

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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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.

TABLE OF CONTENTS

I. Introduction.....	1
II. ADR and Its Incorporation into Legal Systems	4
III. The Development of Mediation in Israel.....	7
A. The Institutionalization of Mediation in Israel.....	7
B. Pre-Mediation Information Acquaintance and Coordination Session (IAC).....	11
C. Problems in the Design Process of the IAC Program.....	12
IV. Attorneys as Gatekeepers of Mediation	14
A. The Role of Attorneys in Mediation.....	14
B. Barriers to Attorneys' Use of Mediation	16
C. Potential Agency Problems in Choosing A Dispute Resolution Method	18
V. Methodology.....	21
A. Population and Sampling Process	21
B. The Questionnaire	22
C. Distribution	23
D. Return Rate	24
E. Comments on the Nature of the Analysis	24
VI. Attorneys' Views and Practices of Mediation.....	25
A. General Demographic Information about the Respondents.....	25
B. Attorneys' General Referral Practices and Views of Mediation.....	28
C. Attorneys' Views on the Effectiveness of Using Mediation in Civil Cases	33
a. Familiarity With Mediation and Likelihood of Use	33
b. Voluntary Inclusion of Mediation Clauses	35
VII. Barriers to Attorneys' Discussion and Use of Mediation	36
A. Clients' Refusal to Use Mediation	36

B.	Lack of “Good” Mediators in the Market	37
C.	The Structure of the Legal System and Actors in the Market	38
D.	Negative Experience with Mediation in the Past	39
E.	Preference for Mediation Compared to Other Dispute Resolution Methods	41
a.	Lack of Preference for Adjudication and Third-Party Decision-Making Power	41
b.	Preference for Direct Negotiations and Litigation-Related Settlements	43
c.	Resources: Time and Profits	46
a.	Time	46
b.	Short and Long Term Profits	48
VIII.	Control and Agency in The Decision to Use Mediation	50
A.	Power and Influence over the Decision to Use Mediation	51
a.	Attorneys’ Overall Influence in Mediation	51
b.	Power over the Decision to Use Mediation	53
c.	The Orientation of the Factors that Attorneys Consider	57
a.	Financial Factors	57
b.	The Attorney’s “Standard Philosophical Map”	60
IX.	The IAC Program in View of the Survey Results	66
A.	Attorneys’ Experiences and Impression of the IAC Session	68
B.	Evaluating the Design of the IAC Program in View of the Results	71
1.	The Mandatory Element	72
2.	The Structure of the IAC Session	72
3.	The Content of the IAC Session	73
C.	Increasing the Use of Mediation in Israel: Further Suggestions	74
a.	Mediation Education and Training	75
b.	Setting Standards or Models for Attorney Fees in Mediation	76
X.	Conclusion	77

Appendix 1: Additional Figures and Tables.....	80
Appendix II: The Questionnaire	85
Bibliography.....	93

LIST OF FIGURES

Figure 1: Respondents' Experience Practicing Law	26
Figure 2: The Number of Case Mediated in the Previous 2 Years	30
Figure 3: Mean of Cases Mediated in the Past 2 Years by Years of Experience.....	31
Figure 4: Who Most Commonly Suggests Using Mediation	32
Figure 5: Correlation Between Number of Cases Mediated and Views on the Effectiveness of Mediation	34
Figure 6: Lack of Good Mediators in the Market Influenced the Decision not to Refer Cases to Mediation	38
Figure 7: Decision Not to Mediate Due to Prospects of Trial-Related Settlement or Similar/Better Negotiated Agreement	44
Figure 8: Past Mediation Experience and Consideration of Settlement Prospects When Deciding Whether to Mediate	45
Figure 9: Time Required for Mediation Compared to Adjudication	46
Figure 10: Views of Short/Long Term Profits in Mediation Compared to Adjudication by Experience in Mediation	49
Figure 11: Clients' Decision to Pursue Mediation against Attorney's Counsel Presented by Attorneys Recommendation Following the IAC Session.....	70

LIST OF TABLES

Table 1: Respondents by Firm Size	26
Table 2: Distribution of Clientele in Percentages.....	27
Table 3: Mean of Cases Mediated in the Past 2 Years by Years of Experience.....	31
Table 4: Attorneys Preferences for Mediators' Attributes.....	62

I. INTRODUCTION

Nowadays, an increasing number of jurisdictions have established mediation, or other alternative dispute resolution (ADR) processes as a prerequisite to adjudication. This is becoming the case in Israel, where a new mandatory court-connected mediation pilot program was recently launched. By obliging parties to civil litigation to attempt to resolve their disputes in mediation before allowing them to proceed to trial, the Ministry of Justice hopes to increase the demand for mediation in Israel. When the new mediation program was designed, however, too little attention was paid to the nature of the barriers that prevented the wide adoption of mediation by disputants and the legal community in the past. More specifically, despite attorneys' central role in mediation, there was no real empirical evidence – and no comprehensive knowledge and understanding – of the views, practices, incentives and barriers that influence *attorneys'* use of mediation.

This paper offers a modest contribution to closing some aspects of this knowledge gap. It empirically studies Israeli civil litigators' perceptions of mediation and their role in referring cases to mediation. The information was gleaned from the responses of 140 litigators to a survey that was administered in February 2009, shortly after the introduction of the new court-connected mediation program. The results of the survey provide insight into attorneys' perception of mediation, and to the way in which they do or do not incorporate mediation in their practice. The findings portray a reality in which the majority of lawyers do not regularly use mediation in their practice, although most of them do have some experience representing clients in mediation. The analysis identifies factors that might act as barriers to attorneys' use of mediation, and reveals that attorneys greatly influence, or even control, the referral of cases to mediation. Given these findings,

it is further suggested that an agency problem may arise if attorneys refrain from referring cases to mediation in a manner which is inconsistent with their clients' best interests.

This important information has so far been lacking in the Israeli discourse on mediation. As a result, the findings from this exploratory research have the potential both for reflecting current practices to legal communities, and for providing policy makers with empirical evidence on specific barriers to the implementation of mediation in Israel. The information is used here to preliminarily assess the design of the newly-launched Israeli court-connected mediation program, and can further assist the design and assessment of other programs in the future. Moreover, the paper offers a modest contribution to the literature on attorneys' roles in the mediation process, by providing evidence for the existence of a potential agency problem. It is suggested that the divergence of attorneys' interests from those of their clients can affect the decision *whether to use mediation*. In other words, there is some evidence to support the notion that when attorneys determine whether to refer a case to mediation, they are affected by considerations other than their clients' best interest.

The paper begins with three introductory chapters: Chapter II describes the evolution of ADR and its incorporation into legal systems; Chapter III outlines the development of mediation in Israel and introduces the inception and structure of the new court-connected mediation program; Chapter IV reviews the current literature on the role that attorneys play in mediation, focusing on barriers to attorneys' use of mediation and the power that they exercise in the process. The paper then moves, in Chapter V, to detailing the methodology that was used in the study. The subsequent chapters describe and analyze the findings of the survey: Chapter VI discusses the general referral practices and views

of attorneys in Mediation; Chapter VII examines the barriers to attorneys' use of mediation; Chapter VIII explores attorneys' control over the decision to use mediation and suggests the existence of an agency problem. Chapter IX evaluates the design of the new mediation program in light of the survey results and provides some recommendations for increasing the use of mediation in Israel. Finally, Chapter X summarizes the findings and conclusions of the paper.

In closing the introduction, two qualifying remarks are in place. The first remark is substantive: since the paper corresponds with the most recent Israeli policy mandating mediation in civil cases, it does not question whether using mediation, particularly in court-connected settings, is normatively desirable at all. Rather, assuming already that the goal is to promote mediation, the paper examines how attorneys influence the accomplishment of this goal. The second remark is terminological: the paper focuses mainly on the role that attorneys play in the *decision to use* mediation, and not in the mediation process itself. Thus, when the term "attorneys' mediation practices" is used, it generally refers to the elements that comprise attorneys' conduct and practices in the preliminary stage of deciding whether to refer a case to mediation, and *not* to their conduct *during* the mediation process itself.

II. ADR AND ITS INCORPORATION INTO LEGAL SYSTEMS

As part of their natural evolution, legal systems typically reexamine the way disputes are resolved. In the early 1970s, particularly in common law jurisdictions,¹ this process went beyond changes to the established legal institutions (principally, the judiciary) to incorporate “complementary” or “alternative” forms of dispute resolution into the general scheme of dispute resolution offered to disputants. Both pragmatic and ideological forces motivated this addition.² Pragmatically, the ADR mechanisms were a response to calls by the “effective access to justice”³ movement for quicker, cheaper, more accessible, readily available and procedurally-informal processes for resolving disputes.⁴ Ideologically, the incorporation of ADR into the legal system reflected the emerging understanding of sociologists of law that the disparate ways in which disputes emerge, the variety of disputes types, the variability of the factors that determine their processing, and the changing interests of disputants call for different dispute resolution methods that can meet the changing needs.⁵ Consequently, a range of disparate experimental procedures

¹ Civil law jurisdictions have also undergone some changes in adopting ADR mechanisms and perspectives, although to a lesser degree than in common law. The different approach to ADR in civil and common law jurisdiction is typically attributed to the more hierarchical, bureaucratic and judge-centered nature of the continental judicial apparatus. See review in: Michael Palmer & Simon Roberts DISPUTE PROCESS: ADR AND THE PRIMARY FORMS OF DECISION MAKING 3-4 (1998)

² See: Paul Carrington, *ADR and the Future of Adjudication: A Primer on Dispute Resolution*, 15 REV. LITIG. 485, 485-490 (1996); Debora R. Hensler, *Our Courts, Ourselves: How ADR is Transforming the U.S. Court System*, 108 PENN ST. L. REV. 165, 168-169 (2003); Jerold S. Auerbach, *JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS* (1983)

³ Mauro Cappelletti & Bryan G. Garth, *ACCESS TO JUSTICE, VOL. 1: A WORLD SURVEY* 6-9 (1978)

⁴ Palmer & Roberts, *supra* note 1, at 26-27. See also Deborah Hensler’s review of the “community justice movement” *supra* note 2, at 170-173. ADR was also responsive in this sense to criticism of the inability of adjudication to protect the rights of citizens. See e.g.: Warren Burger, *Agenda for 2000 A.D.--A Need For Systematic Anticipation*, 70 F.R.D. 83, 93-96 (1976); Warren Burger, *Is There a Better Way?* 68 A.B.A. J. 274 (1982); Derek Bok, *A Flawed System of Law and Practice Training* 33 J. OF LEG. EDU. 570, 582-583 (1983).

⁵ See e.g.: William L. Felstiner Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 LAW & SOC’Y REV. 631, 634-637 (1980); see also: Robert H. Mnookin Lee Ross, Kenneth J. Arrow, Amos Tversky BARRIERS TO CONFLICT RESOLUTION (1995) ; Roger Fisher & William Ury GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981)

were implemented in the early 1980s under the common umbrella of *alternative dispute resolution*. Eventually, parallel to the development of private forms and forums for dispute resolution, and despite criticisms of ADR,⁶ the idea of *legalizing* and *institutionalizing* alternative forms of dispute resolution emerged.⁷ Some legal systems became increasingly willing to provide incentives for using non-adjudicative institutions of dispute resolution,⁸ and there was also a growing disposition by the courts to sponsor settlements through “case management” systems⁹ and offer litigants several alternative methods for dispute resolution.¹⁰ Naturally, the institutional growth of ADR was

(presenting integrative interest-based approach to business negotiation that was central to the adoption of ADR by businessmen.)

⁶ The ADR movement evoked criticism both for what it is and for what it lacks. On the one hand, there was scrutiny on problems associated with its “informalism” and the removal or relaxation of procedural safeguards, which typically served the interests of stronger institutional litigants (see: Richard L. Abel, *The Contradictions of Informal Justice* in Richard L. Abel (ed.) *THE POLITICS OF INFORMAL JUSTICE, VOL. 1: THE AMERICAN EXPERIENCE* 295-298 (1982); Owen M. Fiss, *Against Settlement* 93 *YALE L. J.* 1073, 1076 (1984) (discussing the effect of power imbalances in settlement procedures). One must note, however, that similar criticism was also prevalent earlier with regard to the formal adjudication system: Marc Galanter, *Why The “Haves” Come Out Ahead: Speculations on The Limits of Legal Change*, 9 *LAW & SOC. REV.* 95 (1974). On the other hand, ADR was said to lack the public nature of adjudication and its role in articulating norms and ideals (Fiss, for example, argued that “Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals” (*id.*, at 1089). Fiss’ argument was followed by a rigorous scholarly discourse: Andrew W. McThenia, Jr. & Thomas L. Shaffer, *For Reconciliation*, 94 *YALE L.J.* 1660 (1985); Owen M. Fiss, *Out of Eden*, 94 *YALE L. J.* 1669 (1985). Moreover, in terms of political theory, it was claimed that State sponsored ADR results in the expansion of State power beyond the formal apparatus to fields in civil society that previously were beyond its reach, resulting also in a more informal and less organized State (see: Abel, Vol. 1, *id.*; Richard L. Abel (ed.) *THE POLITICS OF INFORMAL JUSTICE, VOL. 2: COMPARATIVE STUDIES* (1982).

⁷ Auerbach recognizes the 1976 Conference on the Administration of Justice as the defining moment of the ADR movement, see: Auerbach, *supra* note 2, at 123. In a visionary speech at the conference Professor Frank Sander presented the idea of replacing the traditional civil courthouses with a multi-door courthouse, in effect a multi-option dispute resolution center. Sander suggested that disputants would be directed to the dispute resolution procedure most suitable to the nature of their dispute among those offered at the courthouse. The speech was later published: Frank E. A Sander, *Varieties of Dispute Processing*, 70 *F.R.D.* 111 (1976)

⁸ For example, a series of incentives offered by legislation and courts decisions led businessmen and business lawyers to make greater use of mediation. See: Hensler, *supra* note 2, at 181-185, and the text associated with notes 19, 22, 21, and 24 *infra*.

⁹ Palmer & Roberts, *supra* note 1, at 2-3.

¹⁰ The motivation of the courts is unclear. Wayne D. Brazil believes ADR is part and parcel of a broader view of the role of courts, outlining different arguments: a) It is the government’s basic duty to resolve disputes. The judicial system ought to be responsive to the full range of interests and needs of disputants, by offering a wide array of means and methods for resolving civil disputes. The variety of dispute resolution options serves also as a tool for connecting people with their government and performing the

accompanied by the creation of regulatory frameworks to govern matters such as selection, training, accreditation, and standards of practice.¹¹ Whether as its supporters or its opponents, “[l]ooking backwards, we may well come to view the dispute resolution movement as contributing to – if not creating – a profound change in our view of the justice system.”¹²

This paper focuses on the development and operation of one form of ADR – mediation, in one jurisdiction – Israel, and one setting – a mandatory court-connected program. More specifically, it explores empirically the perceptions of attorneys regarding mediation and the role that they play in the decision to use mediation.

Traditionally, mediation has been defined as a process in which a neutral third party is invited by parties to a controversy to assist them in reaching a resolution of their dispute, but generally has no authority to impose an agreement.¹³ As will be discussed in Chapter IV, lawyers are playing an increasingly important role in mediation processes. In jurisdictions that require parties to civil lawsuits to attempt to resolve their disputes in mediation before allowing them to proceed to trial, attorneys are usually involved because these clients have often already sought legal representation. This is now becoming the case in Israel. The following chapter places the discussion in its contextual

function of preventing pugilism; b) Some ADR processes can contribute significantly to the quality of justice; c) ADR services contribute to improved relationship-building, communication and empowerment of the parties themselves, who can thus better understanding and control the process. See: Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241 (2006). Hensler is more skeptical, and suggests that the courts were searching for methods to reduce trial court caseloads and to speed up civil case disposition, *supra* note 2, at 174-181, 185-189.

¹¹ These regulatory frameworks took different forms in different countries. See review in: Palmer & Roberts, *supra* note 1, at 46-48.

¹² Hensler, *supra* note 2, at 195-196.

¹³ See for example: Leonard Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 7 (1996)

framework, by reviewing the development of mediation in Israel, and in particular, the new IAC mandatory pre-mediation program.

III. THE DEVELOPMENT OF MEDIATION IN ISRAEL

A. The Institutionalization of Mediation in Israel

Mediation was formally introduced to the Israeli general civil court system in 1992. An amendment to the Courts Act granted courts the authority to refer cases to mediation, contingent upon consent by the parties.¹⁴ Shortly thereafter, certain aspects of mediation became increasingly regulated.¹⁵ Prior to this legislative amendment, mediation was used only to a limited extent almost exclusively in labor and family court settings.¹⁶ In the late 1990s, growing awareness of mediation and the constant aspiration of courts to reduce their dockets led to the development of case management pilot programs in some courts, which allowed the early referral of a limited number of cases to mediation. The legislature accommodated the evolving practices by establishing case management departments (*Manat*) by law¹⁷ to promote the efficient processing of cases in courts. Henceforth, either of two court officials could refer cases directly to mediation: the

¹⁴ Courts Act (Consolidated Version), 1984, (Amendment, No. 15), §79(c).

