**Settlement Adjudication – Choosing between a Wide and a Narrow Model**

The widely-accepted form of adjudication at present in the judicial systems in the United States, in Israel and in other countries, is adjudication directed at finding a consensual solution to a dispute, including an agreement for the rendering of a decision in a settlement process. Such adjudication will be termed hereinafter ‘settlement adjudication.’ The achievement of the objective of formulating a consensual solution to a dispute, as distinguished from imposing a solution, is carried out in reliance upon various perspectives that dictate the use of diverse judicial techniques. This article will propose that settlement adjudication is likely to be carried out according to a perspective fashioned by considerations of efficiency and it will be termed hereinafter ‘**the narrow model**’ of settlement adjudication. Settlement adjudication is also likely to be carried out according to a perspective guided by considerations of quality, attributed to the advantages of the cooperative approach to dispute management, and it will be termed hereinafter ‘**the broad model**.’ This article discusses these models of adjudication directed at settlements, and will survey in brief their characteristics and the possible reasons for choosing them. Additionally, ideas will be proposed for strengthening the adjudicative choice to use the broad model.

**Changes in the Court System and Settlement Adjudication**

In recent decades, significant changes have occurred in the court systems in the United States and in other common law countries, including Israel. A comparison between the means of clarifying disputes in the court systems in these countries in the middle of the twentieth century, to the means accepted presently, at the beginning of the twenty-first century, emphasize the existence of changes in theory that have influenced the present fashioning of these systems.[[1]](#footnote-1) However, several decades ago, the afore-mentioned judicial systems offered one central process for clarifying all of the kinds of disputes brought before them. This process is adjudication, carried out according to the adversarial approach to handling and resolving disputes. Clarifying the dispute was conducted in a multi-stage process over time, including raising allegations in writing and orally, hearing witnesses and bringing evidence and ended in the rendering of a detailed judicial decision providing the reasoning for the determination. The existence of due process was measured according to the degree of adherence to all of the procedural and evidentiary rules. The conduct of the process in this form at the outset of the twentieth century occurred from a stance of judicial passiveness and distance from the parties.[[2]](#footnote-2) This process shall be hereinafter termed ‘the classic judicial process,’ in which a judicially-determined solution to the dispute was forced upon the parties.

The current judicial system is different. The system offers a variety of processes for the clarification of disputes of various kinds. Many of these processes use a collaborative approach for handing disputes and resolving them. Moreover, adjudication itself has changed. The adjudication common today in common law systems is adjudication directed towards creating a settlement between the parties to a dispute, formulating a consensual solution, including through obtaining the parties’ consent for rendering a judicial decision through settlement, i.e., settlement adjudication.

Settlement adjudication is comprehensively expressed in the judicial systems and can be located in two fields of activity. One, as part of unique processes in the legal system that are designed for the formulation of agreements, such as the settlement conference in American law,[[3]](#footnote-3) or a process called ‘judicial cross-mediation’ in Israeli law.[[4]](#footnote-4) The second, as part of a general trend of making judicial efforts in order to arrive at a consensual solution to disputes even outside of a structured procedure, i.e., in the course of conducting judicial processes intended to end in a judicial determination. These judicial efforts include repeated judicial attempts to advance outlines for action and the formulation of solutions that will result in a consensual end to the dispute.[[5]](#footnote-5)

In comparison to the characteristics of classic adversarial adjudication, as set forth above, settlement adjudication is characterized by the handling of the dispute in a relatively short period of time, with a waiver of various stages of clarifying the dispute. The judicial handling is active and involved. Judicial efforts are made to find a pragmatic solution acceptable to the parties, as opposed to an effort to arrive at the legal or factual truth. The process is less formal and it ends with a brief judicial decision that, for the most part, does not contain rationale and therefore is not subject to appeal.[[6]](#footnote-6)

Settlement adjudication is in wide use in common law legal systems. Settlement adjudication is in use in Israel, for example, in all of the judicial instances and with respect to every kind of dispute. The frequency of the judicial efforts to create settlements in preference to rendering decisions is expressed in estimates that establish that the number of cases opened in the courts is not in decline, but only a small fraction of them result in a judgment rendered as the result of clarification by means of the classic judicial process.

