Mediating Justice:
Legal Dispute Negotiations

2nd Edition

The Honourable
George W. Adams, Q.C.

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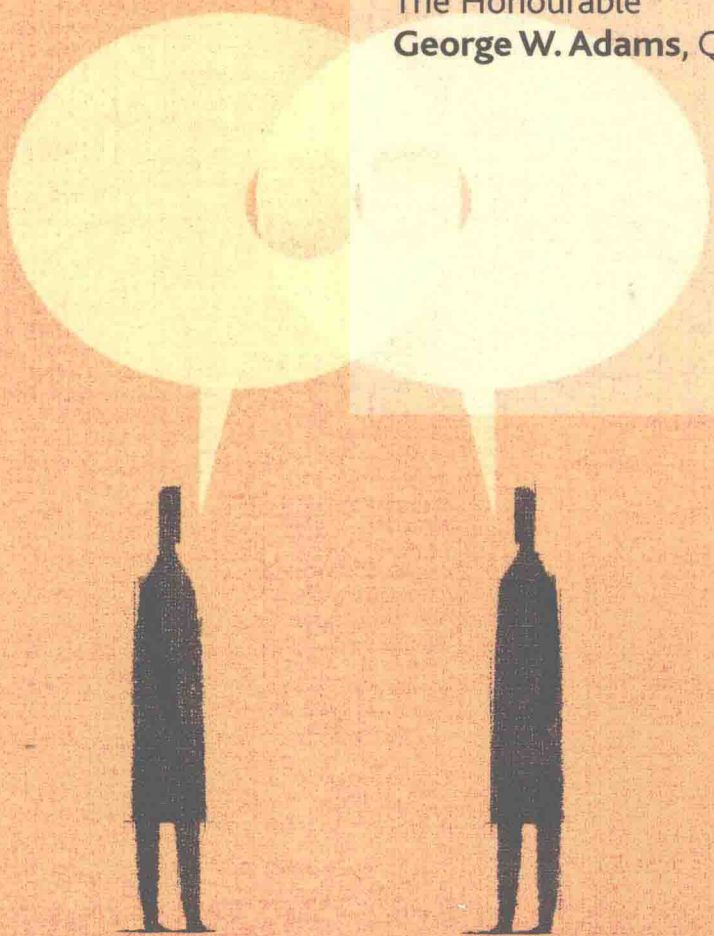

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DEDICATION

To Mara, Paul, Sandra, David and Michael.

And to Michael, Emily, Olivia, James and Alice.

PREFACE

The first edition of *Mediating Justice: Legal Dispute Negotiations* centered on the power of "talk" and "listening" in resolving difficult disputes. I also wanted to showcase for lawyers the substantial theory which underlies all the negotiating they perform on a daily basis. Understanding the theory of dispute resolution allows the practitioner to tailor his or her practice routine to the dispute at hand. This second edition reinforces that "talk" and "listening" are the keys to effective dispute resolution for anyone trapped in conflict.

Most of my professional life prior to April 15, 1997 had been associated with the judging of disputes. Nevertheless, I remained deeply interested in the larger project of conflict resolution since graduate school and by 1997 could see the pivotal importance of an "honest broker" role in our civil justice system. This is notwithstanding the disbelief of my fellow judges when I announced I was stepping down from the bench and I suspect my mother was also not impressed.

Fortunately, both my mediation practice and *Mediating Justice: Legal Dispute Negotiations*, a book I wrote during the first five years of practice as a professional mediator, were well-received. For many years, the book also performed superbly as the backbone to the course on negotiation and mediation my daughter Sandra and I taught at the University of Toronto Faculty of Law. And I understand other teachers have also used it. *Mediating Justice: Legal Dispute Negotiations*, as well, has been the intellectual base to my mediation practice over all these years and the template for mediation training I have provided to members of administrative agencies and privately.

So by 2011 a revised edition was maybe due. Indeed, the publisher had been seeking one from a much earlier point in time but the opportunity for doing so never seemed to present itself. When it became clear the occasion for doing so would never occur unless I simply did it, with Mara's assistance I hired two very talented law students, Rhema Kang from the University of Ottawa Faculty of Law and Andrea Wong from the University of Toronto Faculty of Law, and we went to work.