¹⁵ Courts Regulations (Mediation) 1993 govern the judges' direction of cases to mediation; Courts Regulation (Appointment of Mediator) 1996 determine the prerequisites for inclusion in courts' rosters of mediators

¹⁶ In Israel, labor and family cases are subject to the jurisdiction of specialized subject matter tribunals, which are not part of the general court system. Personal status cases are generally tried in religious instances (Rabbinical tribunal, Sharia tribunal, etc.). However, judgments of the higher appellate instance of each of these tribunals may be appealed by petitioning the Supreme Court in its capacity as High Court of Justice, with its permission). At least in family matters, the inclination to mediate reflects, according to some, the traditional principle of the Rabbinical court system to seek a compromise settlement rather than formal adjudication of the case (see the discussion in: Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 20-21, n. 72-74 (1989).

¹⁷ Courts Act (Consolidated Version), 1984, (Amendment 2001-3), §82A; Courts Regulation (Case Management Department in Courts and in Employment Tribunals) 2002.

Manat (commonly staffed by legally-trained court officials), prior to review by a judge; or the *Moked* judge (case management judge), after holding a preliminary session to review prospects for immediate settlement or referral to mediation.

The Ministry of Justice took additional substantial measures to promote the use of mediation in governmental agencies and among the general public: in 1998, it founded the National Center for Mediation and Conflict Resolution (NCMCR) with the stated objective of promoting the development and integration of mediation in Israel.¹⁸

Furthermore, a variety of initiatives sought to encourage the use of mediation by State Attorneys and governmental agencies,¹⁹ and among the general public in other NCMCR-led projects.²⁰

In addition to these substantive developments, the State also provided financial and legal incentives to encourage the use of mediation. Civil procedure rules were changed to reduce court fees for some parties who settled the case in mediation after having filed an action in court,²¹ and courts sometimes hosted mediations or paid the mediators' fees.²²

¹⁸ The National Center for Mediation and Conflict Resolution, sections on About the Center and The Development of Mediation in Israel (NCMCR), *available at*: <http://www.justice.gov.il/MOJEng/The+National+Center+for+Mediation+and+Conflict+Resolution/> (last visited December 10, 2008)

¹⁹ See: State Attorney Instructions on Use of Mediation in Cases in Which the State is a Party, August 11, 1999, *available at*: <http://www.justice.gov.il/NR/ronlyres/881F7D29-C5D6-4C6B-B50C-004A83399397/0/61203.pdf> (last visited December 10, 2008); Report of the Ministry of Justice Steering Committee on the Resolution of Disputes in Which the State is a Party with Mediation (2003), *available at*: <http://www.justice.gov.il/NR/ronlyres/9B7F0392-8EB1-45BA-ABFB-9CC8EA10C29C/0/MicrosoftWordtakztir.pdf> (last visited December 10, 2008).

²⁰ See for example: Mediators Practicum Program in Small Claims Courts – 2006, *available at*: <http://www.justice.gov.il/MOJHeb/Gishor/> (last visited December 10, 2008).

²¹ See: Court Regulations (Fees), 2007, §5(b), 6(b)(4), 6(d) and 20. For further discussion on the various form of State funding or financial support for mediation see: Moshe Bar-Niv & Ran Lahman, *Examining The Tendency to Turn to Alternative Dispute Resolution (ADR) Over Time and Regulation*, 2 MISHPAT VEASAKIM 209, 219-220 (2005); Elad Finkelstein, *Privatization and Regulation: The Legal Regime Governing Mediation*, 30(3) TEL AVIV UNI. L. REV 623, 628-629 (2008).

²² Direct funding is more common in court-connected mediation in labor courts (see the discussion in Varda Virt Livne, *Mediation in Labor Courts*, 3(1) SHA'AREI MISHPAT 89 (2002)), although, as mentioned earlier,

Legal incentives included broad confidentiality protection for information that has been disclosed in the mediation processes,²³ and procedurally-simplified ways for granting mediation agreements the validity of court decisions.²⁴

Parallel to these developments, numerous centers opened to provide training and mediation services, and the number of mediators and organizations providing mediation services grew rapidly. While these activities increased the availability of mediation and the number of lawyers who are familiar with it, the demand for mediation among the public barely increased, eventually causing many of the mediation centers to close. Indeed, it soon became evident that despite 15 years of various attempts to encourage the implementation of mediation in Israel, disputants, and perhaps also large segments of the legal community, remained reluctant to use mediation. Nonetheless, the Ministry of Justice stayed faithful to its long-stated goal of promoting the use of mediation in Israel.

In view of this reality, in 2003 the Minister of Justice appointed The Commission for Examining Strategies to Increase the Use of Mediation in Courts²⁵ (hereinafter: *the Commission*) “to examine the possibility of enacting mandatory mediation in civil

some court connected mediation was sponsored by the State in the general court system as well (see: Report of the Commission on Mediation, *supra* note 25, at 22-23).

²³ A similar confidentiality protection is given under Israeli case-law also to settlement negotiations.

²⁴ See: Court Law, 1984, §79c(7), Court Regulations (Mediation), 1993, §9, 10. §79c(8) enables the granting of a mediation agreement the validity of a court decision even if no lawsuit was filed in court (this latter option was criticized by Smadar Ottolenghi, *Reflections on Legislation of Mediation*, 3(1) SHA'AREI MISHPAT 25, 33-34 (2002). For further discussion of the legal incentives for using mediation, see Finkelstein, *supra* note 21, at 629. For a further discussion on financial, legal and business incentives to use mediation in Israel see: Bar-Niv & Lahman, *supra* note 21, at 216-220

²⁵ Report of the Commission Examining Strategies to Increase the Use of Mediation in Courts (2006), available at: <http://www.justice.gov.il/NR/rdonlyres/A51934AE-C5C0-4D3E-A677-DEF7BB57C865/5624/dinveheshbon.pdf> (last visited Dec. 10, 2008). The Commission comprised six members: Judge Michal Rubinstein of the Tel Aviv District Court (Chairperson), a Family Court Judge, an attorney-mediator, an attorney-psychologist-mediator, an attorney from NCMCR and an attorney from the office of the Ombudsman of the Israeli Judiciary who was the former legal counsel of NCMCR.

disputes and other measures to increase the use of mediation in courts.”²⁶ More broadly, the preliminary goal of the Commission, as defined in its letter of appointment, was to design a system to increase the use of mediation in courts, thereby contributing to parties’ satisfaction with the dispute resolution process and outcome, strengthening public trust in the courts, and promoting a more tolerant society in Israel. In its July 2006 report, the Commission identified two ongoing problems that hinder the implementation of mediation in Israel to guide the suggested systematic change: a) the low response of disputants to using mediation; and b) the dissatisfaction of attorneys and disputants with the professional level of mediators.²⁷ Eventually, the Commission designed a two-year pilot program with the following stated goals:

1. Examine the influence of IAC [Information, Acquaintance and Coordination]session on the following matters:
 - a. Increase positive response rate to mediation;
 - b. Deal with disputants’ objection to using mediation;
 - c. Increase willingness to consensual settlement in cases that are redirected to court after [un-continued] IAC session (or mediation process that did not result in settlement.)
2. Examine the influence of mediator expertise on the achievement of the goals stated in §1.
3. Identify the characteristics of disputes that could be resolved in mediation.²⁸

The Commission’s report includes a review of current mediation practices in courts; the Commission’s analysis of the reasons for the underdevelopment of mediation in Israel; a presentation of comparative mediation models in four jurisdictions;²⁹ and

²⁶ *Id.* at 9.

²⁷ Report of the Commission on Mediation, *supra* note 25, at 9. Interestingly, the only reference in the Report to reduction of court dockets is reprimanding any exertion of undue pressure to settle. *Id.*, at 20-21.

²⁸ *Id.*, at 47. The design of the mediation program was therefore driven by two sets of goals: a dispute resolution system per se and an experimental model whose lessons should serve for designing the future “final” system.

²⁹ The Commission discussed the following four models: Mandatory Mediation Session (Ontario, Canada); ADR Multi-Option Program (Northern District of California, USA); Notice to Mediate (British Columbia,

recommendations for the model that Israel should adopt for its pilot program: a mandatory pre-mediation Information Acquaintance and Coordination session (IAC).³⁰ The Commission's recommendations were adopted in regulations enacted by the Minister of Justice,³¹ and the IAC program began to operate in October, 2008.

B. Pre-Mediation Information Acquaintance and Coordination Session (IAC)

The IAC program introduces a potentially significant, perhaps unprecedented, change in the Israeli litigation practices: as of October 2008 most civil cases³² filed with the three participating magistrate courts (Tel Aviv, Jerusalem, Rishon Le'Zion) that are valued at over NIS 50,000 (~US\$ 12,500) are directed to one *mandatory* pre-mediation IAC session. In the session, a court-appointed mediator examines the possibility of resolving the dispute in mediation with the parties. Parties are *required* to attend the session; attorneys are allowed to participate but are *not obligated* to do so. The IAC session is held at the mediator's private office, and should last 90 minutes. Following the IAC session, the parties may choose to proceed with mediation, using the services of the same mediator or a different one; or to return to the regular court proceedings. Neither the parties nor the court need to pay for the IAC session, but if the parties choose to continue

Canada); Multi-Door Courthouse (Middlesex, USA). Report of the Commission on Mediation, *supra* note 25, at 29-39.

³⁰“MAHUT”, the Hebrew name of the program is a pun: these are the initials of Information, Acquaintance and Coordination (IAC), and together they compose the Hebrew word “essence” or “substance”.

³¹ Civil Procedure Regulations (Temporary Order), November 1, 2007, Regulation Codex 6620; Civil Procedure Regulations (Temporary Order) (Amendment), Effective Apr. 3, 2008.

³² Two major categories of civil cases are excluded from the IAC Program: a) *expedited procedures* in which the court did not grant the defendant permission to defend himself, see: Civil Procedure Regulations 1984, §202 (Expedited procedure is used principally in claims for a stated monetary sum which are based on a written obligation of specified kinds. In these procedures, the defendant has no inherent right to defend himself; rather, he must ask for and be granted one by the court); and b) *vehicular accidents* tort cases which are governed by the Damages to Vehicular Accidents Victims Act, 1975. Additional to the exclusion of these two predetermined categories of cases, the Director of the Courts may exclude other cases at his own discretion, as long as the cases that are referred to mediation are randomly selected (see §99(9)(b) of Civil Procedure Regulations *infra* note 33.)

with mediation, they each pay the mediator 300 NIS (~US\$ 75) for each additional hour of the mediator's services. Since the IAC session is held prior to the earliest scheduled court session (pre-trial), if mediation is not sought and the case is redirected to court, the IAC session does not delay the general litigation schedule.³³

C. Problems in the Design Process of the IAC Program

As mentioned earlier, the IAC Commission was appointed amid disagreement and obscurity regarding the causes for the reluctance to use mediation and the appropriate means for remedying it. The Commission's task was to identify the nature of the problem and to design a solution. It is perturbing that the Commission performed its task, which resulted in a significant reform of the litigation process in Israel, without consulting reliable empirical evidence³⁴ regarding current mediation practices in Israel, barriers to its adoption, and views of the relevant stakeholders.³⁵ In fact, the Commission's Report, and hence the institutionalization of mediation in Israel, was based primarily on anecdotal evidence and comparative studies of mediation models that are used in other jurisdictions.

³³ See: Civil Procedure Regulations (Temporary Order), November 1, 2007, Regulation Codex 6620; Civil Procedure Regulations (Temporary Order) (Amendment), Effective April 3, 2008.

³⁴ Arguably, the 43 interviews the Commission conducted with different professionals and the reports on the current volumes of mediation in some of the courts do not suffice. The Commission interviewed the Director of the Court System, 8 judges of different courts (some of whom were Presidents), 5 heads of cases management departments, 2 court legal personnel, 1 State attorney, 8 representatives from the Israeli Bar Association, 9 mediators (4 of whom were also lawyers), 4 academics (2 of whom from law schools), 3 functionaries from the Ministry of Justice, 2 representatives from legal and social governmental aid agencies, and 2 representatives from the American Embassy in Israel. The complete list of the professionals and stakeholders who were interviewed by the Commission is detailed in the Report of the Commission on Mediation, *supra* note 25, at 12-13.

³⁵ It is important to emphasize that the Commission did make a worthy effort and has produced an extensive report. In that sense, its work was better than the reality Hensler describes, according to which "Legislatures that adopt ADR programs by statute rarely engage in a close comparison of their features, uses, or consequences. Indeed, some legislators (and many lawyers) have only the haziest notions about the differences among ADR procedures" (Hensler, *supra* note 2, at 187-188). Still, the fine work in other aspects does not remedy the lack of the empirically-gleaned information and in depth understanding of the contextualized barriers to mediation in Israel.

Developing an innovative program with remedial purposes in such a way seems incompatible with the Commission's conclusion that a determinant barrier to implementing mediation in Israel was the disputants' and attorneys' dissatisfaction with the available level of mediation services.³⁶ Strangely, the Commission's report does not include a comprehensive attempt to understand what comprises this "dissatisfaction," and it lacks evidence on the barriers and potential incentives that affect the conduct of the stakeholders involved in mediation: disputants, mediators, lawyers, and judges.

This paper focuses on the interests, incentives, and barriers of an important stakeholder group whose central role in mediation seems to have been largely overlooked by the Commission: attorneys. These issues, as well as the stated objection of the Israeli Bar Association to the IAC program,³⁷ were not addressed in the Commission's report, and seem not to have been taken into account in the design of the IAC program. My study fills in (some of) this knowledge gap by providing empirical insight into the views civil litigators hold on these issues. In addition, the study provides insight into a previously under-researched matter: the role that attorneys play in the decision to use mediation (as opposed to their role in the mediation process itself) and the possibility of an agency problem in the counsel they give to their clients on the matter.

³⁶ Report of the Commission on Mediation, *supra* note 25, at 9

³⁷ *Id.*, at 24-26.

IV. ATTORNEYS AS GATEKEEPERS OF MEDIATION

In order for our society to reap the benefits of mediation while containing its risks, many lawyers must come to understand mediation and a significant number must develop an ability and willingness to mediate a variety of matters that are currently pushed through the adversary mill.³⁸

The idea that that lawyers serve as important intermediaries between clients and the legal system is far from novel. Sociologists of law have long studied the ways in which attorneys help their clients understand legal rules and relate them to individual problems, operate legal processes and work with legal institutions.³⁹ As part of this scholarly tradition, in recent years, greater attention has been given also to the role that attorneys play in mediation. The following sections examine the literature in the field, and point to the necessity of expanding our understanding of the crucial role that attorneys play in the decision whether a case will be referred to mediation.

A. The Role of Attorneys in Mediation

Lawyers are becoming increasingly involved as advocates in mediation. Attorneys' engagement in the process is attributed, in part, to the growth in court-connected mediation programs, in which disputants are commonly represented or advised by legal counsel.⁴⁰ The nature of the role that lawyers should play in mediation is constantly debated (schematically, the suggested options are "silent advisor," "co-participant," or

³⁸ Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L. J. 29, 30 (1982)

³⁹ Austin Sarat & William L. Felstiner, *Law and Strategy in The Divorce Lawyer's Office*, 20 LAW & SOC'Y REV. 93, 93 (1986)

⁴⁰ Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U. L. Q. 787, 796-797 (2001). In Florida, for example, 75% of the circuits surveyed in a study reported that attorneys accompanied their clients to "circuit civil" mediation 100% of the time, the remaining responding circuits reported that attorneys accompanied their clients between 50% and 80% of the time (Sharon Press & Kimberly Kosch, 1998 FLORIDA MEDIATION/ARBITRATION PROGRAMS: A COMPENDIUM 122 (11th ed. 1998). For a review of the history of the development of lawyers' involvement in mediation, see Goldfien & Robbennolt, *infra* note 44, at 283-284

“dominant or sole participant”).⁴¹ At the same time, it is clear that the growing involvement of lawyers in mediation changes the way it is typically conducted, its power dynamics, and the prevalent view of the nature of the process.⁴² Indeed, a growing body of research (conducted primarily in the United States) demonstrates that the practice of mediation is largely affected by the way attorneys perceive and use it, to the extent that they are referred to as the *gatekeepers* of mediation.⁴³ Lawyers generally control which disputes go to mediation, which mediator is chosen, as well as the overall structure and prioritization of interests within the process.⁴⁴ If it is true that “attorneys’ perceptions and values influence the ability of ADR to deliver on its potential benefits,”⁴⁵ then for mediation to be widely implemented in the legal system, attorneys’ interests, which are often not fully aligned with their clients’ interests,⁴⁶ need to be taken into account as well.

Wissler comments that in the United States, many policies and methods that were used to increase the voluntary use of ADR focused on attorneys rather than litigants,

⁴¹ John S. Murray et al, PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 370-371 (2nd ed. 1996)

⁴² Welsh argues that “[w]here mediation becomes routinely integrated into litigation practice, we can expect that this will significantly alter both lawyers’ practices in legal representation and mediators’ practices in offering and providing mediation services.” (Welsh, *supra* note 40, at 188-189).