This phenomenon, that was termed by Professor Glanter ‘the vanishing trial,’[[7]](#footnote-7) occurs in the United States as well as in other common law countries, including Israel. For example, in Israel only about ten percent of all cases filed in recent years in the Magistrate’s Courts are clarified and end with the rendering of a detailed judgment that constitutes the outcome of a classic judicial process. The great majority of cases end with brief judicial decisions giving legal force and effect to settlements arrived at between the parties with the help of judicial mediation.[[8]](#footnote-8)

The scope of the phenomenon attests to the development of a new theoretical organizational culture – ‘settlement culture.’[[9]](#footnote-9) This culture sees in the consensual end of the dispute an appropriate objective which is preferable to the rendering of a judgment in a case whose foundation is a binding decision.

The existence of this alleged settlement culture arises from the analysis of judgments that integrate statements of judges presenting the settlement solution as preferable to the decision solution,[[10]](#footnote-10) scholarly articles,[[11]](#footnote-11)and studies that examine judges’ perceptions of the content of the judicial role. The role of the judge as a resolver of disputes by way of consent, as distinguished from deciding them, constitutes a new perception of the role that is significantly expressed beginning in the last decade of the twentieth century and continuing to the present.[[12]](#footnote-12)

The existence of settlement adjudication in the described scope arouses criticism and concerns. Of the entirety of the extensive discourse that has developed with respect to this issue, we would point out the concerns stemming from the fact that settlement adjudication conducted as part of unique processes in the legal system, such as the American settlement conference or the criminal mediation in Israel, are privileged. The privileged nature of the process raises the concern that cases of interest to the public are clarified and end in a manner that precludes a public discussion. A standard of concealment is created that is liable to lead to the silencing of vital public discussion.[[13]](#footnote-13) The lack of detailed rationale for the solution in the judgment also forecloses the publication of standards for conduct, frustrates the creation of precedents and delays the development of the common law.[[14]](#footnote-14) Non-publication raises concern of impairment of the educational role of the judiciary and its role in directing the future behavior of people and establishing limits and relationships in society.[[15]](#footnote-15)

Further criticism directed towards settlement adjudication processes stems from the perspective that compares the settlement adjudication process to the mediation process that is conducted outside of court. Conduct of the process within the purview of the court by a judge creates a collaborative process accompanied by formal and authoritative indications. These are liable to impair the flexibility and creativity of the collaborative process and raise a concern as to the use of judicial power. This power is likely to be expressed in the application of pressure on the parties to settle and impairment of free will in arriving at an agreement. This concern is particularly relevant where a court’s caseload is liable to lead to systematic directing of judges to bring about a speedy end of the handling of disputes. A central concern that has been raised regarding the existence of settlement adjudication is tied up, therefore, with the question of the assurance of due process. Resnik and others have warned that a reduction in the level of formality of the process, waiving of procedural and evidentiary rules, and holding procedures without recording a transcript are liable to impair the ability to ensure neutrality and lack of favoritism on the part of the judge, as well as to bring about coercive conduct and pressure to end the dispute with a settlement.[[16]](#footnote-16)

Settlement adjudication also has many advantages and it has broad-based support. For example, Schuck and Elliot are of the opinion that a process of settlement adjudication ensures due process, inter alia due to the fact that the judge is meant to ascertain the existence of the parties’ informed consent to the agreed-upon solution, and his presence ensures that the solution to the dispute does not violate binding legal provisions.[[17]](#footnote-17) According to this position, the judicial role in the settlement negotiation is to ensure that that the power gaps between the parties is balanced and it is likely to decrease the influence of extra-legal entities that at times slant the outcomes of handling disputes such as the skills of the lawyer representing the client and the financial resources of one of the parties to bear the expenses of a lengthy proceeding.[[18]](#footnote-18)