The second edition keeps the book connected with the most recent interdisciplinary literature on dispute resolution and confirms the template of the original text. The reader is also updated on the role of emotions in conflict resolution as well as on the topics of ethics, culture, and online technology. There are more visuals, more practice tips and more practice routines to help integrate theory and practice. Recent developments in mediator confidentiality are highlighted as are the evolution and positioning of new models of mediation.

Having said that, I was surprised how well the original text had withstood the test of time. But on reflection, what is so surprising? After all, this is a book about human nature which, so far as conflict goes, has been resistant to change. This may be why such classic texts as Richard E. Walton and Robert B. McKersie, *A Behavioral Theory of Labor Negotiations*, and Thomas C. Schelling, *The Strategy of Conflict*, along with the visionary writings of Mary Parker Follett, are so timeless.

Finally, I must once again acknowledge the debt I owe my wife, Mara. I cannot imagine my personal and professional life without her. Many thanks.

GWA
Toronto, Canada
October 13, 2011

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CHAPTER 1

SETTLEMENT: AN INTRODUCTION

Fundamental to the welfare of a society is its capacity to manage conflict. The two great wars and the many regional conflicts of the twentieth century underline the dark side of human nature.[1] Legal rules and effective dispute resolution systems provide the foundations for economic growth, physical and emotional well-being, educational systems and, ultimately, thriving communities. Canada's founders understood this reality when they enshrined an independent judiciary in the country's constitution. Indeed, the depth of Canada's ancestral commitment to effective dispute resolution can be seen today in the form of those impressive courthouses which adorn our cities and towns.

This emphasis on the peaceful adjudication of conflict has produced a remarkable legal system, but one that has become increasingly expensive and slow. Today, justice has been placed out of the reach of many Canadians. It is this environment which has produced an "alternative dis-

[1] W. Ury, *Getting to Peace: Transforming Conflict at Home, at Work and in the World* (New York: Viking, 1999) at 74. The twenty-first century suggests little change. See S. Pinker, *The Blank Slate: The Modern Denial of Human Nature* (New York: Viking, 2002) at 307 (observes that "[h]istory indicts our species not just with the number of killings but with the manner").

pute resolution" movement dedicated to the use of more facilitative conflict management techniques like mediation in resolving legal disputes. The objective is to resolve disputes quickly, inexpensively and creatively. Increasingly, litigants and even the courts themselves are turning to mediation and other facilitative procedures to support these efforts.[2]

Obviously, the legal profession plays a pivotal role in resolving legal disputes. The profession traditionally resolves more than 95 per cent of all lawsuits before trial. Lawyers do this by negotiating with each other.[3] In the late nineteenth and early twentieth centuries, communities and the legal profession were smaller and courts were not inundated with litigation. Litigants could be reasonably assured of securing a relatively early trial date — a factor which often encouraged timely settlement discussions. Times, however, have changed. There is more law than ever before and seemingly more legal conflict.[4] There has also been a corresponding increase in the number of lawyers.

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[2] Hon. R.A. Blair & H. Cooper, *Ontario Civil Justice Review: First (1995), Supplemental and Final Reports* (Toronto: Ontario Civil Justice Review, 1996) [Blair & Cooper, *Ontario Civil Justice Review*]; See Hon. C.A. Osborne, *Civil Justice Reform Project: Summary of Findings and Recommendations* (Toronto: Ontario Ministry of Attorney General, 2007) (reviewing progress at the 10-year mark and pronouncing mandatory mediation a success); Canadian Bar Association, "Report of the Canadian Bar Association Task Force on Systems of Civil Justice" (Ottawa: Canadian Bar Association, 1996); M.J. McHale & D. Lowe, "Into the Future: Confirming Our Common Vision" (Paper delivered at the Canadian Forum on Civil Justice Conference — Into the Future: The Agenda for Civil Justice Reform, 2 May 2006), online: Canadian Forum on Civil Justice <http://cfcj-fcjc.org/docs/2006/commonvision-en.pdf> (urging a multi-option justice system). See also J.S. Kakalik *et al., Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (Santa Monica: RAND Institute, 1996); E. Plapinger & M. Shaw, *Court ADR: Elements of Program Design* (New York: CPR, 1992); J. Macfarlane, *Court-Based Mediation in Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre* (Toronto: Queens Printer, 1995); C.B.A. Joint Committee on Comprehensive Legal Education, "Attitudes-Skills-Knowledge: Recommendations for Change to Assist in Implementing Multi-Option Civil Justice Systems in the 21st Century" (Ottawa: Canadian Bar Association, 2000). In 2006, Ontario expanded mandatory mediation to include estate matters. Party-driven mediation was adopted in Alberta (2004) and British Columbia (2005); Canadian Bar Association, *CBA-ADR Law Section Provincial Dispute Resolution Comparison Chart* (Ottawa: Canadian Bar Association, 2010).