⁴³ Bobbi McAdoo & Nancy A. Welsh, *Does ADR Really Have a Place on The Lawyers’ Philosophical Map?*, HAMLIN J. PUB. POL’Y 376, 391 (1997)

⁴⁴ See e.g.: Jeffrey H. Goldfien & Jennifer K. Robbenolt, *What if lawyers have their way? An empirical assessment of conflict strategies and attitudes toward mediation styles*, OHIO ST.J. ON DISP. RESOL 277, 282-283 (2007); Reich, *supra* note 46, at 184-185, 188-189; Wissler, *infra* note 47, at 462. This understanding is based on the widespread primarily distributive (evaluative) model of mediation in which lawyers play a central role, as opposed to the multifaceted interest-based (facilitative) model which depends on a significant involvement of the parties. See: Debora R. Hensler: *In Search of “Good” Mediation: Rhetoric, Practice, and Empiricism*, in: Joseph Sanders & Lee V. Hamilton, eds. HANDBOOK OF JUSTICE RESEARCH IN LAW 231, 233-234, 245 (2000); Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: “The Problem” in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863 (2008).

⁴⁵ McAdoo & Welsh, *supra* note 43, at 391.

⁴⁶ Brad J. Reich, *Attorney v. Client: Creating a Mechanism to Address Competing Process interests in Lawyer Driven Mediation*, 26 S. ILL. U. L. J. 183 (2002). Reich claims that the different process interests of attorneys and clients in mediation compete for dominance and that parties’ interests generally lose (*id* at 183-184, 186-195); Jean R. Sternlight, *Lawyers’ Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Non-Adversarial Setting*, 14 OHIO ST. J. DISP. RESOL. 269 (1999). Sternlight reviews the disparate monetary and non monetary incentives and psychological barriers that clients and attorneys have in mediation and offers ways to overcome or deal with them.

because litigants typically do not initiate the discussion of ADR and attorneys have a great deal of influence on their clients' perceptions and decisions regarding the use of ADR.⁴⁷ This is particularly true in court-connected mediation programs, where the views of judges and lawyers are said to play a markedly significant role in the evolution and operation of the system.⁴⁸

Given the central role that attorneys play in mediation, it seems that those who wish to understand its operation and promote its implementation need to know the lawyers' "take" on the matter. As McAdoo & Welsh succinctly state:

Because the effectiveness of ADR is so dependent upon attorneys' perceptions and use of ADR, it should be useful to examine the current status of those perceptions in a ... court which has substantial experience with ADR in non-family civil cases.⁴⁹

This paper performs this exact task: it examines the perceptions of Israeli litigators who practice in the Tel Aviv District, which is the district that has the most extensive mediation experience in Israel. More particularly, the paper explores whether certain barriers deter these attorneys from referring cases to mediation.

B. Barriers to Attorneys' Use of Mediation

Recent years have seen the development of a growing body of literature discussing typical barriers that constrain attorneys from regularly considering using or actually using mediation. However, there have been very few examples of empirical examination of the

⁴⁷ Roselle L. Wissler, *Barriers to Attorneys' Discussion and Use of ADR*, 10 OHIO ST. J. ON DISP. RESOL. 459, 462. (2003). Wissler notes for example programs providing ADR information and education to attorneys, encouraging or requiring attorneys to discuss ADR options with their clients or with opposing counsel.

⁴⁸ See: Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHAIO. ST. J. ON DISP. RESOL. 573, 575-577 (2004); Welsh, *supra* note 40, at 796-797.

⁴⁹ McAdoo & Welsh, *supra* note 43, at 378.

nature, scope and influence of these barriers. Nevertheless, in 2003, Wissler effectively summarized several categories of barriers to attorneys' discussion and use of ADR that have been identified in the (primarily American) literature over the years.⁵⁰ These include: attorneys' knowledge and familiarity with ADR processes; attorneys' views of ADR (possibly also resulting from misconceptions and cognitive barriers);⁵¹ negative past experience; attorneys' economic interests; the time-frame of court-oriented litigation deadlines; and the nature and degree of judicial involvement in the ADR process. It is also possible that lawyers are deterred from using mediation by the challenges of advocacy in non-adversarial settings,⁵² or because they are "fairly uninterested in, and unskilled at, dealing with emotional and interpersonal content,"⁵³ that facilitative mediation processes often require.

Although no previous published study has explored the perceptions of Israeli attorneys regarding mediation, it is likely that many of the issues that are discussed in the aforementioned American literature are also relevant to Israeli attorneys. In fact, as mentioned in Section III(C), the Israeli Bar Association has objected to the IAC Program, thereby indicating a reluctance to embrace a system of mandatory mediation (at least in its current design). This paper, therefore, explores whether the low demand for mediation

⁵⁰ See the detailed review in Wissler, *supra* note 47, at 460-471.

⁵¹ Such as "optimistic overconfidence" that leads attorneys to overestimate the likelihood of favorable case outcomes (see: Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, in BARRIERS TO CONFLICT RESOLUTION, *supra* note 5, at 44, 45-48; or "reactive devaluation" that leads attorneys to view ADR less positively and suspect that using it will be to their disadvantage (see: Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION, *supra* note 5, at 26, 27-28, 38.

⁵² For discussion of these challenges, see: Sternlight, *supra* note 46, and Section VII(B)(2) *infra*.

⁵³ Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEG. L. REV. 145, 158 (2001)

in Israel, despite 15 years of attempts to promote it, results, at least in part, from the existence of barriers to attorney's use of mediation.

C. Potential Agency Problems in Choosing A Dispute Resolution Method

Similar to their colleagues worldwide, Israeli attorneys are subjected to legislated standards of conducts and ethical obligations which require them to serve their clients' best interests faithfully and fairly.⁵⁴ Such rules are necessary because within the agent-principal relationship, lawyers and their clients often have different economic and psychological interests, incentives, and barriers that can potentially result in legal counsel or outcomes that do not serve the best interests of the client. This is the lawyer-client agency problem.⁵⁵

Thus far, the literature addressed the issue of lawyer-client agency problem in mediation mainly with regard to attorneys' role *during* the mediation process.⁵⁶ This literature focuses on the different potential barriers to conflict resolution that typically characterize clients and attorneys, pointing to the divergent monetary, non-monetary and psychological interests and barriers in the principal-agent relationship.⁵⁷ Generally it is

⁵⁴ §54 of the Bar Association Law, 1961 describes the statutory *Duty of the Attorney to His Client and the Court* as follows: "In fulfilling his duties, a lawyer shall act faithfully and dedicatedly in the best interest of his client and shall assist the court in making justice" (translated by the author). The Rules of the Bar Association (Professional Ethics), 1986 further stipulate in §2 the *Duty of the Lawyer* as follows: "A lawyer shall represent his client faithfully, dedicatedly, fearlessly, and while maintaining fairness, respect for the profession and respect for the court". §14 to the Rules of The Bar Association further prohibits representation of a client if there is concern that the attorney will not be able to fulfill his professional duties due to a conflict of interest.

⁵⁵ Agency Cost is defined as the reduction in welfare that it attributable to the role played by an agent in a particular relationship (see John W. Pratt & Richard J. Zeckhauser, *Principals and Agents: An Overview*, in: PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 1, 3 (John W. Pratt & Richard J. Zeckhauser eds., 1985)

⁵⁶ See e.g.: Dwight Golann *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* (1996); John W. Cooley *MEDIATION ADVOCACY* (1996); Eric Galton *REPRESENTING CLIENTS IN MEDIATION* (1994); John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839 (1997); Sternlight, *supra* note 46; Riskin, *supra* note 38.

⁵⁷ Sternlight, *supra* note 46, at 313

asserted that “attorneys often have a critical impact in determining how they and their clients should behave in mediation,”⁵⁸ and that “the insertion of the attorney agent into the negotiation process may add new barriers to settlement... [or] lower negotiation barriers, sometimes causing the client to enter into settlements that are not actually in the client’s best interests.”⁵⁹ As opposed to that, there is very little writing, and even less empirical work, on potential diverging interests and related agency problems that can affect *the decision whether to use mediation at all*. This potential agency problem becomes particularly worrisome if, as suggested here, mediation remains a lawyers-dependent process.

Despite the importance of the discourse between lawyers and their clients, not much is known, in a systematic empirical sense, about what actually goes on in the lawyer’s office. In particular, there seems to be no available empirical evidence on the attorney-client dynamics in the process of choosing the dispute resolution method that will be pursued in a particular case. Indeed, without direct knowledge of such interactions, “it is

⁵⁸ Guthrie, *supra* note 53, at 271.

⁵⁹ Sternlight, *supra* note 46, at 313. Clearly, not all divergences between attorneys and their clients are undesirable: there are several theoretical arguments and some experimental evidence which suggest that attorneys’ participation in negotiation and dispute resolution processes can often lead to beneficial settlements for the client. Sternlight offers a concise review of the available literature on the topic, *id.*, at 272-273 and n.13-14. See particularly: Rachel Croson & Robert H. Mnookin, *Does Disputing Through Agents Enhance Cooperation? Experimental Evidence*, 26 J. LEGAL STUD. 331 (1997) (discussing the results of an experiment that showed that use of lawyers as agents can enhance clients’ reliance on a cooperative approach); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994) (suggesting that when clients use their attorneys as agents in negotiations they can cooperate more often than they would otherwise); Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 238, 247 (1993) (presenting and analyzing four types of barriers to negotiation: strategic barriers arising out of game theory and economic analysis, principal-agent problems, cognitive barriers, and reactive devaluation); Russell Korobkin & Chris Guthrie, *Psychology, Economics and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 82, 84 (1997). (presenting experimental evidence that shows that attorneys are less subject to certain “irrational” psychological phenomena than their clients, which could allow them to encourage their clients to enter into beneficial settlements that they might not reach without assistance (nonetheless, the authors also recognize that in doing so, lawyers do not necessarily serve their clients’ best interests, see *id.* at 125)

difficult to pose or answer major questions about the content, form, and effects of legal services, the nature of dispute transformation, and the transmission of legal ideology.”⁶⁰

While in the 1970s lawyers were “not welcome” in mediations, nowadays, following the introduction of court-connected mediation as a prerequisite for adjudication in many jurisdictions, “attorneys attend and dominate these mediation sessions while the disputants play no or a much-reduced role”.⁶¹ Thus, the hopes of purists that mediation will remain free of attorney advocacy (at least in its traditional form)⁶² no longer seem realistic (at least in court-connected settings). This reality requires addressing questions relating to the role attorneys play not only in the mediation process itself, but also in the earlier crucial stage of choosing between mediation and other dispute resolution methods, and primarily litigation. To encourage the implementation of mediation, and to examine whether an agency problem exists, it is important to understand the attorneys’ interests, incentives and barriers to using mediation.

After reviewing the general practices and views of Israeli attorneys in mediation, this paper offers insight into the crucial earlier stage of the legal decision-making process: choosing which dispute resolution mechanism to use to resolve a given dispute. To do so, the paper studies the degree of control attorneys have on the decision making process as well as the factors that influence their decision.

⁶⁰ Sarat & Felstiner, *supra* note 39, at 94

⁶¹ Welsh, *supra* note 40, at 796-797 (Welsh refers to court-connected non-family mediations). It should be noted, however, that there is some evidence that the extent to which lawyers attend mediations varies according to the nature of the dispute and the culture of the jurisdiction (see: Lande, *supra* note 56, at 883 nn.205-207. Gilson & Mnookin observe this with respect to cooperative problem-solving; *supra* note 59, at 549 and nn.119-123).

⁶² “Some have argued that attorneys’ participation in mediation as advocates for their clients is inconsistent with the goals of mediation. At the extreme, persons holding this view believe that mediation works best when attorneys are altogether excluded from the process.” (Sternlight, *supra* note 46, at 279); “Lawyers are not to think or act like lawyers when they are mediating” (Riskin, *supra* note 35, at 36).

V. METHODOLOGY

The data for this study were gleaned from a web-based survey that was completed by 140 attorneys. The survey was distributed electronically in February, 2009, to a random sample of civil litigators practicing in the Tel Aviv District. The respondents were asked to complete a questionnaire regarding their practice of mediation and their views about the process.

A. Population and Sampling Process

Since the research was conducted with reference to the new IAC program, the target population was defined as *civil litigators*. The Tel Aviv district was chosen since it is the busiest jurisdiction in Israel in terms of litigation case-load,⁶³ and it has greater reported past experience with court-connected civil mediation compared to other jurisdictions.⁶⁴

As no official Bar Association public directory includes information on members' practice areas, a new database was created by combining the listings of civil litigation attorneys and firms from two Israeli commercial online directories.⁶⁵ The combined database comprised the "universe" of civil litigators in the Tel Aviv District, which included 4,195 attorneys.⁶⁶ Although the database was incomplete since not all lawyers and firms are listed in these directories, it was the best available option for this research. Unfortunately, as this survey was conducted via the internet, coverage error (the problem

⁶³ THE ISRAELI COURT SYSTEM – SEMI-ANNUAL REPORT: 1.1.08-30.6.08 24-25 (August 5, 2008), *available at*: http://www.htpelyon1.court.gov.il/heb/haba/7-12_2008.pdf (last visited September 24, 2008), at 24-25

⁶⁴ See: Report of the Commission on Mediation, *supra* note 25, at 22-23.

⁶⁵ www.martindale.co.il/ (last visited Dec. 20, 2008); <http://duns100.dundb.co.il/ts.cgi?tsscript=/2008-heb/e62a27> (last visited Dec. 20, 2008). In many cases, the exact number of attorneys in the firms and the attorneys' contact details were obtained from the firm's website.

⁶⁶ See the qualifying remarks on the size of the population *infra* note 69.

of subjects missing from the frame population) remains an inherent disadvantage for the representativeness of the results.⁶⁷ However, a random sample of a frame population which is biased in a known way⁶⁸ is preferable to a non-random selection. From this sample, a random number generator yielded a sample of 700 attorneys, which was further narrowed by additional coverage challenges.⁶⁹ The survey was eventually successfully sent to 441 attorneys.

B. The Questionnaire

The questionnaire was designed to obtain information on the use of mediation by lawyers, incentives and barriers for their conduct and the possible related agency problems, as well as the attorneys' views on and use of the IAC program.⁷⁰ It totaled 75 questions, some of which were clustered together into unified multi-question matrices

⁶⁷ See Mick P. Couper, *Web-based surveys: A review of issues and approaches* 64(4) PUBLIC OPIN. Q. 464, 467-468 (2000). Coverage error is a function of two elements: the proportion of the target population which is not covered by the frame and the difference on the survey statistic between those covered and those not covered (*Id.*)

⁶⁸ The lack of Internet central registries often makes it impossible to draw a random sample. Thus, web-based surveys are typically "limited in their ability to provide generalizable results due to self-selection, non-random and non-probabilistic sampling". It thus seems that "To infer for a general population based on a sample drawn from an online population is not as yet possible and will not be possible until the online and offline populations reflect each other." (Dorine Andrews, Blair Nonnecke, & Jennifer Preece, *Conducting Research on the Internet: Online Survey Design, Development and Implementation Guidelines*, 16(2) INT. J. OF HUM-COMPUT. INT. 185 (2003)). See also: Couper, *supra* note 67, at 467-468 (2000)

⁶⁹ The email addresses of 148 lawyers could not be obtained, presenting a further coverage error, which is not uncommon in web-surveys. Difficulties in reaching subjects due to lack of internet access or email address is a typical problem of list-based web surveys (See: Couper, *Id.*, as well as the discussion *supra* in notes 67 and 68). In addition, 111 attorneys from list were disqualified from the sample due to reasons such as irrelevant jurisdiction or practice area, duplication in the data-base due to mergers or divisions of law firms, or otherwise inaccurate entries in the two directories or on the firms' websites. These figures raise the question, which is unanswered at this point, whether the disqualification rate of attorneys from the sample similarly influences the size of the frame population (see *supra* the text next to note 66).

⁷⁰ The questionnaire relied on the relevant Israeli legislation, literature on the topic, and informational interviews with attorneys and mediators. The structure of the questionnaire was also inspired by similar empirical studies which were conducted in the United States, including: Bobbi McAddo & Art Hinshaw *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri* 67 MO. L. REV. 473 (2002); Bobbi McAddo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota* 25 HAMLIN L. REV. 401 (2002), John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137 (2000); Morris L. Medley & James A. Schellenberg, *Attitudes of Attorneys Toward Mediation*, 12 MEDIATION Q. 185 (1994).

(the complete questionnaire, translated from Hebrew, appears in Appendix 2). The questionnaire was divided into three sections, each dedicated to extracting a different type of information: (a) *Lawyer Information* – sex, age, years of practice, size of law firm, practice area, type of clients; (b) *Mediation Practices, barriers and Perceptions* – mediation training, view of mediation, the extent and nature of the attorneys’ use of mediation, and an assessment of the factors and barriers that determine whether mediation is used; (c) *The IAC Court-Connected Mediation Program* – views on the appropriateness, effectiveness, design and effect of the new system.