Settlement adjudication is also efficient. These proceedings do not only bring about a fast, efficient and relatively inexpensive conclusion of the action, but also sharpen points of agreement and disagreement in cases in which the case does not end in a settlement. This enables a restriction of the scope of the controversy brought at the end of the process for a decision through means of an adversarial process.[[19]](#footnote-19) The judge’s professionalism and his expertise in the law and the details of the case are perceived as an important input that garners a high degree of satisfaction on the part of the litigants and their attorneys,[[20]](#footnote-20) regardless of the outcome of the process.[[21]](#footnote-21) Moreover, the involvement of a judge in formulating the settlement is perceived as ensuring trustworthiness and stability in its execution.[[22]](#footnote-22) This kind of adjudication is also considered particularly appropriate for handing complex disputes with multiple parties, involving complicated technological issues or in which the evidence relies upon complicated technology. A process of a settlement conference enables bringing evidence in a convenient and practical manner, and therefore it is perceived as a more efficient forum than the classic adjudication for handing these complexities.[[23]](#footnote-23)

**Settlement Adjudication According to a Narrow Model and a Broad Model**

I propose that settlement adjudication, whether it is conducted as part of a process inherent to the legal system for the purpose of formulating a settlement, or it is carried out as part of a judicial efforts to advance a settlement during the handling of an action that has been referred for decision, can be conducted according to a narrow or a broad model.

Settlement adjudication according to the narrow model is motivated by considerations of efficiency. These considerations are relevant both to the court system and to the parties. From the perspective of the system, efficiency means a reduction of the case load with which the system is dealing through ending the handling of the dispute (in a legal case) quickly, taking up a minimum of judicial time. From the perspective of the parties, efficiency means the quick end of the dispute which means a reduction of resources of time and generally also of the costs involved in handling the dispute over a protracted period of time.

Accordingly, conducting the judicial process according to the narrow model is characterized by the following judicial methods: Emphasizing the strengths and weaknesses of the arguments of the parties, and conducting a broad discussion of the risks and chances of each party to the dispute that await in the continued handling of the dispute in a prolonged multi-phase process and culminating in a decision that makes a determination of a victor and a loser. The judicial techniques for formulating a consensual solution underscore the description of the advantages of arriving at a settlement that enables saving resources of time and expenses.[[24]](#footnote-24)

The judicial process emphasizes the place of the judge as an expert in handling disputes and as one possessing more knowledge than the parties in bringing the dispute to a proper consensual resolution. The place of the attorney of each of the parties as representing his client and as the one authorized to lead the discussion and to agree in his client’s name to a solution is also underscored. dsThe emphasis is accorded to the outcome of the process.

The advantages of the settlement adjudication conducted according to the narrow model are involved, therefore, with the question of achieving efficiency in handling the legal case.

The disadvantages of using the narrow model are that the way of conducting the process may be seen as a form of bartering, which does not give the parties to the dispute their day in court in terms of their ability to set forth the dispute in an expansive manner including bringing evidence and hearing witnesses, a process that takes time. Additionally, the narrow model places the main emphasis, and at times it is limited to, the financial aspect.

As distinguished from the narrow model, settlement adjudication according to the broad model is motivated by considerations of quality and relies upon the broad perspective of the judge’s role as one who resolves conflicts and on insisting upon the advantages of the collaborative approach to managing and resolving conflicts.

The collaborative approach to managing and resolving conflicts opines that a conflict has a number of layers. The top layer is the layer of positions. At the base of this layer is a deeper layer, where the interests of the parties, their needs, feelings and goals can be found. These interests are likely to be identical or complementary and not necessarily contradictory. Collaborative thinking deals with this layer, and seeks a consensual solution to the dispute that will address most of the needs and interests of both of the parties as a given. Such thinking does not derive from the assumption that at the base of the dispute there is a limited resource, but rather examines the possibility of increasing the resources available for distribution out of a broad view of the dimensions of the dispute and the human circle of parties to it (‘increasing the size of the pie’).[[25]](#footnote-25) The collaborative approach supports holding a dialogue between the parties to the dispute and empowering the place of the owner of the dispute in managing it and in control of its solution. This approach aspires for the procedure for handling the dispute to be not only efficient but also to have a positive educational value of the way of relating to the other party and having consideration for him. It places the emphasis on the existence of a relationship and inter-personal connections, and recognizes the importance and influence of human conduct.[[26]](#footnote-26)