[3] R.H. Mnookin & L. Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale L.J. 950; C. Menkel-Meadow, "For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference" (1985) 33 UCLA L. Rev. 485 [Menkel-Meadow, "For and Against Settlement"]; see also R.H. Mnookin, S.R. Peppet & A.S. Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Cambridge: Harvard University Press, 2004) (where it is pointed out that negotiations between lawyers involve several relationships: (1) between lawyers; (2) between each lawyer and his or her client; and (3) between the clients) [Mnookin, Peppet & Tulumello, *Beyond Winning*].

[4] Surprisingly, however, the popular belief of a litigation crisis is not the product of hard documentation. See M. Galanter, "The Day after the Litigation Explosion" (1986) 46 Md. L. Rev. 3; M.J. Saks, "Do We Really Know Anything about the Behavior of the Tort Litigation System — and Why Not?" (1992) 140 U. Pa. L. Rev. 1147 at 1153.

In society at large, a growing incivility in our communities has become palpable.[5] Contemporary culture and changes influencing families, religion and communities have challenged earlier methods for building community consensus.[6] We now rely on formal law to accomplish what we previously achieved through informal networks.[7] Civil discourse, civic solidarity, organized reciprocity and the sharing of perspective between citizens all appear to be in decline. This erosion of "social capital" has contributed to rising levels of conflict and to the undermining of a "civil society".[8] An increasingly stingy welfare state is widening the gap between the well off and the less fortunate. Global economic and technological transformations have contributed to this decline in the connectedness that comes from a shared fate. The result is a troubling unwillingness to insure each other against common troubles.[9]

The legal profession — antiquated as it may sometimes seem — has not been insulated from change. Increases in the diversity and size of the profession have contributed to ideological tensions and other communications problems between lawyers. Lawyers increasingly distrust one another.[10] The profession is no longer a seamless cadre of legal professionals. Recessions and the economics of lawyering have also increased the number of inexperienced lawyers willing to handle lawsuits. The courts have been slow to adopt modern management techniques to administer the growing caseloads primarily because our traditional conception of justice encour-

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[5] R.D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000) at 146 [Putnam, *Bowling Alone*]. See also R.D. Putnam, "E Pluribus Unum: Diversity and Community in the Twenty-First Century, the 2006 Johan Skylte Prize Lecture" (2007) 30 Scand. Political Studies 137.

[6] Putnam, *Bowling Alone*, *supra* note 5 at 335.

[7] *Ibid.* at 147.

[8] *Ibid.* at 25; R.D. Putnam, "Bowling Alone: America's Declining Social Capital" (1995) 6 J. Democracy 65; R.D. Putnam with R. Loenardi & R.Y. Nanetti, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton: Princeton University Press, 1993); J.Q. Wilson, *The Moral Sense* (New York: Free Press, 1993); M. Kingwell, *The World We Want: Virtue, Vice and the Good Citizen* (Toronto: Viking, 2000); A. Etzioni, *The Spirit of Community: Rights, Responsibilities, and the Communitarian Agenda* (New York: Crown, 1993); R. Sennett, *The Corrosion of Character: The Personal Consequences of Work in the New Capitalism* (New York: W.W. Norton, 1998); J.Q. Wilson, "Bowling with Others" (2007) 124 Commentary 30.

[9] W.A. Galston, "Won't You be My Neighbor?" (1996) 26 American Prospect 16; Putnam, *Bowling Alone*, *supra* note 5 at 283. But see R.A. Ackerman, "Disputing Together: Conflict Resolution and the Search for Community" (2002) 18 Ohio St. J. Disp. Resol. 27 at 29; R.A. Ackerman, "Vanishing Trial? Vanishing Community? Potential Effect of the Vanishing Trial on America's Social Capital" (2006) J. Disp. Resol. 165.