C. Distribution

The survey was administered via an automated web-based survey system.⁷¹ The respondents received an email with a short explanation of the purpose and nature of the study that invited them to complete the survey.⁷² The email included an individualized link to the questionnaire, which ensured the anonymity of the responses. To overcome the risks of “junk mail block” and increased mistrust by recipients, which are inherent in the use of email surveys, contact persons informed the respondents about the survey before it was sent to them, and encouraged them to complete it. The contact persons were mostly colleagues of the randomly selected lawyers, recruited by networking. Out of the 441 attorneys to whom the survey was distributed, 265 were approached by a contact person. Interestingly, there was no significant difference in the return rate between attorneys who were encouraged to complete the survey by a contact person, and those who received

⁷¹ The software *Opinio* was used (see: <http://www.objectplanet.com/opinio/> (last visited Dec. 20, 2008)). The survey was stored on a Stanford University server. There is some evidence that electronic survey results may be no different – and some claim even better – than postal survey content results, while providing a speedier, more cost-effective, large-scale data-collection by others than organizations at the centers of power in society. See reviews in Andrews et al, *supra* note 68, and in Couper, *supra* note 67.

⁷² Due to technical constraints the respondents received an email in English, which referred them to a link with an available Hebrew version of the text.

nothing but the email and reminders inviting them to participate,⁷³ suggesting that the responses are not biased in this respect.

D. Return Rate

The questionnaire was completed fully by 140 respondents⁷⁴ representing a 32% return rate, which is relatively high⁷⁵ by web-survey standards,⁷⁶ and the standards of social science surveys of lawyers.⁷⁷ It is also a higher return rate than the sole published survey of Israeli attorneys on ADR related topics.⁷⁸

E. Comments on the Nature of the Analysis

The data presented here consists of the attorneys' self-reported beliefs and perceptions. In questions that required them to describe their experiences, respondents were asked to refer to the two years preceding the survey, in order to limit the risk of bias in the respondents' recollection of past behavior as well as to enable comparisons between lawyers with varying extents of experience. The web-survey was structured with

⁷³ Since the survey-system maintains the anonymity of the respondents, this analysis is based on all 210 lawyers who have entered the survey (sample + attrition), and not only on the 140 attorneys who completed the full survey who are not identifiable as such.

⁷⁴ An additional groups of 70 attorneys started taking the survey (or at least viewed it) but did not complete it, leading to a 33% attrition rate.

⁷⁵ The relatively high return rate could be attributed to the guaranteed anonymity, the personalized appeal (respondents received an email referring to them by name), sent reminders, and the professional look of the survey, hosted on the Stanford University server. In addition, the third reminder was framed as a personal request, which generated some more responses. Naturally, at least in some cases, the encouragement by the contact persons helped, although, as mentioned in Section V(c), there were no general significant differences in return rates based on this encouragement.

⁷⁶ A response rate of 20% or less is not uncommon for email surveys, and although rates exceeding 70% have been recorded they are often attributed to respondents' cohesiveness, such as in organizational studies. See review in Andrews et al, *supra* note 68. Non-response remains a major concern even when there is cohesiveness and no non-coverage problems (See Couper, *supra* note 67, at 486, referring to a study of students whose complete list of email addresses was obtained from the university's registrar's office, where response rate was 41.5%).

⁷⁷ See review in McAddo & Hinshaw, *supra* note 70, at 480 and n. 24.

⁷⁸ The Bar-Niv & Lahman surveys from 1989 and 1999 were both sent to a sample of 1,500 randomly selected attorneys by post-mail, and reported a 22% response rate (*supra* note 21, at 226-227). Considering the fact that at least in the United States, most studies showed that email surveys failed to reach the response rate levels of post-mail surveys (See review in Couper, *supra* note 67, at 473-474), a 32% return rate is an encouraging figure in the Israeli context.

a branching function which automatically directed respondents to the next question that is relevant to their reported experiences, based on a predefined scheme. In addition, respondents who chose the option “Irrelevant / Unknown” in questions that allowed that response were also excluded from the analyzed sample for that particular question. Thus, although the size of the entire sample was 140 attorneys, the N is smaller for some questions, which is indicated where it occurs.

VI. ATTORNEYS' VIEWS AND PRACTICES OF MEDIATION

A. General Demographic Information about the Respondents

The survey was successful at targeting primarily litigators (90%),⁷⁹ who conduct the majority of their practice in the Tel Aviv District (86%). The distribution of the respondents by firm size (the survey was sent only to attorneys who practice solo or in firms) is represented in Table 1, which shows a particularly high representation (27%) of the respondents working in extra-large firms (over 80 attorneys) and a low representation of solo attorneys and lawyers working in small partnerships (2-5 attorneys).⁸⁰ In terms of gender and age, 36% of the respondents were female and 64% were male; the mean age was 35 (the youngest respondent was 26 years old, the oldest was 65; the median age was

⁷⁹ The remaining 10% of the attorneys in the sample reported that they did not practice litigation.

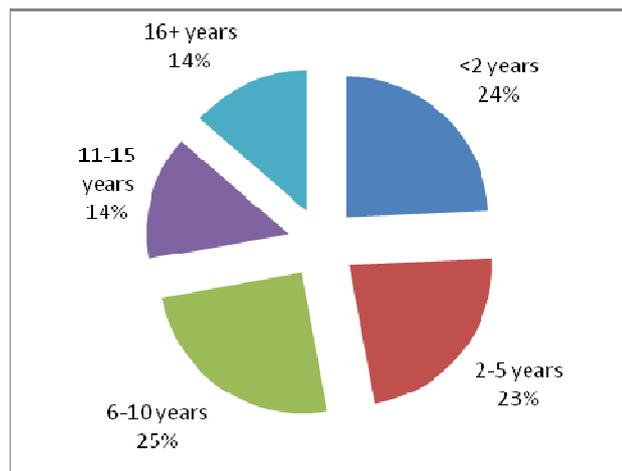
⁸⁰ There are no official data available on the distribution of attorneys by firm sizes in Israel. However, according to a recent Dun & Bradstreet report, in 2008 there were 3,000 law firms operating in Israel, 25% of which employ over 5 lawyers (See Dun & Bradstreet, Press Release, February 2, 2009, *available at*: http://duns100.dundb.co.il/2008/press/law2009_press.asp (last visited March 20, 2009)). No particular distribution for firms in the Tel Aviv District could be found. The low representation of attorneys from small firms is partially attributed to difference in accessibility. On average, relative to their representation in the population and sample, it was significantly easier to obtain valid email addresses of attorneys from larger firms, due to the structured nature of these firms' websites. See also the discussion in notes 67 and 68 *supra*.

33).⁸¹ Figure 1 presents the distribution of the respondents’⁸² experience practicing law. Since there are no available demographic data on the distribution of civil litigators in Tel Aviv, it is hard to ascertain whether the sample is representative of the real population.⁸³

Table 1: Respondents by Firm Size

Firm Size (by # of Attorneys)	Freq.	%
Solo	2	1.4
2-5	3	2.1
6-15	22	15.7
16-25	18	12.9
26-40	26	18.6
41-60	20	14.3
61-80	11	7.9
80+	38	27.1
Total	140	100

Figure 1: Respondents’ Experience Practicing Law



Several noteworthy factors could have influenced the reported views and practices of the respondents regarding mediation. Almost 80% of the litigators in the sample reported having litigated in the Tel Aviv Magistrate Court,⁸⁴ which is where the IAC Program is currently being tested; for 30% of the respondents, Magistrate Court was also where they conducted the majority of their litigation.⁸⁵ Second, a large proportion of the respondents

⁸¹ The complete age distribution is presented in Figure 1 in Appendix 1. See also note 83 *infra*, discussing possible explanations for the relatively young sample.

⁸² The distribution of the sample of litigators alone (N=126) is fairly similar: less than 2 years – 23%, 2-5 years – 23.8%, 6-10 years – 23.8%, 11-15 years – 14.3%, over 15 years – 15.1%.

⁸³ The uneven distribution probably reflects an accurate inverse of the billable hour rate of each experience category, as well as, perhaps, the mind set regarding completing an online survey. Some studies show that those who participate in web-based surveys may be more experienced, more intense Internet users, and may be predominately younger males (Andrews et al, *supra* note 68).

⁸⁴ The reported numbers of cases litigated in the Tel Aviv Magistrate Courts in the past 2 years were as follows: 1-5 cases – 28%; 6-10 cases – 29.5%; 11-25 cases – 13.5%; 26-40 cases – 4%; over 40 cases – 3%. 22% reported they have not litigated in the Tel Aviv Magistrate Court at all during this period.

⁸⁵ At the same time, most litigators (58%) reported that they conducted the majority of their litigation in the District Court (where no court-connected mediation program is regularly offered). About 10% reported

represent mainly defendants (54%, compared to 12% who represent primarily plaintiffs, and 34% who report an equal representation of both). In addition, 64% of the respondents stated that medium-large companies formed their primary client base (defined as consisting of 50% or more of an attorney’s clientele), while individual clients were the primary client base for only 3.5% of respondents (Table 2 presents additional information on the general clientele distribution).⁸⁶ In the absence of valid data on the distribution of clientele in the general population, it is impossible to determine whether the results are biased in this respect.

Table 2: Distribution of Clientele in Percentages

	N	Min.	Max.	Median	Mean	S.D
Individuals	116	0	100	12.5	18.28	17.211
Small business	91	0	55	15	16.34	11.585
Medium-large companies	130	5	100	70	63.1	24.923
State / public	69	0	50	10	11.55	11.352
NGO / Non-profit	65	0	50	5	8.35	10.316
Other	35	0	100	5	9.26	16.874

N is the number of lawyers who reported representing a given type of client at some rate; the minimum and maximum refer respectively to the lowest and highest rates that were reported in a given category.

The responding attorneys represented a broad array of practice areas, including, among others, torts, real estate, environmental law, intellectual property, corporate and securities, construction, taxation, labor, administrative law and vehicular injuries. However, there was a significant representation of litigators who reported that one of their two most dominant practice areas was commercial/business (46%) or family law

working mainly in Special Courts (family, labor etc., where mediation is also more customarily used). Less than 1% of the respondents reported litigating primarily in the Supreme Court and less than 2% in Administrative Courts.

⁸⁶ The clientele distribution of means in the sample of litigators alone (N=126) is very similar. See Table 1 in Appendix 1 for the complete distribution.

(45%) (See Figure 2 in Appendix 1 for the complete practice area distribution).⁸⁷ At least with respect to the family practice, the high rate of representation should probably be attributed to a positive response bias by family lawyers.⁸⁸ This assumed over-representation of family lawyers might have had a significant effect on the survey results, due to the relatively prevalent use of mediation in family courts.⁸⁹ On the other hand, the low rate of respondents (10%) who reported litigating primarily in specialized courts (which include family courts) indicates that, in fact, these attorneys litigate extensively in other courts.

B. Attorneys' General Referral Practices and Views of Mediation

One of the goals of this exploratory study is to present preliminary empirical evidence on the nature of the experience Israeli civil litigators have in mediation and their perceptions of it. Two direct indicators of attorneys' familiarity with mediation are their ADR education, which also has the potential to shape their attitude towards mediation,⁹⁰ and their experience with mediation, either as advocates or as mediators.⁹¹

⁸⁷ Other noteworthy reported fields of practice were Corporate/Securities – 15%; Labor – 12.5% (another field in which there is mediation is more prevalently used in Israel); Real Estate – 10%; Administrative Law – 9.5%; Intellectual Property – 8%; Construction – 5%. Please note that since respondents were asked to note their *two* most dominant fields of practice, the overall sum exceeds 100. The only available data on the distribution of practice areas refers to the entire country and dates back to 2004. According to this Dan & Bradstreet report, in 2004 this was the division to primary practice areas: Commercial – 19.5%; Litigation – 15.9%; Property and Real Estate – 11.1%; Civil Law – 8.8%; Torts and Insurance – 5.1%; High-Tech and Computers – 4.6%; Capital Markets and Securities – 4.4%; Other – 30.5% (The compilation is *available at*: <http://www.asakim.org.il/upload/law.pdf> (last visited March 20, 2009).

⁸⁸ Since family courts began referring cases to mediation long before the general court system, and mediation is still used to a much greater extent in family courts, attorneys working in the field were probably more interested in and willing to complete the survey.

⁸⁹ See review in Chapter III(A) and the description of the differences between subject matter jurisdiction tribunals and the general court system, *supra* note 16.

⁹⁰ Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 Minn. L. Rev. 193 (1991); Roselle L. Wissler, *When Does Familiarity Breed Content: A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations*, 2 PEPP. DISP. RESOL. L.J. 199 (2002).

⁹¹ “[A]n expansion of lawyers’ knowledge about mediation is not enough. Increased use of mediation in many cases currently processed through the adversary system will develop only if substantial numbers of lawyers begin to function *explicitly* as mediators.” (Riskin, *supra* note 38, at 42)

Interestingly, only 11% of the attorneys reported having had training in mediation.⁹² The results show, however, that mediation training is not material to attorneys' experience with mediation as either mediators or advocates. The data reveal that 22 respondents (15.5%) served as mediators in the past, and only 8 of them had had training in mediation. More interestingly, 79% of the attorneys reported resorting to mediation at least once in the two years preceding the survey. This last figure is an encouraging sign for the proponents of mediation, since it indicates that the vast majority of lawyers are at least willing to try mediation. Less encouraging is what seems to be the relatively low rate at which most lawyers use mediation. Figure 2 shows that only slightly more than 20% of the attorneys used mediation more than five times over the past two years.⁹³ The median range was 3-5 cases, and the mean reflects a slightly lower range.⁹⁴

⁹² Out of those who were trained in mediation (N=16), about half were trained in a mediation course offered by the Bar Association, about one third took a mediation course as part of the academic education in law school, and approximately a fifth took a course in a mediation center. Only 2 respondents took an advanced course in mediation. The effect of negotiation training on the issues that were examined in the survey cannot be identified, since only 6.5% of the attorneys had negotiation training (and a third of them had also had mediation training).

⁹³ Since the survey did not ask respondents to report the overall number of cases they litigated in the past two years, but only the number of cases they have litigated in the Tel Aviv Magistrate Court, which was not the principal instance in which most respondents (68%) litigated, no relative comparison to litigation rates can be made. Limited insight can be inferred from the reported litigation rates in the Tel Aviv Magistrate Court by attorneys who litigate primarily in the Tel Aviv District, in Magistrate Court instance, and who have litigated in the Tel Magistrate Court (N=30). The coded mean of the reported range of cases litigated was 2.67 and the median was 2.5 (SD = 0.994), where 2=6-10 cases litigated, and 3=11-25 cases litigated. The mean mediation rate of the same sample was 1.8 and the median was 2 – virtually the same as the entire sample of attorneys (where 1= 1-2 cases and 2 = 3-5 cases).

⁹⁴ The mean was 1.7, where 1 equals 1-2 cases, and 2 is equal to 3-5 cases.

Figure 2: The Number of Case Mediated in the Previous 2 Years

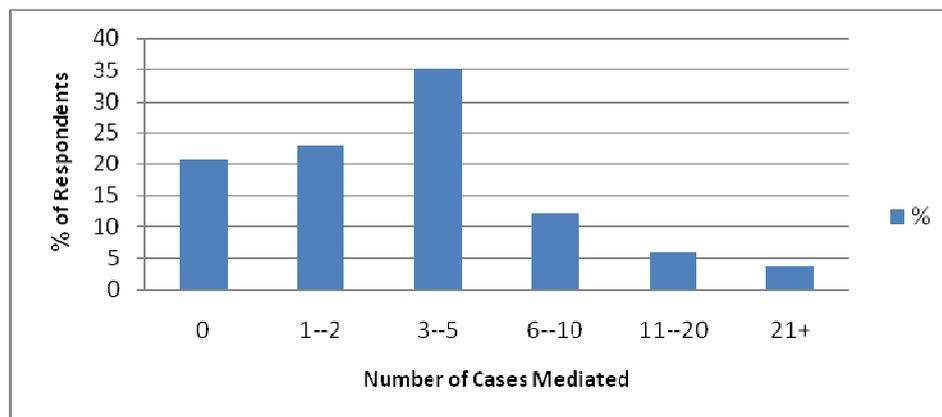


Figure 3 and Table 3 show the mean⁹⁵ number of cases in which attorneys used mediation, based on the number of years they have been practicing law. Generally, more experienced lawyers reported using mediation more frequently in the two years preceding the survey than less experienced lawyers.⁹⁶ These data could be explained by Gilson & Mnookin's idea that experienced lawyers are able to develop a more cooperative reputation, as a function of their repeat professional encounters than less experienced lawyers.⁹⁷ It seems plausible that a more cooperative reputation facilitates and motivates

⁹⁵ The numerical values of the means are the median of the range of cases presented in the optional answers to the survey. The responses were coded so that each option (range of cases mediated) is coded as the mean of the median of the range: 0 cases mediated=0; 1-2 cases=1.5.5; 3-5 cases=4; 6-10=8; 11-20 cases=15.5; Over 20 cases=25 (this more vague category of over 20 cases was coded, somewhat arbitrarily, as 25, but it has very little effect on the results, given the fact that only 5 respondents (4% of the sample) selected it.

⁹⁶ The respondents were asked about the number of cases they had mediated *in the past 2 years* and not generally, so that except for lawyers who had practiced law for less than 2 years, all lawyers had the same statistical chance to mediate.