The solution arrived at in the process for clarifying the dispute conducted according to the collaborative approach will include a discourse of clarifying the needs and interests at the basis of the pleadings, which reflect the parties’ positions, it will employ tools enabling respectful and empathetic inter-personal communication, and will make a serious effort to arrive at a solution that provides mutual benefit to the parties. Settlement adjudication according to the broad model concentrates, therefore, on the engagement of the parties in the process.

It is to include, in addition to a discussion of rights and obligations, a discussion of examination of needs, interests and feelings.

The judicial technique for advancing a settlement includes addressing non-fiscal losses and relating to the possibility of a continuation of a relationship or proper communication between the parties.[[27]](#footnote-27)

Settlement adjudication according to the broad model is conducted on the basis of the assumption that there is importance to the process and not only to the outcome and that procedural fairness will be attained according to the current interpretation in the matter of the litigants. This interpretation, that was also recommended in the white paper of the American Judges Association (AJA) [[28]](#footnote-28) grants importance to the manner in which the process is conducted and to the inter-personal communication. Due process with respect to the litigants is constructed from components such as hearing the litigants directly (‘providing a voice’), expressing judicial empathy and caring regarding the parties’ case, relating respectfully to the parties, providing clarifications regarding the process and rationales for decision-making, etc.[[29]](#footnote-29) This interpretation is based, therefore, on relational orientation and less on rules orientation. Settlement adjudication according to the broad model also relates to the psychological well-being of the parties and can also be carried out with the intention of creating constructive, restorative, and rehabilitative outcomes.[[30]](#footnote-30)

Adjudication according to the broad model also has advantages and disadvantages. Its main disadvantages are rooted in the fact that in systemic terms this adjudication is liable to go on for a lengthy period of time in comparison to the use of the narrow model. It also entails active involvement of the litigants, which is not always desirable in their view or in the view of their attorneys.

It seems that the advantages of adjudication according to this model outweigh its disadvantages. The intense handling of the dispute and the involvement of the parties in the solution generally creates a solution that resolves the dispute at its deepest level and prevents the filing of further actions by the parties regarding the matter. The interpersonal communication that demonstrates involvement and judicial caring increases the degree of satisfaction from the manner of conducting the dispute and the degree of public faith in the judicial system. The court also fulfills an educational role here of advancing a discourse that de-escalates disputes and strengthens community and democratic values.

Conducting a settlement process before a judge according to the broad model is likely to also address a number of the concerns and criticism raised against managing disputes in processes directed toward settlements. Concerns regarding fair process are found in the interpretation given to the components structuring this due process. Resnik and others are concerned about due process when it is examined by them according to the traditional interpretation of due process which relies upon adherence to the procedural and evidentiary rules. In other words, due process is measured by the extent to which there is orientation to the rules. As opposed to this, the current interpretation of due process, such as that recommended in the white paper of the AJA, reflects a perception of due process as oriented towards connections. In other words, due process is measured with respect to the matter of the litigants and examines respectful and empathetic inter-personal communication. Indeed, it is found that in practice, attorneys measure the fairness of a settlement conference process according to the connection orientation. Attorneys report that in the cases in which they felt that the judge devoted thought to a solution to the dispute, related to the parties and their attorneys with empathy and respect, refrained from applying pressure and clarified his viewpoint while carrying out a dialogue in clear language and heard the parties, a sense was created that there was judicial neutrality and impartiality. Judicial conduct according to this interpretation provided the basis not only for due process but also legitimacy for the existence of the process and increased the faith in the courts.[[31]](#footnote-31)

Settlement adjudication according to the broad model combines the advantages of managing a dispute according to the collaborative approach with the advantages attributed to clarifying a dispute and resolving it before a judge. A judge is considered to be neutral, well-versed in the law, and the person best able to appraise the expected outcome for the parties according to the alternative whereby the handling of the dispute is carried out in the traditional adversarial judicial system. Clarification of the dispute according to the broad model accords the judge a significant role of a resolver of disputes according to the legal system and returns to the judiciary its significant position in handling and resolving disputes in a manner that is both of high quality and efficient. The handling of the process for clarifying the dispute before a judge addresses the need for handling a process for clarifying a dispute according to the collaborative approach while avoiding the concern regarding privatization of justice that arises when the handling of disputes is transferred to private resolvers of disputes such as mediators.