[10] R.J. Gilson & R.H. Mnookin, "Disputing Through Agents: Cooperation and Conflict between Lawyers in Litigation" (1994) 94 Colum. L. Rev. 509; Putnam, *Bowling Alone*, *supra* note 5 at 47. See attempts to deal with increasing incivility by the Canadian Bar Association, *CBA Code of Professional Conduct* (Ottawa: Canadian Bar Association, 2009) at 132 (introducing principles of civility for advocates) and the American Bar Association, Litigation Section, *Guidelines for Conduct*, online: American Bar Association, 1998 <http://www.americanbar.org/groups/litigation/policy/conduct_guidelines.html> (to address a decline in professionalism and civility).

ages judges to be passive, disinterested and impartial. Dealing primarily with "private" disputes, judges have tended to leave the pace of pursuit to the parties.[11]

Interest in alternative dispute resolution ("ADR") across Canada must be seen against this backdrop. We have been constantly learning about peer mediation programs in our schools, community-based court diversion projects, environmental mediation successes, industry-consumer arbitration alternatives and pioneering First Nations sentencing and healing circle initiatives in our formal criminal processes.[12] Banks, universities and airlines are now offering ombuds services to help resolve disputes without the intervention of lawyers. Many other industries provide mediation and arbitration dispute resolution options to customers. The securities industry is a case in point.[13] Indeed, whole areas of law, such as motor vehicle litigation, have been removed from the courts and redesigned to emphasize mediation-assisted negotiations.[14] The workplace too, is turning to mediation in order to resolve racial discrimination and sexual harassment complaints.[15] Lawyers are becoming inundated by mediation and negotiation training advertisements. They are beginning to see that developing a better understanding of dispute resolution techniques is as important as keeping on top of legal developments. Mediation services are also part of what is known as ODR or OADR [Online (Alternative) Dispute Resolution services on the Internet].[16]

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[11] M.S. Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (and We Think We Know) About our Allegedly Contentious and Litigious Society" (1983) 31 UCLA L. Rev. 4 [Galanter, "Reading the Landscape"]. But see B. McLachlin, "The Challenges We Face" (2007) 40 U.B.C. L. Rev. 819.

[12] T.D. Henhoffer & R.V. Ericson, "The Victim/Offender Reconciliation Program: A Message to Correctional Reformers" (1983) 33 U.T.L.J. 315; D.P. Emond, "Cooperation in Nature: A New Foundation for Environmental Law" (1984) 22 Osgoode Hall L.J. 323; J. Board & P. Finkle, "Consumer Redress Through Alternative Dispute Resolution: A Research Report" (1994) 14 Windsor Y.B Access Just. 308; D.C. Elliott & J.H. Gross, *Grievance Mediation: Why and How it Works* (Aurora: Canada Law Book, 1994); R. Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Toronto: Penguin Books, 1996) [Ross, *Returning to the Teachings*]; J. Macfarlane, ed., *Rethinking Disputes: The Mediation Alternative* (Toronto: Edmond Montgomery, 1997) [Macfarlane, *Rethinking Disputes*]; B. Stuart, "Building Community Justice Partnerships: Community Peacemaking Circles" (Ottawa: Aboriginal Justice Section, Department of Justice, 1997).

[13] D. Masucci, "Securities Arbitration: A Success Story: What Does the Future Hold?" (1996) 31 Wake Forest L. Rev. 183.

[14] E.H. Fleischmann & N.L. Bussin, "The Institutionalization of Alternative Dispute Resolution: A Case Study of the Ontario Insurance Commission" (1996) 6 C.I.L.R. 265.

[15] M. Meece, "The Very Model of Conciliation" *New York Times* (6 September 2000) C1 and C6; J.K. Jameson, A.M. Bodtker & T. Linker, "Facilitating Conflict Transformation: Mediator Strategies for Eliciting Emotional Communication in a Workplace Conflict" (2010) 26 Negot. J. 25.

[16] M. Conrad, "Automated ADR" (2001) 25 Can. Law. 10; D.A. Larson, "Online Dispute Resolution: Technology Takes A Place at the Table" (2004) 20 Negot. J. 129.