⁹⁷ Gilson & Mnookin attribute the difference in the ability to gain reputation as cooperative to the growing size of the legal communities. More experienced lawyers had a chance to gain a cooperative reputation in smaller-sized legal communities compared to succeeding generations of lawyers who find it harder to develop such reputations due to the continued growth of the legal community (*supra* note 59, at 538, 546-547). This explanation seems applicable to Israel too, where the number of lawyers has continuously and significantly grown over the years, mainly due to the sharp increase in the number of law schools. If the current growth rate persists, the number of lawyers in Israel is expected to double itself within 10 years

the two opposing counsels to agree on using mediation. There is no apparent explanation for the discrepancy in the results of respondents that practiced law for 11-15 years,⁹⁸ but considering the general pattern, it might be incidental to the coverage error or some other undetected bias.

Figure 3: Mean of Cases Mediated in the Past 2 Years by Years of Experience

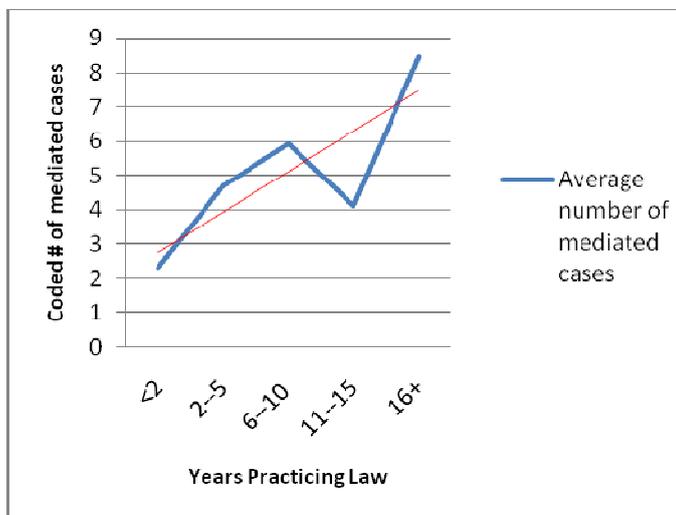


Table 3: Mean of Cases Mediated in the Past 2 Years by Years of Experience

Years Practicing Law	Median	Mean	N	S.D.
< 2	1.5	2.31	29	1.644
2-5	4	4.716	30	5.498
6-10	4	5.933	30	5.286
11-15	4	4.138	18	4.597
16+	4	8.473	19	8.497
Total	4	4.936	126	5.585

The numerical codes in both figures represent the following values: 1.5= 1-2 cases mediated, 4=3-5 cases, 8= 6-10 cases see further note 95. The complete statistically significant correlation is presented in Table 2 in Appendix 1

While these data suggest that most attorneys have used mediation to some degree, the question remains whether they *wanted* to use mediation, or *were bound* to do so.

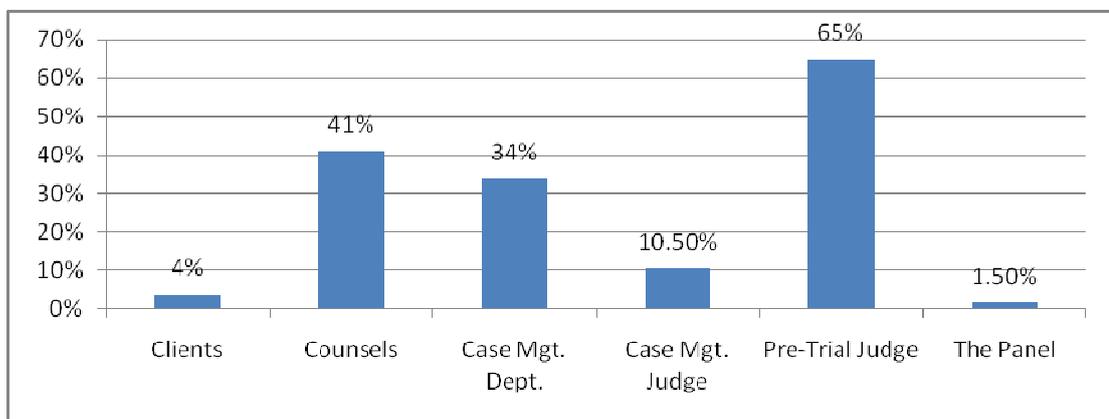
While the evidence is somewhat mixed, the results indicate that many attorneys do not regularly initiate voluntarily a discussion on mediation. Out of the 120 attorneys who reported having previously discussed mediation with their clients, only 12.5% said they *often* discussed the possibility of using mediation with their clients without having been

(see: Ela Levi-Weineriv, *The Israeli Legal Market Is Saturated With Lawyers: Should the Flood Be Stopped?* GLOBES (October 29, 2008) available at: <http://www.globes.co.il/news/docView.aspx?did=1000392316&fid=829> (last visited March 23, 2009))

⁹⁸ The respondents who practiced law for 11-15 years were not found to have specific demographic characteristics such as particular practice area, mediation training, firm size etc.

asked by the court to do so first (no attorney said he *always* did it). On the other hand, approximately 43% reported they *never* or *rarely* discussed mediation under such circumstances, and a similar number of lawyers reported doing so *sometimes*. These mixed results can be further understood by the responses to the question “Who most commonly suggests using mediation?”⁹⁹ which point to the centrality of courts in the initiation of mediation processes.

Figure 4: Who Most Commonly Suggests Using Mediation



As Figure 4 shows, the most prevalent answer was the *pre-trial judge* (65%), whereas 35% pointed to the court’s Case Management Department. Still, the fact that 41% of the respondents selected *counsels* as an answer to the same question¹⁰⁰ should not be discarded.¹⁰¹ To conclude, the results show that a significant number of lawyers initiate the discussion on mediation, but that for the most part; it is the court, whether by

⁹⁹ Responses add up to more than 100% since attorneys could choose up to two responses, if they thought there was more than one dominant factor. N=133

¹⁰⁰ It is interesting to note, that out of the 55 attorneys who indicated counsels as those who most commonly initiate the discussion on mediation, only 25% chose that as their only answer; the vast majority chose an additional dominant initiator of mediation (the most recurring answer here too was the pre-trial judge).

¹⁰¹ Perhaps it could be explained statistically, by noting that the difference between counsels and case management departments is not statistically significant; or psychologically, by a positive self-reporting bias the also the discussion in notes 168 and 169 *infra* and the text associated with it.

way of the pre-trial judge or the case management department, that suggests using mediation.

C. Attorneys' Views on the Effectiveness of Using Mediation in Civil Cases

a. Familiarity With Mediation and Likelihood of Use

As one would probably expect,¹⁰² the responses to the survey reveal that attorneys who are more familiar or experienced with mediation – whether by means of mediation training, serving as a mediator, or representing clients in mediations – generally express more favorable views regarding the effectiveness¹⁰³ of mediation.

A two-thirds majority (68%) of the litigators said that they found that mediation is *sometimes* an effective tool in civil cases, and the mean and median of the responses also point to this view.¹⁰⁴ The margins, however, seem to indicate a tendency of the sample towards a more favorable view of mediation: while 19.5% thought it is *often* effective, and 2.5% that it was *always* effective, only 9% believe it was *rarely* effective, and only 1 respondent believed it was *never* effective (N=123). As expected, mediation training¹⁰⁵ and having served as a mediator¹⁰⁶ were each correlated independently with more

¹⁰² See also Wissler, *supra* note 90, suggesting that familiarity breeds content, so that there exists a relationship between attorneys' familiarity with ADR through education and their ADR recommendations.

¹⁰³ The survey used the Hebrew word *Ya'il* (יָאִיל), which can be translated into English as either *efficient* or *effective*. In any event, the "effectiveness" or "efficiency" of mediation could be measured by respondents differently (by time, profitability, client-satisfaction, etc.).

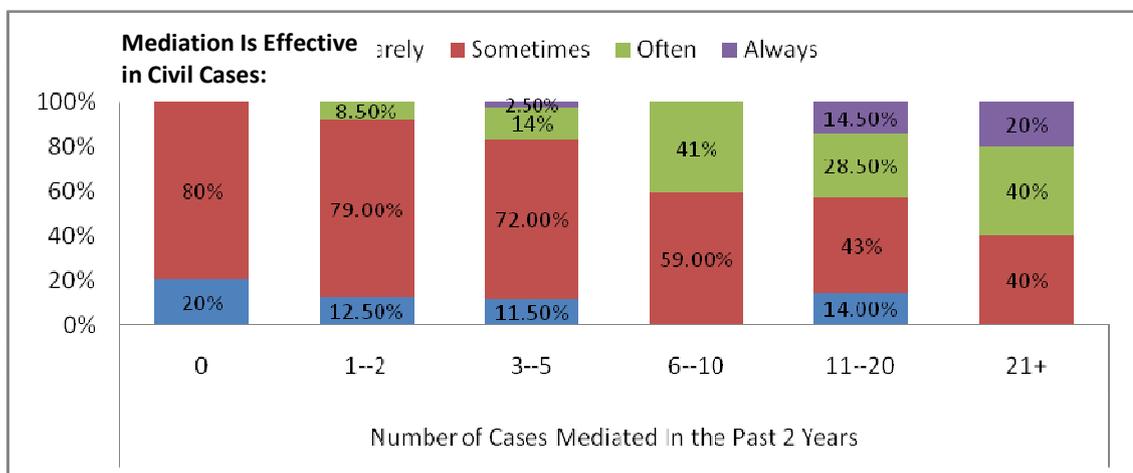
¹⁰⁴ Never=1; rarely=2; sometimes=3; often=4; and always=5. The mean was 3.14, and the median was 3 (Standard deviation = 0.631)

¹⁰⁵ On the one hand, among respondents trained in mediation, none found mediation to be *never* or *rarely* effective, compared to almost 10% of respondents without mediation training who hold such views. On the other hand, 56% of attorneys trained in mediation *often* or *always* view it as effective, compared to 14.5% of those without mediation training (N=123). See Figure 3 in Appendix 1 for the complete results. These findings complement Riskin's argument regarding the importance of attorneys' experience in mediation to increasing the use of mediation (Riskin, *supra* note 91).

¹⁰⁶ Results were similar to those reported regarding mediation training with respect to the negative views (rarely or never) and while 45.5% of those who served as mediator found mediation to be *often* or *always* effective, only 17% of those who had not served as mediators expressed such views (N=123). See Figure 3

favorable views of the effectiveness of mediation. Interestingly, while only a marginally significant correlation was found between views on the effectiveness of mediation and reporting to have previously used mediation,¹⁰⁷ the number of mediated cases was significantly correlated with those views. Figure 5 illustrates that generally, attorneys who have mediated more cases express more positive views on the effectiveness of mediation.

Figure 5: Correlation between Number of Cases Mediated and Views on the Effectiveness of Mediation



In chi square test: $p=0.040$, linear by linear association= 4.230, $df=1(N=101)$

(Notice the general decrease in the percentage of attorneys who believe that mediation is only *rarely* or *sometimes* effective in favor of an increase in the percentage of respondents who believe that mediation is *often* or *always* effective). If causality exists in this case, it remains to be determined in which direction it operates. Since, as it was observed earlier, more experienced lawyers generally mediate more cases (See Figure 3

in Appendix 1 for the complete results. These findings too are consistent with Riskin's argument (*id*) about the importance of attorneys' service as mediators for increasing their appeal to mediation.

¹⁰⁷ In a Chi-Square test, $p=0.077$, linear by linear association = 3.130, $df=1$ ($N=123$). No pattern was observed in the correlation, but this is perhaps also due to the very small sample of litigators who have not used mediation ($N=14$).

and Table 3 above), it is not surprising that they were also observed to hold more favorable views about the effectiveness of mediation. Finally, it is worth noting that virtually no correlation was observed between gender¹⁰⁸ or firm size¹⁰⁹ and views on the effectiveness of mediation.

b. Voluntary Inclusion of Mediation Clauses

Another indicator of attorneys' opinion of mediation is whether they include mediation clauses in the contracts they draft. Arguably, attorneys who hold favorable views regarding the effectiveness of mediation would be more inclined to include mediation clauses in contracts they draft. The results are quite clear on this matter: out of the 80 respondents who draft contracts¹¹⁰ the overwhelming majority (75%) are reluctant to include in them a mediation clause (50% indicated they *never* include a mediation clause, and 25% reported they only *rarely* do so).¹¹¹

Further insight into attorneys' general views on mediation can be discerned from the degree to which different factors influenced their decision *not* to use mediation. This is

¹⁰⁸ In Person chi square test: $p=0.901$, linear by linear association = 0.014, $df=1$ ($N=123$). Generally, gender was not found to be correlated to particular views on mediation. It is interesting to mention in this respect a study of American law students which found that while upon entrance to law school male students were likely to hold a "rights-oriented" approach and female students were characterized by a "care perspective", by the end of the first year "there was no significant difference between the rights orientations of women and men. See: Janoff, *supra* note 90, at 218, 232.

¹⁰⁹ In Pearson chi square test: $P=0.935$, likelihood ratio= 5.593, $df=12$ ($N=123$)

¹¹⁰ As expected from a sample of litigators, 43% of the respondents reported that they do not draft contracts.

¹¹¹ Only 3.5% of the respondents said that they *often* include a mediation clause in contracts, and 21.5% said they *sometimes* do so. While attorneys' take on the matter is probably influenced by their clients, given the extensive influence of lawyers on their clients' legal decision making (see Chapters III and VIII), it is probable that the responses reflect the attorneys' own views to a large extent. The rates remain similar when examining only the responses of more experienced lawyers, with one slight shift when focusing on attorneys with over 10 years of experience. Then, the rate of attorneys who *sometimes* include a mediation clause in contracts increases from 21% to 35% (respectively reducing the rate of those who *rarely* include such clauses from 25% to 12%).

the topic of Chapter VII, which investigates the existence of barriers to attorneys' use of mediation.

VII. BARRIERS TO ATTORNEYS' DISCUSSION AND USE OF MEDIATION

The analysis in this section is based primarily on a long set of questions in which attorneys were asked to rate the degree or the frequency at which different factors had previously affected their decisions *not* to use mediation. This particular formulation was used in order to identify factors that act as barriers to attorneys' use of mediation. Given the phrasing of the question, the analysis here is sometimes limited only to the influence of these factors on the decision *not to mediate*, as opposed to the more general question of *whether* to mediate.

A. Clients' Refusal to Use Mediation

Attorneys provide legal services to their clients. It is therefore possible that the real barrier to using mediation is actually the unwillingness of parties to use mediation. In fact, as mentioned in Section III(B), only disputants are required to attend the IAC session, suggesting that the system designers assumed that only disputants' opinions about mediation need to be changed. The data, however, do not support such an explicit assumption. Only 20.5% of the respondents reported client refusal as a factor that *often* causes them not to use mediation, whereas 46.5% admitted that their clients *never* or *rarely* refuse to use mediation (33% said that their clients *sometimes* refuse to do so, N=103).¹¹² This finding is important: it indicates that more often than not disputants do

¹¹² Responses to this question were not correlated to whether or not the respondent has used mediation in the previous 2 years: Chi-square test: $p=0.872$, linear by linear correlation = 0.026, $df=1$ (N=103).

not act as barriers to using mediation after it has been suggested.¹¹³ Something else, or someone else, accounts for the low demand for mediation. If policy makers are intent on increasing the demand for mediation in Israel, they ought to find what or who constitutes this barrier.

B. Lack of “Good” Mediators in the Market

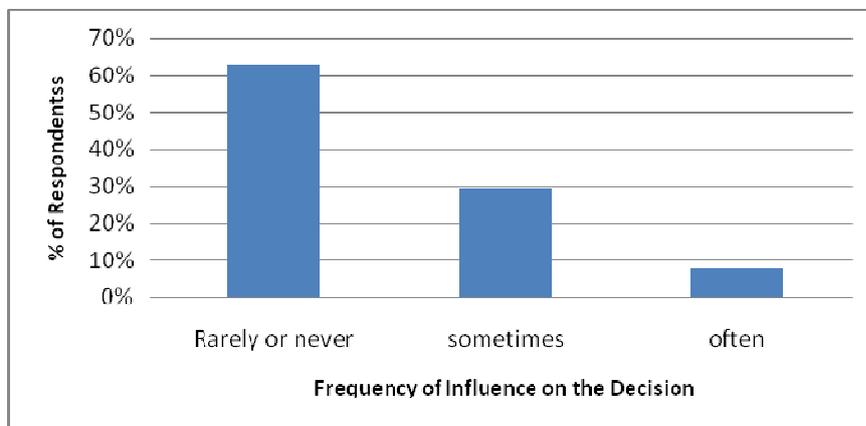
The IAC system designer cited a second significant barrier to the use of mediation: the professional level of mediation services¹¹⁴ (the absence of “good” mediators in the market).¹¹⁵ Arguably, if the professional level of mediation services provided is low, this factor alone could account for the difficulty in implementing mediation in Israel. This conclusion, however, seems unwarranted: a very definite figure of 63% of the attorneys *rarely* or *never* considered the professional level of mediators in the market as reason not to use mediation, while only 7% identify this factor as a real barrier that *often* causes them not to use mediation (N=92, see Figure 6). This important finding again undermines one of the fundamental working assumptions of the IAC Commission. The data reveal that as far as attorneys are concerned, the mediators’ professional level had little influence on the referral of cases to mediation. Considering the great degree of control attorneys have on the decision to use mediation (see Chapter VIII), there is reason to believe that the effect of this finding extends beyond the mere opinion of lawyers.