**The Choice of the Model of Adjudication and Proposals for Directing the Increased Use of the Broad Model**

The scope of settlement adjudication to be used is significant and therefore encouragement for using the broad model appears to be appropriate.

Several factors can be identified that are likely to serve as the basis of the judge’s decision to in fact use a narrow or broad model of judicial handling of a dispute. Among these factors may be included components related to the type of process involved, the subject of the dispute, and the judicial instance. Other factors involved include the judicial background of the judge with respect to his knowledge and skills. In addition, the choice of the model may be influenced by direction from the legislator, rules and guidelines that provide a framework for this kind of judicial handling and give instructions regarding the rules of appropriate judicial conduct and hence proper techniques for fulfilling them and what is considered undesirable conduct.

The ability to conduct a judicial process in the form of the broad model also depends upon the approach of the attorneys and their skills to participate in it and its suitability for the parties.

Therefore, it seems that in order to increase the use of settlement adjudication according to the broad model, the following actions may be recommended:

A. Acting in order to bring about a change in legal education. The common legal education is based on an adversarial approach for the resolution of disputes. The inclusion of a mandatory course in the field of dispute resolution that will explicate what the collaborative approach is and its advantages, processes for dispute resolution using this approach, etc., can open a new horizon for thinking by future attorneys and judges.

B. Promoting their proposal of courses and training for lawyers that will teach skills of handling collaborative processes as well as representation of clients according to the collaborative approach will provide lawyers with practical tools for the necessary work today in the courts.

C. Providing guiding rules that will deal with the conduct of settlement adjudication during the conduct of judicial processes. It is appropriate to relate, inter alia, to the following issues: Should special rules for the conduct of settlement adjudication be set forth for certain courts or special instances or should there be uniform rules,[[32]](#footnote-32) what are the permitted or prohibited practices for conducting such processes, such as the possibility of meeting with each party individually or holding telephone conversations in order to promote a settlement, the question of the location of the conduct of the judicial process (limited to the courtroom or even the judge’s chambers?), the stages of the judicial process during which it is possible to continue with the effort of settlement adjudication (up to the end of the evidentiary stage? After the submission of briefs?), what is the explanation that should be provided to litigants in order to provide a basis for informed consent for conducting a judicial process, etc.

D. Additionally, it is recommended to update the rules of ethics of the judges so that they will be appropriate for the common settlement conduct.

E. Establishing an apparatus in the courts to direct disputes. An appropriate apparatus for directing disputes must be carried out by someone who has knowledge of the characteristics of the disputes and has sufficient time to examine the files and to accommodate the appropriate forum for handling them. The existence of a successful apparatus for directing cases is necessary in order to establish which cases are appropriate for being sent first to be conducted through a process outside of the court, such as a mediation or arbitration process, and which cases should be conducted within the judicial system.[[33]](#footnote-33) The cases that remain in the system will be examined according to the question of whether settlement adjudication efforts should be made with respect to them at the outset (and then they will be referred to the special settlement processes such as those mentioned above) and which are appropriate for the traditional adversarial adjudication.