Indeed, online mediation is challenging our traditional views of both litigation and ADR.[17]

Advances in the study of negotiation and mediation techniques over the past 20 years have reinforced these trends.[18] At one time it was thought that dispute resolution skills could be acquired only by experience, or perhaps heredity. Today, the study of conflict resolution through the lens of the social sciences has produced a body of readily transferable theoretical principles and practical knowledge. This body of work explains the best practices and examines ways of improving their effectiveness. Important studies have highlighted the barriers to agreement embedded in traditional conflict resolution techniques and the problem-solving methods available to overcome them.[19]

Still, no definitive theory of human conflict has yet evolved. Conflict resolution remains a complex, interdisciplinary field that is, at present, more

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[17] Ellen Zweibel, "Online Dispute Resolution" in J. MacFarlane, ed., *Dispute Resolution: Readings and Case Studies* (Toronto: Emond Montgomery Publications, 2011) 419 at 423; S.R. Cole & K.M. Blankley, "Online Mediation: Where we are now and where we should be" (2006) 38 U. Tol. L. Rev. 193; P. Gillieron, "Face-to-face to Screen-to-Screen: Real Hope or True Fallacy" (2008) 23 Ohio St. J. Disp. Resol. 301; H.A. Haloush & B.H. Malkawi, "Internet Characteristics and Online Alternative Dispute Resolution" (2008) 13 Harv. Negot. L. Rev. 327.

[18] See, for example, R.E. Walton & R.B. McKersie, *A Behavioral Theory of Labor Negotiations*, 2d ed., unrevised but with a new introduction (Ithaca: Cornell University Press, 1991); J.Z. Rubin & B.R. Brown, *The Social Psychology of Bargaining and Negotiation* (New York: Academic Press, 1975); H. Raiffa, *The Art and Science of Negotiation* (Cambridge: Harvard University Press, 1982) [Raiffa, *The Art and Science*]; K. Kressel & D.G. Pruitt, eds., *Mediation Research* (San Francisco: Jossey-Bass, 1989); M.A. Rahim, ed., *Managing Conflict: An Interdisciplinary Approach* (Westport: Praeger, 1989); R. Fisher, W. Ury & B. Patton, *Getting to Yes: Negotiating Agreement without Giving In*, 3d ed. (New York: Penguin Books, 2011); R.E. Walton, J.E. Cutcher-Gershenfeld & R.B. McKersie, *Strategic Negotiations: A Theory of Change in Labor-Management Relations* (Boston: Harvard Business School Press, 1994); C.W. Moore, *The Mediation Process: The Mediation Process: Practical Strategies for Resolving Conflict*, 3d ed. (San Francisco: Jossey-Bass, 2003); G.R. Shell, *Bargaining for Advantage: Negotiation Strategies for Reasonable People* (New York: Viking, 1999); W. Ury, *Getting to Peace* (New York: Viking, 1999); Mnookin, Peppet & Tulumello, *Beyond Winning*, *supra* note 3; D. Kahneman & A. Tversky, eds., *Choices, Values and Frames* (Cambridge: Cambridge University Press, 2000); J.W. Burton, *Resolving Deep-Rooted Conflict: A Handbook* (Lanham: University Press of America, 1987); J.W. Burton, ed., *Conflict: Human Needs Theory* (London: MacMillan Press, 1990); M.L. Moffitt & R.C. Bordone, eds., *The Handbook of Dispute Resolution* (San Francisco: Jossey-Bass, 2005); H. Raiffa, J. Richardson & D. Metcalfe, *Negotiation Analysis: The Science and Art of Collaborative Decision Making* (Cambridge: Belknap Press, 2002); G.J. Friedman & J. Himmelstein, *Challenging Conflict: Mediation Through Understanding* (Chicago: American Bar Association, 2008); R. Fisher & D. Shapiro, *Beyond Reason: Using Emotions as You Negotiate* (New York: Penguin Group, 2005).

[19] C.M. Stevens, *Strategy and Collective Bargaining Negotiation* (New York: McGraw-Hill, 1963); Rubin & Brown, *supra* note 18; C. Mendel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem-Solving" (1984) 31 UCLA L. Rev. 754 [Menkel-Meadow, "Toward Another View"]; K. Arrow *et al.*, eds., *Barriers to Conflict Resolution* (New York: W.W. Norton, 1995); J.K. Sebenius, "Negotiation Analysis: From Games to Inferences to Decisions to Deals" (2009) 25 Negot. J. 449; C.J. Tsay & M.H. Bazerman, "A Decision-Making Perspective to Negotiation: A Review of the Past and a Look to the Future" (2009) 25 Negot. J. 467; L.L. Thompson, *The Mind and Heart of the Negotiator*, 3d ed. (Upper Saddle River: Pearson Prentice Hall, 2005); M.S. Herrman, ed., *Handbook of Mediation: Bridging Theory, Research, and Practice* (Oxford: Blackwell Publishing, 2006); G.J.O. Fletcher & M.S. Clark, eds., *Blackwell Handbook of Social Psychology: Interpersonal Processes* (Malden: Blackwell Publishers, 2003).