¹¹³ One might argue that the fact that parties do not *ask* their attorneys to use mediation is a barrier in itself. However, this argument can be countered by a general response regarding the client-attorney relationship: clients often do not know what legal (or other) mechanism they should use in a certain case, and turn to their lawyer for a professional counsel.

¹¹⁴ See Chapter III, and particularly the text associated with notes 25-26 *supra*.

¹¹⁵ See the discussion in Section VIII(B)(2) about what the attorneys’ views as desirable traits for a mediator and compare Hensler’s criticism of the search for “good” mediation, *supra* note 44.

Figure 6: Lack of Good Mediators in the Market Influenced the Decision not to Refer Cases to Mediation



C. The Structure of the Legal System and Actors in the Market

In addition to the legislative developments described in Chapter III, the structure of the legal regime and its principal actors might also affect the rates at which attorneys use mediation. Generally, the results indicate that attorneys report having experienced a fairly positive climate for mediation: structural considerations, as well as the positions of the court, law firm’s management and insurance companies do not seem to have a significant deterring effect on attorneys’ referral of cases to mediation.

If mediation agreements are harder to execute than court decisions, this difficulty would undoubtedly function as a barrier to using mediation. However, the results indicate that this is not a barrier: roughly 90% of the respondents (whether the results include only respondents who used mediation in the past or all respondents) agree that this factor *rarely or never* influenced their decision not to use mediation.¹¹⁶ Likewise, the inability

¹¹⁶ This finding is consistent with the legislative amendment that allows parties to file mediation agreements to the court in order to grant them the status of a judicial decision (see *supra* note 24 and the text associated with it. The additional “transaction costs” associated with certifying the agreement in courts seem to be negligible.

to create precedents in mediation had virtually no effect on attorneys' decision (93% said it had *little or no effect*).

Similarly, the attorneys' reports are quite conclusive in suggesting that Courts' and law firms' positions on mediation do not function as barriers to attorneys' referral of cases to mediation.¹¹⁷ Evidently, 95% of the respondents confirmed both that they were *rarely* or *never* induced not to use mediation because the court discouraged it,¹¹⁸ and that their firm's position on using mediation had *little or no effect* on their decision.¹¹⁹

D. Negative Experience with Mediation in the Past

As mentioned in Chapter III, the Commission identified the dissatisfaction of attorneys with mediation services as one of the main factors that accounts for the low rate at which mediation is used in Israel. It is therefore interesting that more than 75% of the respondents said that negative past experience with mediation had *little or no effect* on

¹¹⁷ An additional possible actor in the market that could act as a barrier to using mediation is insurance companies. Insurance companies often bear the financial burden of their clients' legal proceedings and their interests are often not aligned with those of the insured. As a result, they have the incentive to influence legal decision making, either directly by involvement in the process or indirectly, by setting insurance premiums accordingly. Sternlight points to several ways in which the interests of the insurance company may diverge from those of the insured, such as: "the insurance company is only concerned with short term losses up to the policy limit, the insurance company may be concerned with how a particular result will affect other cases, and the principal will have concerns not shared by the insurance company such as protecting her reputation." (Sternlight, *supra* note 46, at n.156). See also: Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlements*, 44 UCLA L. Rev. 1, 18, 26, 50, 59 (1996) (discussing the effect of insurance companies on litigation and settlement rates and outcomes). Unfortunately, only 48 respondents (34% of the sample) thought that they could express a view on the issue. Out of that sub-sample, almost 75% said that this factor *never* or *rarely* affected their decision. The low response rate to this question and the generally reported *no* (or *low*) effect of insurance companies on the decision to use mediation suggest that this factor is for the most part irrelevant. Further investigation is required to answer the question whether a policy action is warranted because one out of four attorneys whose response to the question was *sometimes* (20.5%) or *often* (6.5%) were deterred from using mediation due to the discouraging influence of insurance companies.

¹¹⁸ The question phrasing can accommodate two interpretations: a) that judges do not discourage using mediation, and b) that attorneys are not influenced by such discouragement. However, it is plausible that respondents referred in their answer to the first option.

¹¹⁹ These results could be interpreted in one of two ways. Either law firms did not discourage attorneys from using mediation, or alternatively, the firm's policy (whatever it may be) did not affect the respondents' decision. See note 138 *infra* discussing Gilson & Mnookin's idea on the diverging interests of the firm and the lawyer.

their decision not to use mediation. Only 3% said it *greatly affected* them, and 21% were *somewhat* influenced by it (N=101). These results are very intriguing. If they indicate that attorneys generally have not had negative experiences with mediation, then the Commission possibly erred in identifying the dissatisfaction of attorneys with mediation services in Israel as a barrier to its wide adoption.¹²⁰ Alternatively, and arguably more probable, one could believe that attorneys are reluctant to use mediation, but that the causes for their reluctance are not rooted in the quality or the nature of the process itself (as supported also by their views regarding the professional level of mediators that were discussed in Section VII(B)). Rather, attorneys' reluctance to use mediation is probably rooted in other factors. If this is true, then in order to effectively change the mediation referral practices, it is necessary to trace the actual barriers to attorneys' use of mediation.

It is interesting to note that responses regarding the effect of previous negative mediation experiences were not correlated to whether mediation had been used in the past¹²¹ or to the extent to which it was used.¹²² At the same time, they were significantly correlated to views regarding the effectiveness of mediation. It was found that the more favorable one's views are on the effectiveness of mediation, the less one reports that previous negative experience had influenced one's decision not to use mediation. Clearly, the data does not establish causality nor suggest which factor is the cause and which the effect; however, it does indicate that the overall impression from the mediation

¹²⁰ See Chapter III and particularly the text associated with note 27 *supra*.

¹²¹ Respondents were asked whether their own negative past experiences or the experiences of others that they have heard of affected their decision. In Chi-Square test, N=101, df=1, P = .501, linear by linear association= 0.452.

¹²² In Chi-Square test, N=101, df=1, P = .982, linear by linear association= 0.001.

experience is related to its *perceived* effectiveness.¹²³ The elements that influence the effectiveness of the process in the eyes of the lawyers remain to be explored.¹²⁴

E. Preference for Mediation Compared to Other Dispute Resolution Methods

In deciding whether to refer a case to mediation, an attorney is expected to consider, among other things, both the compatibility of mediation for the dispute at hand and the desirability of using alternatives, namely, other dispute resolution methods. Three out of four attorneys said that they *often* (23%) or *sometimes* (52%) had not used mediation in the past because the case at hand was not suitable for mediation. Although arguably some cases are indeed not suitable for mediation, it is worth examining *why* lawyers identify certain cases as being more suitable for resolution in other means. Generally, it was found that while attorneys do not express a preference for adjudication, prospects of adjudication-related settlement and preferences for direct negotiations with the other party did have an influence on their decision not to refer a case to mediation.

a. Lack of Preference for Adjudication and Third-Party Decision-Making Power

Due to the centrality of courts in the dispute resolution spectrum in Israel it was expected that attorneys will have a predisposition to adjudication (not necessarily shared by their clients).¹²⁵ Contrary to expectations, however, the vast majority of the sample (83.5%) said that personal preference for adjudication had *little or no effect* on their

¹²³ Figures 4 and 5 in Appendix 1 demonstrate the two possible causal directions of this correlation.

¹²⁴ As will be discussed in Section VII(B)(2), it is possible that due to their “standard philosophical map,” (see particularly the texts related to note 180 *infra*) attorneys enter mediation processes with a skeptical view about the usefulness and appropriateness of the process. If this is true then it is possible that attorneys’ subjective negative experiences in mediation are sometimes the product of their own biases more than of the actual process that takes place (or that has the potential to take place).

¹²⁵ See Sternlight, *supra* note 46, at 322-325 and n. 187-188.

decision not to mediate,¹²⁶ while only 5.5% said it influenced them *greatly* and 11% reported it *somewhat* influenced them (N=108). The fact that lawyers do not report having an inherent preference for adjudication seems encouraging, in itself, for the prospects of the future incorporation of different alternative forms of dispute resolution into the Israeli legal system. The results go further, disproving the hypothesis that lawyers generally resent using dispute resolution processes in which the third party has no power to decide the case. In other words, as far as attorneys are concerned, the fact that a mediator, unlike other third parties – such as a judge or an arbitrator – has no power to decide the case, but rather can only to facilitate consensual settlement, did not act as a barrier to using mediation: only 4.5% of the respondents indicated that the mediators' lack of decision-making power *greatly* affected their decision not to refer their clients to mediation. The majority of the sample (62%) stated that this issue had *little or no effect* on their previous choices not to use mediation, and about a third of the lawyers said it *somewhat* affected them.¹²⁷ At the same time, as will be discussed extensively in Section VIII(B)(2), attorneys do exhibit a definite preference for the evaluative mediation style (as opposed to facilitative or transformative styles), expecting that the mediator would give the parties his evaluation of the merits of the case.

It appears, therefore, that the attorneys' perception that a case is not suitable for mediation does not stem from a general rejection of facilitated consensual dispute resolution. It then becomes intuitive to examine whether attorneys prefer other consensual settlement methods over mediation.

¹²⁶ Whether they do not prefer to litigate or have such a preference but are not influenced by it remains unknown.

¹²⁷ Since the survey did not examine the attorneys' views regarding arbitration, it is not possible to compare these results to their views regarding a non-adjudicative but completely discretionary process

b. Preference for Direct Negotiations and Litigation-Related Settlements

Mediation competes not only with the antithetical trial option but also with other consensual dispute resolution methods. Two principal competitors are direct negotiations and adjudication-related settlements. Like mediation, these methods are consensual, but unlike mediation, they are independent, rather than facilitated. The former presents a challenge to mediation if lawyers view mediation as a variation on negotiations,¹²⁸ and the latter represents a competition if attorneys consider mediation as a form of a settlement mechanism. As Figure 7 reveals,¹²⁹ the prospects of resolving the case in direct negotiations¹³⁰ are more likely to deter attorneys from referring a case to mediation than the prospects for settlement in the pre-trial or trial.¹³¹

Notwithstanding the greater deterring effect of negotiations, it should not be overlooked that 4 out of 10 lawyers *often* or *sometimes* do not use mediation due to settlement prospects in adjudicative processes. Due to the small sub-samples sizes, it was not possible to determine whether the results vary by practice area.¹³²

¹²⁸ “[M]ediation is an effective alternative for parties who are blocked in their abilities to negotiate directly” (Edward. E. Dauer, *MANUAL OF DISPUTE RESOLUTION: ADR LAW AND PRACTICE* §11.10 11-28 (1996)).

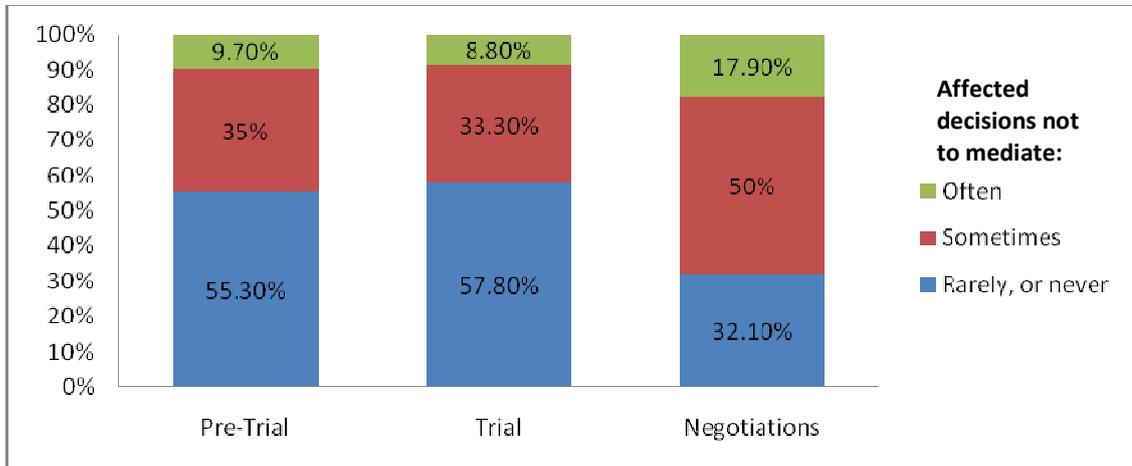
¹²⁹ The three questions were answered by samples of slightly different sizes, based on relevance to their experience: Pretrial – N=103; Trial – N=102; Negotiations – N=112).

¹³⁰ The relevant question in the survey referred to “a similar or better agreement” that “can be reached in direct negotiations with the other party”. Read independently, this question could be interpreted as referring to either pre-litigation negotiations or negotiations taking place after the lawsuit was filed. However, since the question appears in the same cluster of questions immediately after having inquired about litigation-related settlement prospects, it is assumed that the most responses were directed at the latter alternative.

¹³¹ If the reported views are based on how mediation is differentiated from the competing dispute resolution method then the findings suggest that more attorneys perceive mediation as a form of facilitated negotiation than a form of settlement.

¹³² Some practice areas were represented by very small sub-samples (for example: vehicular injury – 4 lawyers, environmental law – 2 lawyers, construction – 6, Intellectual Property – 7) rendering any statistically significant determination impossible. The only practice area in which marginally significant results were observed is labor law: 73% of the sub-sample said that prospects of settlement either in pre-trial or in trial *rarely* or *never* influenced their decision not to use mediation (N=15, in a Chi-Square test for pre-trial: df=1, P = 0.177, linear by linear association = 1.826; and for trial: df=1, P = 0.12, linear by linear association = 2.414. The difference compared to the general sample could be attributed to the prevalent use of mediation in labor settings.

Figure 7: Decision Not to Mediate Due to Prospects of Trial-Related Settlement or Similar/Better Negotiated Agreement



Possibly, these results indicate that attorneys believe that mediation does not have a substantial added value particularly compared to direct negotiations, but also, to some extent, compared to trial-related settlement. This interpretation gives rise to the hypothesis that many attorneys are not motivated to use mediation in part because they do not consider its unique characteristics as an important enough reason, in and of itself, to use mediation.

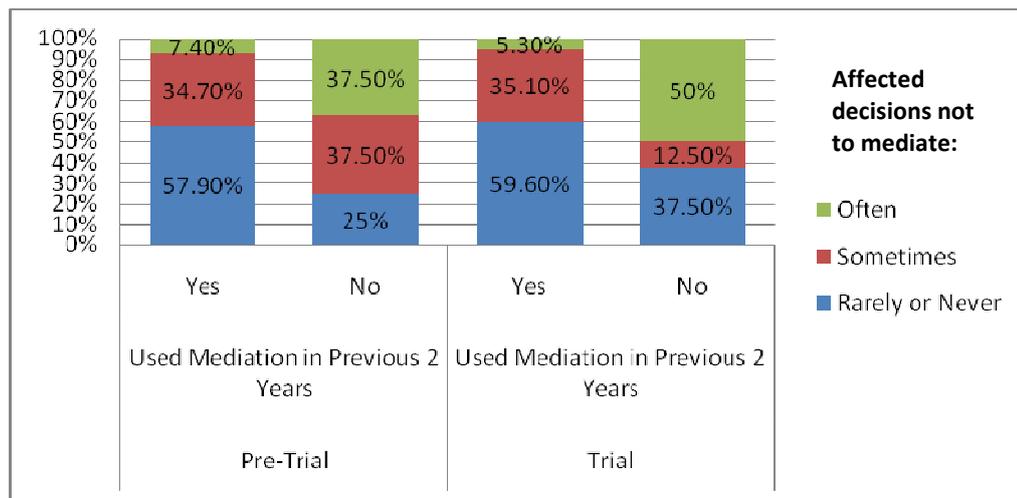
Interestingly, the influence of adjudication-related settlement prospects on the decision not to use mediation was correlated to whether attorneys had mediation experience.¹³³ As Figure 8 illustrates, attorneys who had used mediation in the previous two years were *less* likely not to refer a case to mediation due to the possibility of settling it in either the pre-trial¹³⁴ or the trial.¹³⁵ Since the attorneys were asked whether they did

¹³³ It is worth mentioning that responses to the question regarding the prospects of direct negotiations were *not* significantly correlated to either the existence and extent of past mediation experience or to views on the effectiveness of mediation. In other words: more positive views on the effectiveness of mediation were *not* correlated to a less frequent consideration of the prospects of direct negotiations, to the existence of past experience in mediation, or to a higher number of mediated cases.

¹³⁴ Chi-Square test: $p = 0.010$, linear by linear association = 6.563, $df = 1$ (N=103).

not refer a case to mediation due to the prospects of its settlement, it seems more probable that if causality exists, then it operates so that the lack of mediation experience leads to less referral of cases to mediation due to settlement-prospects.