F. An organizational infrastructure should be established to study and acquire knowledge from the experience of the judges serving in Israel. The establishment of this infrastructure can be accomplished by gathering data and conducting studies. This infrastructure is likely to assist in fashioning recommended tools for operation and to also serve as a tool for comparison and oversight. Concentrating the information within one internal body that will deal with its professional analysis will enable to use of information for the purpose of locating and distributing successful practices that can be implemented.[[34]](#footnote-34)

1. [↑](#footnote-ref-1)
2. [↑](#footnote-ref-2)
3. [↑](#footnote-ref-3)
4. [↑](#footnote-ref-4)
5. Louise Otis & Eric H. Reiter, *Mediation by Judges: A New Phenomenon in the Transformation of Justice*, 6 Pepp. Disp. Resol. L. J. 351, 352 (2006); Peter Robinson, *Adding Judicial Mediation to the Debate About Judges Attempting to Settle Cases Assigned to Them for Trial*, 2006(2) J. Disp. Resol. 335, 368–375 (2006) (hereinafter: Robinson, *Adding Judicial Mediation*). [↑](#footnote-ref-5)
6. [↑](#footnote-ref-6)
7. [↑](#footnote-ref-7)
8. [↑](#footnote-ref-8)
9. James J. Alfini, *Risk of Coercion too Great, Judges Should Not Mediate Cases Assigned to Them for Trial*, 6 Disp. Resol. Mag. 11 (1999). [↑](#footnote-ref-9)
10. *E.g.*, “A bad settlement is almost always better than a good trial,” Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 Harv. L. Rev. 924 (2000). [↑](#footnote-ref-10)
11. Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial,* 90 Mich. L. Rev. 319 (1991): “A trial is a failure. Although we celebrate it as the centerpiece of our system of justice, we know that trial is not only an uncommon method of resolving disputes, but a disfavored one.” [↑](#footnote-ref-11)
12. [↑](#footnote-ref-12)
13. Judith Resnik, *Uncovering, Disclosing. and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 Chi.-Kent L. Rev. 521 (2006). [↑](#footnote-ref-13)
14. The non-publication of detailed judicial decisions with rationale impairs one of the purposes of adjudication – coordination and guiding of future conduct of factors that are not involved at the time of the specific dispute. Ezra Friedman & Abraham L. Wickelgren, *No Free Lunch: How Settlement Can Reduce the Ability to Induce Efficient Behavior*, 61 S.M.U. L. Rev. 1355 (2008). Considerations of ex-ante efficiency are also impaired when the courts’ decisions are not published, insofar that the information contained in them is likely to influence the willingness to arrive at a settlement and the content of the settlement. Regarding ex-ante considerations of efficiency, *see* Alon Klement & Roi Shapiro, *Efficiency and Justice in Rules of Civil Procedure – A New Interpretative Approach*, 7 Mishpat V’asakim 75, 91-3 (2007) [Hebrew]. Regarding the influence of trial agreements, especially at an early stage of the dispute, regarding the decision as to whether to settle, *see* Alon Klement & Daphna Kapeliuk, *Deliberation Contracts*, 33 Iyunei Mishpat 187, 213 (2010) [Hebrew]. [↑](#footnote-ref-14)
15. Smith described the judiciary as fulfilling three main roles: the role of resolving disputes, the role of coordination and guidance (the judiciary as the source for determining limits and relationships in society), and the role of education and fashioning values (judicial decisions as a source for fashioning values, education to uphold norms, and for achieving social objectives). *See*, Steven D. Smith, *Reductionism in Legal Thought*, 91 Colum. L. Rev. 68 (1991). [↑](#footnote-ref-15)
16. *See*, Resnik, *Managerial Judges*, Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators,* 73 Neb. L. Rev. 712 (1994). [↑](#footnote-ref-16)
17. Peter H. Schuck, *The Role of the Judge in Settling Complex Cases: The Agent Orange Example*, 53 U. Chi. L. Rev. 337 (1986) (hereinafter: Schuck, *The Role of the Judge)*. [↑](#footnote-ref-17)
18. Donald Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. Chi. L. Rev. 306, 324 (198 [↑](#footnote-ref-18)
19. Hebert M. Kritzer, *The Judge’s Role in Pretrial Process,* 66 Judicature 28 (1982). In Israel, similar arguments were raised according to which mediation sessions, even where they did not end with a settlement, are beneficial for the work of the court because the parties arrive at litigation after they have met together, exchanged information, and they are more prepared and have formulated some partial points of agreement. *See*, Edna Beckenstein, *An Interview with the President of the Tel Aviv Magistrate’s Court*, 3 Nekudat Gishur (95762-2002) [Hebrew]. [↑](#footnote-ref-19)
20. Wayne D. Brazil, *Hosting Settlement Conferences: Effectiveness in the Judicial Role*, 3 Ohio St. J. on Disp. Resol. 1 (1987); John A. Epp, *The Role of the Judiciary in the Settlement of Civil Actions: A Survey of Vancouver Lawyers*, *in* 15 Winsdor Yearbook of Access to Justice 82 (1996) [↑](#footnote-ref-20)
21. Peter Robinson, *Adding Judicial Mediation to the Debate About Judges Attempting to Settle Cases Assigned to Them for Trial*, 2006(2) J. Disp. Resol. 335 (2006); Tania Sourdin, *Five Reasons Why Judges Should Conduct Settlement Conferences,* 37 Monash U. L. Rev. 145, 148 (2011)*.* Resnik herself discusses this subject and clarifies that litigants and their attorneys prefer proceedings of settlement adjudication: Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, J. Disp. Resol. 155 (2002). [↑](#footnote-ref-21)
22. Schuck, *The Role of the Judge, supra* note 17; *Mediating Preferences: Litigation Preferences for Process and Judicial Preferences for Settlement*, J. Disp. Resol. 155 (2002). [is this meant to be here? It’s cited above in note 21} [↑](#footnote-ref-22)
23. Lee H. Rosenthal, James C. Francis & Daniel J. Capra, *Managing Electronic Discovery: Views from the Judges,* 76 Fordham L. Rev. 1 (2007); Sourdin, *Five Reasons, supra* note 40; Schuck, *The Role of the Judge, supra* note 17. Almog, in her book Law and Literature in the Digital Era, notes that the digital era in which we live brings with it substantive changes in judicial conduct. The traditional means that the law used have been weakened and this has brought about the strengthening of alternative systems to the classic judicial process. *See,* Shulamit Almog, Law and Literature in the Digital Era 166-7 (2007) [Hebrew]. [↑](#footnote-ref-23)
24. [↑](#footnote-ref-24)
25. Menkel-Meadow, *The Trouble with the Adversary System, When Winning Isn’t Everything*, *supra* note 14; Roger Fisher & William Ury, Getting to Yes: Negotiating Agreement Without Giving In {no year or p. no. is cited – the translator to Hebrew appears, but the citation should be to the original English). [↑](#footnote-ref-25)
26. With respect to this emphasis, which is at the basis of the relational perspective for managing and resolving disputes, *see* Pearlman, The Therapeutic Judge, *supra* note 1, at 429-30 (note 52).