an art than a science. There is no one methodology or technique generally accepted as the definitive way to resolve a dispute. In fact, there is not even a cohesive profession of dispute resolvers. Many mediators are not lawyers but possess significant experience and are often members of other professions. Many lawyer-mediators have been trained in interest-based facilitation techniques which emphasize underlying human needs, not legal entitlement. This intersection of competing perspectives has produced its own conflict. For example, there are mediators and mediator trainers who question the role of law and lawyers in settling legal disputes. Not surprisingly, lawyers question the neutrality of this perspective. Lawyers worry that clients are being asked to forego their legal rights in favour of resolving disputes according to what seems fair to intervening non-lawyer mediators.[20] The different interdisciplinary approaches to conflict resolution may, therefore, pose significant ethical and professional issues for lawyers who are duty bound to represent their clients without compromise or conflict of interest.[21] To better understand this conflict between professionals, a closer examination of the relationship between law, settlement and mediation is necessary.

1. Legal Dispute Negotiations

A legal dispute is a grievance or complaint grounded in a claimed legal entitlement.[22] Lawyers help people understand their grievances and what they can do about them. In doing so, they "transform" grievances into claims recognized by law.[23] The law reduces most conflict to disputes over money and seizes on a single principle to assess conduct. This transformation may remove some of the dispute's moral and situational complexity while exaggerating the claimed harm.

[20] O.M. Fiss, "Against Settlement" (1984) 93 Yale L.J. 1073 [Fiss, "Against Settlement"]; L. Nader, "Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology" (1993) 9 Ohio St. J. Disp. Resol. 1 [Nader, "Controlling"]. See also C. Menkel-Meadow, "When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals" (1997) 44 UCLA L. Rev. 1871 [Menkel-Meadow, "Begets Disputes"]; T. Farrow, "Privatizing Our Public Civil Justice System" (2006) 9 News and Views on Civil Justice Reform 16; T. Farrow, "Civil Justice, Privatization and Democracy" (2010) SSRN Working Paper Series.

[21] D. Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988) [Luban, *Lawyers*]; A.T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge: Harvard University Press, 1993); M.A. Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society* (New York: Farrar, Straus & Giroux, 1994). See also Menkel-Meadow, "Begets Disputes", *supra* note 20; K.K. Kovach, "Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards" (2003) 39 Idaho L. Rev. 399.

[22] Mnookin, Peppet & Tulumello, *Beyond Winning*, *supra* note 3 at 99; J.K. Lieberman & J.F. Henry, "Lessons from the Alternative Dispute Resolution Movement" (1986) 53 U. Chicago L. Rev. 424.

[23] W.L.F. Felstiner, R.L. Abel & A. Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ..." (1981) 15 Law & Soc'y Rev. 631.

Negotiations aimed at resolving disputes over rights are, therefore, quite different from negotiations to create a commercial deal.[24] Dispute settlement negotiations are, by definition, backward looking and distributive in nature. Parties are concerned only with what has already happened in light of their claimed rights and entitlements. These disputes usually centre on the distribution of losses arising out of an accident or breach of contract. Deal-making negotiations, on the other hand, look optimistically toward the creation of wealth out of a future relationship or transaction. If a dispute or conflict can be said to exist at all in this form of negotiation, it relates to integrating the parties' respective interests (i.e., sharing wealth to be created) as opposed to reconciling conflicting claims of right (i.e., sharing losses which have occurred). Conflicts over interests can be resolved in many different ways because the needs, wants, perspectives and value systems of the parties usually differ, and sometimes greatly. In such negotiations, the parties' co-operative interest in wealth creation often overwhelms the wealth-claiming or distributive function. Game theorists call this type of bargaining a variable sum or non-zero sum game. Another term to describe this type of negotiation is "integrative" bargaining — the integrating of each party's interests.

