help with reality checking options;
- Assist with record keeping and drafting the agreements reached.

How to Achieve Success at Mediation

Focus on the needs of the other side

- ❖ Shift from a focus only on what your client wants and needs from the negotiation
- ❖ Move from positions to interests
- ❖ Look for common ground
- ❖ Ask open questions, be curious
- ❖ Be a learner not a judger

Counsel's Role in Arbitration

- Define the legal issues;
- Be sure that you stick to the matters for decision;
- Act as advocate;
- Present the evidence;
- Be professional and courteous;
- Support your client;
- Ensure all of the documents have been disclosed;
- Do not hide information.

Preparation for Arbitration-Counsel

- It is essential that you are prepared.
- Prepare an opening - this is helpful for you, opposing counsel and the arbitrator.
- Have a thorough knowledge of all the relevant facts.
- Ensure all relevant documents – financial records, expert reports, appraisals, etc. – have been disclosed.
- Have the relevant legal research ready.
- Prepare your client.

Preparation for Arbitration - Client

- Make sure your client completely understands the arbitration process and the arbitrator's role;
- Make sure the client has reasonable expectations;
- Prepare your client to provide his/her evidence;
- Answer any questions and alleviate any concerns.

Video Presentation

Erin Brockovich

<https://www.youtube.com/watch?v=BGX4nMrnxg0>

Ethical Considerations



Counsel's Duty to Encourage Settlement and ADR

- Whenever the case can be settled reasonably, the lawyer should advise and encourage the client to do so rather than commence or continue legal proceedings. The lawyer should consider the use of alternative dispute resolution (ADR) for every dispute and, if appropriate, the lawyer should inform the client of the ADR options and, if so instructed, take steps to pursue those options.

*CBA Code of Professional Conduct,
Chapter 10, The Lawyer as Advocate*

- Whenever the dispute will admit of fair settlement the client should be advised to avoid or to end the litigation.

*Code of Professional Conduct for BC,
Chapter 2, Standards of the Legal Profession*

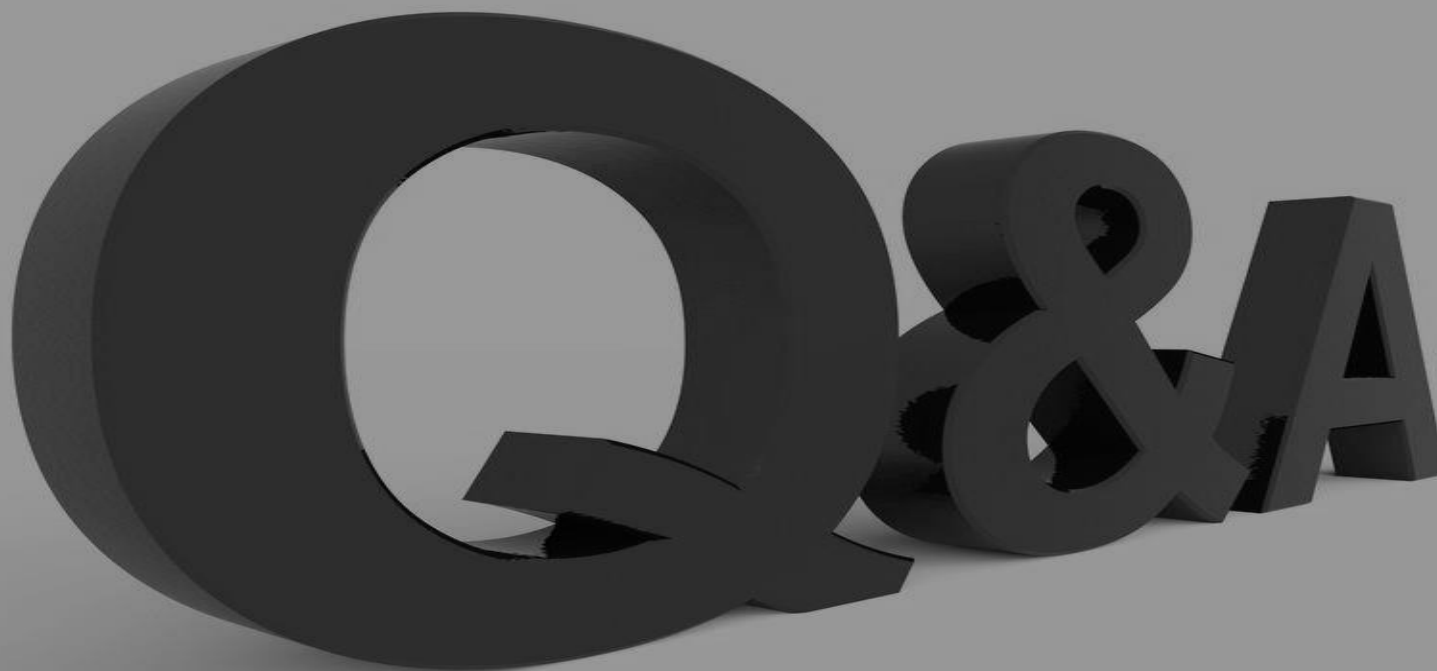
Mediation

- ❑ Managing emotions
- ❑ Tactics
- ❑ Handling power imbalances/safety concerns
- ❑ Dealing with highly competitive approaches and perceived “bullying”
- ❑ Deadlocks
- ❑ Unrepresented party/parties

Arbitration

- ❑ Managing outbursts
- ❑ Tactics
- ❑ Handling power imbalances/safety concerns
- ❑ Resist pre-arbitration ex parte communications but rely on pre-arbitration conferences
- ❑ Controlling the hearing
- ❑ Unrepresented party/parties

Challenges



The Lawyer's Role in ADR

Practical and Ethical Considerations

EXERCISE

Win as Much as You can!



Win As Much As You Can Pay Off Schedule

Results

4 A's
3 A's 1C
2 A's 2C's
1 A 3 C's
4 C's

Payoff

Lose \$1.00 each
Win \$1.00 each Loses \$3.00
Win \$2.00 each Lose \$2.00 each
Win \$3.00 Loses \$1.00 each
Win \$1.00 each