

ATTORNEYS' PERSPECTIVES OF MEDIATION:
AN EMPIRICAL ANALYSIS OF ATTORNEYS' MEDIATION
REFERRAL PRACTICES, BARRIERS AND POTENTIAL AGENCY
PROBLEMS, AND THEIR EFFECT ON MEDIATION IN ISRAEL

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By

Ayelet Sela

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ABSTRACT

My research examines attorneys' views about mediation and their effect on the use of mediation in Israel. The paper contributes to closing some aspects of the knowledge gap regarding barriers to the adoption of mediation as a prominent method of dispute resolution in Israel. This empirical study is based on a survey of 140 civil litigators in the Tel Aviv district that was conducted in February 2009, four months after a new mandatory court-connected mediation program was introduced in magistrate courts.

The findings of the survey reveal that some of the fundamental assumptions that guided the design of the new mandatory mediation program were inaccurate. The survey portrays a reality in which most civil litigators have had some experience with mediation, but do not refer cases to mediation on a regular basis. Once mediation is used, Israeli attorneys exhibit a clear preference for evaluative mediation processes over other mediation styles. The findings confirm the hypothesis that Israeli attorneys act as gatekeepers to mediation; they control both which cases go to mediation and the nature of the subsequent mediation process. The analysis further suggests that an agency problem that causes lawyers to act as barriers to the use of mediation might exist. Given the attorneys' dominant influence, or even control, over the decision to use mediation as well as their financial interests and personal professional preferences, it seems that some attorneys refrain from referring cases to mediation based on self-interest.

Finally, the paper suggests several regulatory, financial and educational measures to remove attorneys' financial and perceptual barriers to using mediation. It is hoped that these findings and other conclusions of the study will contribute to the assessment and design of future mediation programs in Israel.