In contrast, dispute settlement negotiations involve fewer opportunities for inventive or wealth-creation solutions. The parties have the same frame of reference for evaluating solutions — what a court is likely to do about something that has already happened — and as a result, retrospective disputes over rights and losses are more likely to involve claims of "I win and you lose". In the terminology of game theorists, legal dispute negotiations are a zero-sum game and are referred to in the literature as "distributive" bargaining. Rights-based dispute settlement negotiations tend to be more difficult to resolve, a fact compounded by our adversary legal system. A rights discourse between parties to a dispute over "justice" is usually accusatory. Litigants see themselves as either victims or innocents wrongly accused and their lawyers as loyal champions of their causes.

The explosion of law and the parallel interest in alternatives to courts has produced a stew of misunderstanding over where dispute resolution, short of a trial, fits into our legal system.[25] Unfortunately, the resulting debate has sometimes taken an ideological tone. Lawyers and judges have often

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[24] F.E.A. Sander & J. Rubin, "The Janus Quality of Negotiation: Dealmaking and Dispute Settlement" (1988) 5 Negot. J. 109; Mnookin, Peppet & Tulumello, *Beyond Winning*, *supra* note 3 at 127-155.

[25] Lieberman & Henry, *supra* note 21 at 424; J.R. Sternlight, "ADR is Here: Preliminary Reflections on Where it Fits in a System of Justice" (2002) 3 Nev. L. Rev. 289; J.R. Sternlight, "Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia" (2004) 80 Notre Dame L. Rev. 81.

perceived ADR, which includes mediation, as an attack on the law, the legal profession and the judiciary.[26] To them, ADR is a deregulation movement striking at the very foundations of civilized society.[27] With so much emphasis on settlement, their thinking goes, where will courts find the cases needed to set important precedent? To many lawyers, mediation and ADR are a charade aimed at permitting problem solvers to ignore substantive rights and procedural safeguards associated with a trial.[28] They believe the "rhetoric of consent" masks the influence that the powerful are able to exert in informal mediation forums.[29] But these perspectives have undergone substantial change as lawyers have come to experience the benefits of mediation.[30]

Proponents of ADR see its processes as a potent recipe for solving community conflict by helping disputants adopt new approaches and new attitudes in dealing with each other.[31] They emphasize the benefits of voluntary settlements. Robert Mnookin and William Kornhauser set out several advantages of settlements in divorce disputes:

> ... There are obvious and substantial savings when a couple can resolve distributional consequences of divorce without resort to courtroom adjudication. The financial cost of litigation, both private and public, is minimized. The pain of a formal adversary proceeding is avoided. Recent psychological studies indicate that children benefit when parents agree on custodial arrangements. Moreover, a negotiated agreement allows the parties to avoid the risks and uncertainties of litigation, which may involve all-or-nothing consequences. Given the substantial delays that often characterize contested judicial proceedings, agreement can often save time and allow each spouse to proceed with his or her life. Finally, a

[26] O.M. Fiss, "Out of Eden" (1985) 94 Yale L.J. 1669 [Fiss, "Out of Eden"]. See also Farrow, *supra* note 20.

[27] Fiss, "Out of Eden", *supra* note 26 at 1673.

[28] R.J. Condlin, "Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role" (1992) 51 Md. L. Rev. 1; M.J. Bailey, "Unpacking the 'Rational Alternative': A Critical Review of Family Mediation Movement Claims" (1989) 8 Can. J. Fam. L. 61.

[29] R. Delgado, "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution" [1985] Wis. L. Rev. 1359; Nader, "Controlling", *supra* note 20; G. Smyth, "Strengthening Social Justice in Informal Dispute Resolution Process Through Cultural Competency" (2009) 27 Windsor Y.B. Access Just. 111; L. Wing, "Mediation and Inequality Reconsidered: Bringing the Discussion to the Table" (2009) 26 Conflict Resol. Q. 383.

[30] S.N. Subrin, "A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought, A Symposium: Perspectives on Dispute Resolution in the Twenty-First Century" (2003) Nev. L.J. 196.

[31] Menkel-Meadow, "Toward Another View", *supra* note 19; A.W. McThenia & T.L. Shaffer, "For Reconciliation" (1985) 94 Yale L.J. 1960; T.J. Stipanowich, "ADR and the Vanishing Trial: The Growth and Impact of 'Alternative Dispute Resolution'" (2004) 1 J. Empirical Legal Stud. 3 at 848.