Figure 8: Past Mediation Experience and Consideration of Settlement Prospects When Deciding Whether to Mediate



These data imply that attorneys who gain experience in mediation might better evaluate the difference between mediation and settlement as part of adjudication and perhaps recognize also the added value of mediation. At the very least, it suggests that attorneys who have mediation experience do not believe that settlement prospects are, in and of themselves, a reason not to use mediation. This conclusion is reinforced by the fact that the tendency not to consider the prospects for adjudication-related settlement when deciding not to use mediation generally increased as the number of cases the attorney had mediated increased (The strong correlation is presented in Table 3 in Appendix 1).

¹³⁵ Chi-Square test: $p=0.006$, linear by linear association = 7.630, $df=1$ (N=102).

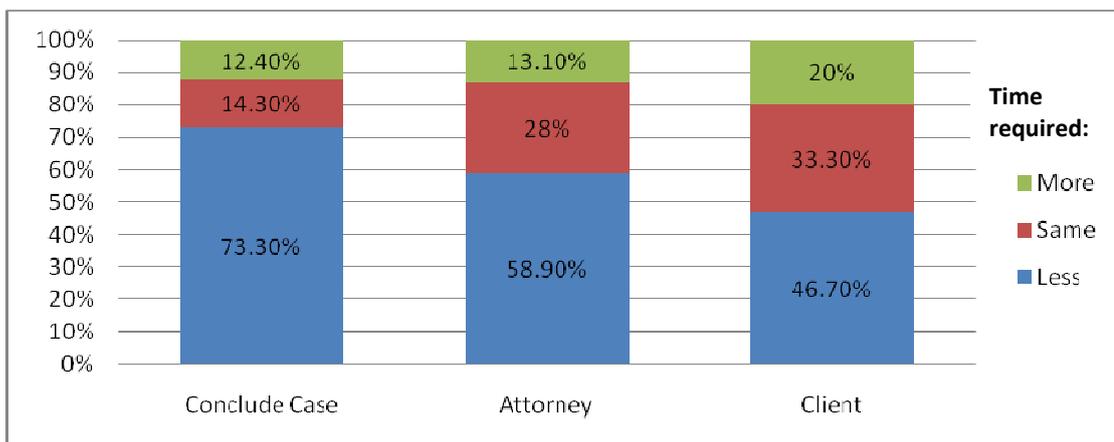
c. Resources: Time and Profits

Arguably, the financial gains in mediation, compared to other dispute resolution methods, could affect attorneys’ views of mediation. Two major factors that affect the attorneys’ financial gains are the time they are required to spend working on the case and the profits they make.

a. Time

As a resource, “time” can be divided into three different categories: the time that is required to conclude the case; and the time that the attorney and the client each invest in the case. Figure 9 shows that the majority of attorneys thought that, compared to adjudication, using mediation results in *less* time required to *conclude the case* (73.3%, N=105) and *less* time invested by *attorneys* working on the case (59%, N=107). Almost half of the lawyers in the sample (46.5%, N=105) believed that *clients* also need to invest *less* time in mediation.

Figure 9: Time Required for Mediation Compared to Adjudication



Looking at Figure 9, several interesting observations emerge. First, there is a noticeable difference in the number of lawyers who believe that it takes less time to

conclude a case in mediation and the rate of lawyers who think they themselves have to invest less time in the process. It seems unlikely that lawyers actually have to invest more time in a process that generally takes less time, arguably requires less “paper-work”, and reportedly results in smaller profits to the attorneys than does adjudication (see Section VII(F)(2)). Rather, this difference should probably be attributed to a bias of self-reported personal experiences, as well as to a reluctance to admit to a smaller workload in mediation, due to its related financial implications.¹³⁶

Second, although mediation is considered to be a principal-centered process, only 20% of the attorneys reported that clients are required to invest *more* time in mediation compared to adjudication. As Section VIII(A)(1) discusses, these figures, and other related factors that shed light on clients’ involvement in mediation, indicate that in many cases, attorneys remain the central figures in the mediation process. On the other hand, it is also possible that even when the client is highly involved in the mediation process, overall he still needs to invest less time than in trial.

The generally perceived shorter time that is required to conclude a case using mediation can affect different aspects of the attorneys’ view of mediation, one of which is their profits, as a product of the billing model that they use. Naturally, when billing increases solely on the basis of the hours spent working on the case (the billable hours’ model) the shorter time span can reduce the attorneys’ immediate profits. In contrast, if an attorney is paid by the outcome, by a contingency fee,¹³⁷ or while taking other factors

¹³⁶ See discussions in Chapter VII(F)(2) *infra* and the possible explanation in the text related to note 171.

¹³⁷ Riskin notes that also in contingency-fee model mediation may entail a related financial loss for the lawyer, since in mediation, while settling the dispute, the parties may wish to include non-material considerations such as trading money for respect or recognition (*supra* note 38, at 49)

into account in a retainer model, the shorter time spent working on the case can translate into greater profits.¹³⁸

b. Short and Long Term Profits

It is commonly asserted that “referral [of a case] to mediation would cost the lawyer all or part of his fees”.¹³⁹ The results support this assertion only to a certain extent. With respect to both short- and long-term profits, approximately 40% of the sample responded that they profit *less* from mediation compared to adjudication; roughly 40% said they earn the *same* whether they use mediation or adjudication, and about 20% said they earn *more* if they mediate a case (N= 68 and 64, respectively). No statistically significant difference was found in the distribution of the answers between lawyers of different firm sizes, experience,¹⁴⁰ or practice area.¹⁴¹ However, as Figure 10 illustrates, the proponents of mandatory mediation can be reassured by the finding that attorneys who have mediated more cases generally report more favorable views regarding their long-term profits from mediation (the apparent discrepancy in the responses of attorneys who have

¹³⁸ See Riskin, *supra* note 35, at 48-49; Sternlight *supra* note 46, at 320-321 (discussing the interplay of the financial incentives based on the fees-model); Gilson & Mnookin, *supra* note 59, at 548, 530-533 (discussing agency costs by the billing model, introducing the organizational aspect: possible divergent interests of the attorney working on the case and his employing law firm: while the attorney might be personally incentivized for a short-term increase in the number of his billable hours in order to meet his “quota”, the firm might be more interested in long term profits and retention of clients. The data does not provide direct insight into this issue, although generally most attorneys said that they did not refrain from using mediation due to their firm’s policy (See discussion in Chapter VII(C)).

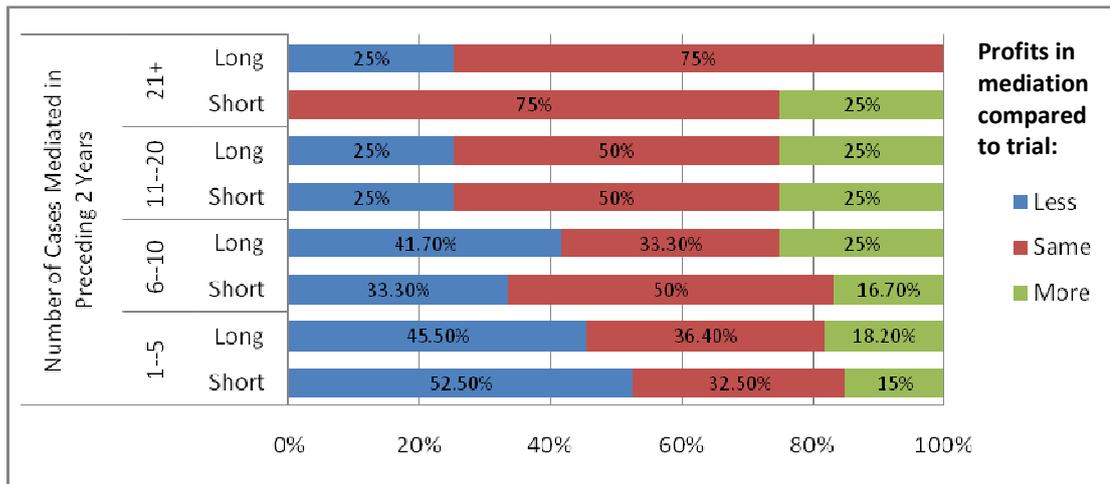
¹³⁹ Riskin, *supra* note 38, at 42.

¹⁴⁰ Some interesting, albeit not statistically significant, variation exists between the views of attorneys with more or less experience practicing law regarding views on their *long-term* profits in mediation compared to litigation. Generally, attorneys who have practiced over 5 years exhibit greater correlation to a favorable view on long term profits from mediation than attorneys who have practiced fewer than 5 years. See Table 4 in Appendix 1 for the complete analysis. (In Pearson Chi Square test: df=2, P=0.068, Likelihood ratio = 5.391 (N=64).

¹⁴¹ When checked across different practice fields, the only field that presented statistically significant different rates with respect to long term profits (compared to the average of the population) was labor law: less = 18%, same = 45.5%, more = 36.5%. Df=1, P = 0.032, Linear by Linear Association= 4.589 (N=64). This suggests that generally, results did not vary according to practice field (as mentioned earlier, these results should be taken with a grain of salt, since for many practice fields, the N was too small to make any statistically significant determinations.

mediated more than 20 cases should be regarded cautiously, since they are based on the responses of four attorneys).¹⁴²

Figure 10: Views of Short/Long Term Profits in Mediation Compared to Adjudication by Experience in Mediation



An interesting finding of this study is that despite the fact that many attorneys report earning less money in mediation compared to adjudication, an absolute majority of almost 95% of the respondents said that this factor had *little or no effect* on their decision not to use mediation. These intriguing results, and their possible implications on the referral of cases to mediation by attorneys, are discussed in Section VIII(B)(1).

¹⁴² Only the correlation to perception of long term profits is statistically significant: in a Chi-Square test: $p = 0.043$, Linear by Linear Association= 4.076, $df=1$ (N=64). (Short term: $P= 0.498$, Linear by Linear Association= 0.460, $df=1$ (N=68))

VIII. CONTROL AND AGENCY IN THE DECISION TO USE MEDIATION

Undisputedly, lawyers' economic incentives and psychological characteristics are different from their clients'.¹⁴³ As Macaulay puts it, "[o]nly the most innocent could think" that these differences do not affect their practice; rather, most lawyers "will be more eager to do things which they find satisfying and not distasteful and which will contribute to their income both today and in the future."¹⁴⁴ The question then arises whether these differences cause disputes to be taken to trial when clients could have benefited from mediation.¹⁴⁵ To answer this agency question, it is important to examine three elements. First, whether attorneys hold the power to determine if mediation is used. Second, whether the factors that influence the attorneys' decision are not oriented toward the best interest of their client but are rather (at least partially) a product of the attorney-agent's preference. Third, whether clients would have wanted things to be done differently had they not been advised by someone subjected to an agency problem. Since this study focuses on attorneys, it discusses only the first two elements.

In the similar context of trial-related settlements, it is recognized that clients are largely dependent on their attorneys for an evaluation of the prospects of winning the case, and that attorneys have a great deal of influence, or even control, over a client's decision

¹⁴³ At the very least, there is evidence to suggest that lawyers approach issues (and hence also decisions) differently from the average person (see Section VIII(B)(2) and more particularly, the works cite in note 180 *infra*). Due to the illusive nature of agency problems, it is difficult to collect direct empirical evidence on its existence.

¹⁴⁴ Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC. REV., 115, 116-117 (1979)

¹⁴⁵ Sarat & Felstiner, *supra* note 39, at 125 argue, in the conclusion of their study of attorney-client interaction in divorce litigation, that "Lawyers and clients usually have different agendas, expectations, and senses of justice... Every conference is thus to some extent competitive: Each of the participants sets out to fulfill their own agenda and generally only provides what the other wants on demand."

to pursue settlement.¹⁴⁶ The data presented in this Chapter demonstrate that the same is true also for mediation: attorneys have a dominant role in the decision to use mediation. Moreover, their interests and preferences, at least potentially, sometimes diverge from their clients' best interests, and although they do not necessarily admit to it, they could be subject to agency problems.

If an agency problem does indeed exist, it is not necessarily the product of malice or an explicit conflict of interest. Rather, it may be that, due to their “standard philosophical map”¹⁴⁷ and customary practices, lawyers tend to see the mediation process and the solutions it produces as a threat to their professional integrity in serving the best interests of their *clients*.¹⁴⁸

To examine whether an agency problem exists, the responding attorneys were presented with a series of questions that examine both the degree of control and the influence they exert over their clients in the process of deciding whether to use mediation, as well as the factors that they consider in giving counsel to their clients on the matter.

A. Power and Influence over the Decision to Use Mediation

a. Attorneys' Overall Influence in Mediation

As mentioned earlier, the litigation process usually requires clients to rely heavily on their lawyers. The data show that attorneys retain their strong influence in mediation: over 80% of the attorneys surveyed did not feel they exerted less influence in mediation

¹⁴⁶ Korobkin & Guthrie, *supra* note 59, at 81; Gilson & Mnookin go further to say that it is often the lawyers – who benefit from prolonging the contention to run up large legal fees – that are in control, and not their clients who have to pay the bill (*supra* note 59, at 528).

¹⁴⁷ See *infra* in Chapter VIII(B)(2).

¹⁴⁸ Riskin, *supra* note 38, at 45, 49, 51. As a side note, it should be noted that these reported views support the suggestion that even if an agency problem exist, attorneys do believe (perhaps in a biased erroneous manner) that their decisions are guided by what is best for their *clients*.

processes than in adjudication. Most of them (58.5%) felt that they have the *same* degree of influence in mediation as in adjudication, and 24.5% thought they exert even *greater* influence in mediation (compared to 17.5% who said that they had *less* influence in mediation, N=103).

These data also shed some light on the role of the client-principal in the mediation process. The fact that less than a fifth of the attorneys reported having less influence in mediation should be read in conjunction with the data reported in Figure 9 regarding the time clients invest in mediation and the degree of their involvement in the process. As discussed there, about 4 out of 5 lawyers said that their clients invest *less* or the *same* time in mediation compared to adjudication. Additional data that could explain these figures are inconclusive, but one plausible explanation is that most clients are not greatly involved in the mediation process. However, 51.5% of the attorneys reported that their clients are *more* actively involved in mediation processes compared to adjudication. At the same time, almost 50% of the attorneys report a *similar* (43%) or *smaller* (5.5%, N=105) degree of involvement of their client in mediation compared to trial.

At least from the lawyers' point of view, these results support the hypothesis that mediation often remains a lawyer-dependent process. They, therefore, raise some doubts regarding the actual accomplishment of the often cited advantage of mediation, namely, that it results in greater principals' self-determination and strengthens the autonomy of the parties compared to adjudication.¹⁴⁹ These results are consistent with Welsh's

¹⁴⁹ These arguments are generally made by those who adhere to facilitative mediation models, who identify "promoting self-determination of parties and helping the parties examine their real interest and develop mutually acceptable solutions" as the "primary objectives of mediation" (Kimberlee K. Kovach & Lela P. Love, 'Evaluative' Mediation is an Oxymoron, 14 ALTERNATIVES TO HIGH COST LITIG. 31, 32 (1996); see also: Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks fo Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 88(1996). However, many Ethical codes for mediators also describe party self-

observation that “the originally dominant vision of self-determination, which borrowed heavily from concepts of party empowerment, is yielding to a different vision in the court-connected context” and that “[p]erhaps not surprisingly, this vision is more consistent with the culture of the courts.”¹⁵⁰

b. Power over the Decision to Use Mediation

The survey results draw a clear picture of the decision dynamics: the majority (70.5%) of the respondents who were required to advise their clients whether to use mediation in the past reported that their clients *often* (56%) or *always* (14.5%) accepted their advice. Only 7% said their clients *never* accepted their advice on the matter (The remaining respondents said their clients *sometimes* accepted their advice, N=118).¹⁵¹ Similarly, among the attorneys 27 attorneys whose clients participated in an IAC session, 85% said that their clients *never* pursued mediation against their advice, and the remaining 15% said they did so only in *a few cases*.¹⁵² Combined with the previously discussed finding that almost half of the respondents indicated that they *never* or *rarely*

determination as the fundamental principle of mediation (see review in: Welsh, *infra* note 150, at 3, n.1). To the degree that the satisfaction of clients is in part a product of their involvement in the process (as derived from the idea of parties’ self-determination and autonomy in mediation), it is interesting to note that 65% of the attorneys do *not* believe that their clients are more satisfied by mediation processes than by adjudication (15% of the respondents reported that their clients were *less* satisfied from mediation than from adjudication; 50% said that their clients were satisfied to the *same* degree by the two processes.) while 35% said their clients are more satisfied in mediation (N=94).

¹⁵⁰ Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?* 6. HARV. NEGOT. L. REV. 1, 4 (2001).

¹⁵¹ Out of the 8 respondents who said that their clients *rarely* or *never* accepted their advice to mediate, only 1 has not used mediation in the past 2 years, suggesting that it was not a lack of their attorneys’ experience or familiarity with mediation that lead the clients to reject their attorneys’ advice on the matter.