    {I assume this is an article because of the way it’s cited here, but don’t know. ITM, there is no text in ftnt 1, just the no.} [↑](#footnote-ref-26)
27. [↑](#footnote-ref-27)
28. [↑](#footnote-ref-28)
29. [↑](#footnote-ref-29)
30. [↑](#footnote-ref-30)
31. Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 Ohio St. J. on Disp. Resol. 271 (2011). [↑](#footnote-ref-31)
32. *E.g*., courts such as courts for the resolution of problems that were meant to be established in Israel in 2015. [↑](#footnote-ref-32)
33. As Supreme Court President (ret.) Justice Barak noted in relating to the mediation process: “There are disputes in which an agreement between the parties is not practical. The judicial determination is vital. There are disputes that can be resolved through a settlement, but it is desirable that the solution be judicial, and in that manner a binding legal principle will be created that will be applicable to the entire society.” *See*, Barak, *supra* note 109, p. 10. [↑](#footnote-ref-33)
34. Regarding this idea and an analysis of it regarding the mediation process, *see*, Fiona Millman-Sivan & Orna Rabinovich-Einy, *Mediation Between Procedure and Substance: On the Privatization of Justice and Employment Equality,* 11 Mishpat U’mimshal 517 (2008) [Hebrew]. [↑](#footnote-ref-34)