¹⁵² It is unclear whether the responding attorneys never advised their clients not to proceed to mediation after the IAC session, or that their clients never proceeded to mediation against their counsel’s explicit advice.

did not to use mediation because of their clients' refusal,¹⁵³ it seems that more often than not, clients follow their attorneys' advice on resorting to mediation. These results are consistent with the literature, which observed that generally, after having hired an attorney for his expertise, clients are predisposed not to question his expert opinion.¹⁵⁴

The context and settings of the decision regarding using mediation, and the nature of the considerations that attorneys indicate have influenced their decisions in the past, provide further insight into the degree of influence attorneys have over clients. Arguably, the more legalistic the context, settings and considerations are, the more influence the attorneys will have on the decision.

i. Context and Setting of the Decision to Use Mediation

The responses to the survey portray a reality in which the idea to use mediation is almost always raised either by the court or the attorneys.¹⁵⁵ In both cases, the context and setting of the decision reside in the lawyer's professional domain, thus arguably strengthening the reliance of the client on the counsel's expertise, thereby creating the potential for an agency problem.

The results confirm the hypothesis that clients hardly ever initiate a discussion with their lawyers about the possibility of using mediation. Three quarters of the respondents reported that their clients *never* (21%) or *rarely* (53%) independently asked them to

¹⁵³ 47% of the respondents said they *never* or *rarely* decided not to use mediation because their clients refused to do so, 32.5% said this consideration *sometimes* influenced their decision, and 20.5% said this was *often* the case.

¹⁵⁴ Sternlight, *supra* note 46, at 318-320 and nn.175-176. Suchman & Cahill further explain that "clients face a complex, turbulent, and unpredictable social environment, and they seek legal counsel primarily as way of fending off cognitive chaos." (Mark C. Suchman & Mia L. Cahill *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 LAW & SOC. INQUIRY 679, 681 (1996))

¹⁵⁵ See Section VI(B) and Figure 3, *supra*.

examine the possibility of using mediation. Only 1% said their clients *often* independently asked them to use mediation, and 25% said they *sometimes* did so (N=133).¹⁵⁶ Indeed, as shown in Figure 4 above, the suggestion to use mediation most commonly originates from the court (the pre-trial judge, the case management judge, the case management department or the panel) or from the attorneys. The fact that 43.5% of the attorneys said that they *never* or *rarely* discuss mediation with their clients if the court has not suggested it¹⁵⁷ further emphasizes the often legalistic context within which the discussion on mediation arises. When mediation is discussed as an alternative to an ongoing adjudication process, which is found in the professional domain of the attorney's legal counsel, it seems plausible that attorneys will exert considerable power over the decision to use mediation.

These figures support the strategy that was chosen by the Commission on Mediation to attempt to increase the demand for mediation by increasing the number of cases that are referred to mediation by the court. At the same time, they also explain that attorneys will remain intrinsically involved in the mediation processes, and that the decision to use mediation will often be made in litigation-related contexts that are generally conducted under the professional auspices of the attorney.

ii. Legalistic Considerations in Deciding Whether to Use Mediation

The legalistic nature of the considerations that affect the decision to use mediation is another indication that the decision to use mediation is often made in the attorney's

¹⁵⁶ These results are consistent with the finding presented in Figure 4, according to which, only 3.8% of the respondents named clients as one of the two figures who most commonly raised the idea of using mediation.

¹⁵⁷ See Section VI(B)

domain, which further suggests that attorneys exert a high degree of influence over their clients in this context.

As Figure 7 demonstrated, approximately 45% of the respondents said their decision to use mediation was influenced by the view that appropriate cases will settle anyway in pre-trial or trial.¹⁵⁸ Similarly, about 40% of the respondents indicated that the fear of providing “free discovery” has influenced their decision not to use mediation in the past.¹⁵⁹ These considerations are clearly trial-oriented, and are customarily determined by lawyers, as part of the professional legal counsel that they provide to their clients. Attorneys’ authority over the meta-language with which issues such as discovery and settlement-prospects are translated into terms that allow for a solution to be found is significant:¹⁶⁰ when such reasons influence or determine the decision to take a case to mediation – attorneys must dominantly influence or control it.

Overall the results demonstrate quite clearly that attorneys both report having a great degree of influence over the mediation process and the decision to use mediation, and are expected to have such influence, due to the legalistic setting in which the decision is often made. Attorneys’ dominant influence is not necessarily a negative thing; often it results in

¹⁵⁸ In fact, 68% of the respondents said that the thought that a similar or better result could be achieved in direct negotiations with the other party has *often* (18%) or *sometimes* (50%) influenced their decision not to use mediation. These data however, seem to be somewhat less indicative of attorney control since it is unclear, due to the phrasing of the question, to which phase in the course of treating the dispute they referred (arguably, at least in earlier stages, direct negotiation are the default way of handling a dispute, which might lead to the simplest, fastest and least costly way of resolving the issue (even if some personal or legal aspects of the dispute are not treated).

¹⁵⁹ More specifically, 7.5% of the respondents said they were *greatly* influenced in their decision not to use mediation by the fear of providing “free discovery, 32% said this consideration *somewhat* influenced their decision, and 60.5% said it influenced them *a little* or *not at all*. 11 additional respondents said that the answer to this question is irrelevant or unknown to them.

¹⁶⁰ Compare: Macaulay, *supra* note 144, at 151

beneficial outcomes for the client.¹⁶¹ In addition, Riskin claims that attorneys will be more inclined to make appropriate referrals to mediation if they can retain some control over the strictly legal work.¹⁶² However, if it is determined that attorneys use their power, consciously or subconsciously, to make decisions that cater to their personal interests and preferences instead of those of their clients then the potential for an agency problem in the decision whether to use mediation arises. The next section examines this question.

c. The Orientation of the Factors that Attorneys Consider

After establishing that attorneys possess the power to determine or control the decision whether to use mediation, it remains to be determined if an agency problem exists in the manner in which attorneys use this power. To do so, this section examines whether some of the factors that influence their decision are oriented toward the attorneys' own interests and preferences.

a. Financial Factors

Attorneys' financial incentives may diverge sharply from those of their clients and may at times impede a resolution that would serve the best interest of the client-principal.¹⁶³ Murray et al. observe that, perceived threat to their "exclusive control" over the resolution of disputes, and self-interest in "substantial fees" lead to attorneys' indifference to ADR.¹⁶⁴ Mnookin & Gilson also argue that the two opposing counsels have an incentive to "implicitly conspire to take advantage of both clients" by prolonging mediation to "run up large legal fees".¹⁶⁵ By the same logic, attorneys might have also an

¹⁶¹ See the works discussed *supra* in note 59.

¹⁶² Riskin, *supra* note 38, at 42

¹⁶³ Sternlight, *supra* note 46, at 271-272 (see also works discussed *id.*, at n.9); Riskin, *supra* note 38, at 49.

¹⁶⁴ Murray et al, *supra* note 41, at 52, 76-80.

¹⁶⁵ Gilson & Mnookin, *supra* note 59, at 528.

incentive to delay (or avoid) referring cases to mediation, due to the often perceived comparatively shorter life and reduced profits of cases that are mediated (see Figure 9).

However, although many attorneys believe that mediation is less profitable to them than adjudication, the overwhelming majority said that this factor did not influence their decision not to use mediation. In Section VII(F)(2) it was reported that approximately 40% of the attorneys said that they earn *less* money in mediation compared to adjudication, in both the short and long terms.¹⁶⁶ Despite this difference in profitability, 94.5% of the attorneys stated that the idea that mediation is *less* profitable to them than litigation had *little or no effect* on their previous decisions not to use mediation (N=93).¹⁶⁷ It remains to be seen whether this curious finding is explained by the attorneys' faithful assessment of the client's best interests, or by some other (conscious or unconscious) reluctance to report the existence of an agency effect. One explanation is that the attorneys suffer from a "positive illusion": a tendency, which is characteristic of most people, to be overly optimistic about their future, and overestimate their skills as being above average in a variety of domains.¹⁶⁸ This tendency is more prevalent in situations in which the definitions are ambiguous, where people tend to define things in

¹⁶⁶ This data was gleaned by asking attorneys to compare mediation to litigation without referring to the way the differences they report influence their decision.

¹⁶⁷ This data should be compared to the limited 5.5% of the respondents who indicated that the fact that mediation is less profitable for *them* than adjudication has *somewhat* influenced their decision (no respondent said it *greatly* affected his decision). Similar to their responses with respect to profits in trial, 92.5% of the attorneys said that the fact that mediation is *less* profitable for them than direct negotiations had *little or no effect* on their decision not to use mediation in the past, while 7.5% said it *somewhat* influenced them.. Interestingly, in contrast to attorneys' reported indifference to their profits, 40% of the lawyers recognize the effect of increased *client expenses* on their past decisions not to refer a case to mediation. Although the majority (61%) of the attorneys reported that the idea that mediation increases the *client's* expenses (compared to adjudication) has *rarely* or *never* affected their decision, 5.5% said it *often* has affected them, and 33.5% said it *somewhat* has (N=105).¹⁶⁷

¹⁶⁸ See: Shelley Taylor POSITIVE ILLUSIONS (1989)

ways that place them in the most positive light.¹⁶⁹ The “above average effect” (which, it should be said, is not unique to lawyers) may have motivational causes, such as maintaining the lawyers’ self-esteem, or be a consequence of the availability heuristics, in which one’s own best traits are the those most readily brought to mind.¹⁷⁰ In a similar context, Macaulay employs a broader social perspective, suggesting that holding such classical position on lawyering (“lawyers advise clients by applying the law, and place the interests of clients ahead of their own”) is a Platonic “golden lie,”¹⁷¹ which misleads both the lawyers and the public for a good purpose (ensuring disputants’ greater trust in attorneys that, in turn, generally promotes justice). Moreover, as Suchman & Cahill put it, “lawyers are rewarded for performing rituals that persuasively symbolize certainty and order, even when those rituals produce few material benefits.”¹⁷² In other words, this golden lie has costs, particularly if it is discovered that, in practice, attorneys often fail to conform to this model.¹⁷³

If the results are representative,¹⁷⁴ then these reported views indicate that at least in terms of financial considerations, attorneys are strongly oriented toward the *client*.

¹⁶⁹ See: Paul Brest & Linda Hamilton Krieger PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT Ch. 12 (forthcoming, 2010). See also the works treated *id* in n.54.

¹⁷⁰ *Id.*

¹⁷¹ This is an allusion to Plato’s suggestion to the philosophers in *The Republic*, Book III, 415 to pacify the people with a golden lie that will facilitate the achievement of the ideal state: people are ‘gold, silver or bronze’ and should be segregated accordingly for the purposes of fair government. This move was criticized as manipulative propaganda for aristocratic oligarchic government that raises questions about Plato’s commitment to truth and democracy.

¹⁷² Suchman & Cahill, *supra* note 154, at 681.

¹⁷³ Macaulay, *supra* note 144, at 166 (see also *id* at 116-117). Macaulay discusses these problems of attorneys’ interested representation within the context of consumer protection disputes.

¹⁷⁴ It should be noted that as far as clients’ expenses are concerned (see also note 167 *supra*), results for the two sets of questions (“independent” assessment of the difference between mediation and litigation and “contextualized” assessment of the way the different factors influenced the attorneys decision not to use mediation).

However, as was suggested earlier, some common sense and an ounce of skepticism call, at the very least, for a future, more thorough investigation of this relationship.

b. The Attorney's "Standard Philosophical Map"

As mentioned throughout this paper, different scholars, mediators, lawyers, disputants and policy makers have disparate visions regarding what mediation is or should be. More than a decade ago, Riskin introduced a typology of mediation styles by describing it as a spectrum revolving around an axis with two continua: a facilitative or evaluative process, with a broad or narrow definition of the dispute.¹⁷⁵ Since its presentation, Riskin's grid has served as the principal framework for discussions on the nature of mediation, and up until now, the "most heated debate concerns the question whether mediation is facilitative or evaluative or both."¹⁷⁶

It seems reasonable to argue that generally, depending on the context, different disputes and disputants can benefit more from one form of dispute resolution than another, and from one mediation style than another.¹⁷⁷ "Good" lawyers would choose the dispute resolution process which best serves the interests of their client (trial, mediation,

¹⁷⁵ See: Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES 111, 111 (1994); Leonard L. Riskin, *Decision-making in Mediation: The New Old Grid and the New Grid System*, 79 NOTRE DAME L. REV. 1 (2003). While seen as a central piece in the study of mediation, Riskin's dichotomous division was subject to fierce criticism. See generally: Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the 'Grid' Lock*, 24 FLA. ST. U. L. REV. 985, 986 (1997). Some view the true purpose of mediation as neither facilitative nor evaluative, but rather transformative and empowering: helping individuals gain a better understanding of each other and themselves. See: Robert Baruch Bush & Joseph Folger *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994). More recently, Deborah Hensler noted that as the use of mediation for resolving civil disputes has spread, the distinction between mediation and other forms of ADR has eroded, the voluntary basis for the process became questionable by court mandates, and mediators use various, substantially different, techniques in their work. See: Hensler: *supra* 44, at 231, 233-234.

¹⁷⁶ Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1887 (1997). See also: James J. Alfini, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 Fla. St. U. L. Rev. 919 (1997).

¹⁷⁷ The argument persists even if the "evaluative" mediation is not classified as "mediation" (Kovach & Love, for example, entitled one of their articles on the topic "'Evaluative' Mediation is an Oxymoron", *supra* note 149). It would simply mean that "evaluative mediation" will be entitled differently.

arbitration etc.); and when choosing mediation, draw the process towards the orientation (facilitative, transformative or evaluative) that is best-suited for the particular case, circumstances and parties.

An agency problem may arise if lawyers, due to their own preferences, interests and barriers, are unable or unwilling to use mediation at all, and facilitative mediation in particular, despite the fact that such a process would serve the best interests of their clients.¹⁷⁸ This discussion conceives the attorneys' role as entailing more than merely giving counsel for the vindication of legal rights; rather, it assumes a more holistic view of serving the best interests of the client.¹⁷⁹ To do so, attorneys must be capable and willing to recognize the complex multi-layered nature of some disputes, and be willing to use, when appropriate, facilitative or transformative mediation as well.

Riskin suggests that most lawyers are inclined to behave in an evaluative fashion because they operate according to a "standard philosophical map" which rests on the twofold assumption that disputants are adversaries and that disputes should be resolved according to the application of law to fact.¹⁸⁰ Welsh also suggests that "the party-centered

¹⁷⁸ For an assessment of the way in which disputants subjectively evaluate the different dispute resolution processes, particularly with respect to principal-control as opposed to third-party control over the process, see: Donna Shestowsky & Jeanne Brett, *Disputants' Perceptions of dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63 (2008)

¹⁷⁹ See also Macaulay, *supra* note 144.

¹⁸⁰ See Riskin, *supra* note 38, at 43-48. Riskin asserts that Lawyers "put people and events into categories that are legally meaningful, . . . think in terms of rights and duties established by rules, [and] focus on acts more than persons." (*id.*, at 45). There is evidence to suggest that "lawyers' approach to problems . . . is significantly more homogeneous and more focused on objective, rational analysis of rules and codified rights than the general population" (Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1397 (1993)). Daicoff also discusses attorneys' competitiveness and aggression, motivation for achievement, and general Myers-Briggs personality dimensions (*id.*, at 1390-1394). See also Guthrie, *supra* note 53, at 154-164 and Riskin, *supra* note 13. There are of course lawyers who do not fit this description, see: Robert Redmount, *Attorney Personalities and Some Psychological Aspects of Legal Consultation*, 109 U. PEA. L. REV. 972, 974-978 (1961) (Describing three typical archetypes of attorney personalities: "zealous, aggressive," "coping, competitive," and "empathic, conciliatory." Attorneys of the latter category would be expected to be more inclined toward mediation).

empowerment concepts that anchored the original vision of self-determination are being replaced with concepts that are more reflective of the norms and traditional practices of lawyers and judges...¹⁸¹ In practice, there are few systematic empirical data about the general distribution of mediation paradigms, the proportion of civil legal disputes that are mediated in facilitative as opposed to an evaluative fashion,¹⁸² or the role that lawyers play – if at all – in drawing the mediation towards one orientation or the other. The data gleaned from this survey suggest that the responding lawyers strongly preferred an evaluative mediation style and that the mediation processes they were involved in were generally evaluative in nature.

Table 4: Attorneys Preferences for Mediators' Attributes

Trait	Important	Preferable	Not Important	Preferably Not
Lawyer	60.50%	36.50%	3%	0%
Judge	11%	40.50%	41.50%	7%
Legal Expertise in the Field	84%	15%	1%	0%
Evaluates the Case	59%	32.50%	5%	3.50%
"Case Closer"	40%	44%	14%	2%
Helps Identifying Non-Legal Interests	61%	31.50%	5.50%	2%
Helps Clarifying Issues	78%	19%	3%	0%

As Table 4 shows, an overwhelming 97% of the attorneys think it is *important* (60.5%) or *preferable* (36.5%) that the mediator be a lawyer (N=109); and all respondents but one found it *important* (84%) or *preferable* (15%) that the mediator possess legal expertise in the relevant fields (N=111). These results indicate a preference for a process that is oriented towards a legalistic application of law to fact. The results

¹⁸¹ Welsh, *supra* note 150, at 5.

¹⁸² Hensler, *supra* note 44, at 239, 246.

further support the expectation that lawyers will generally draw mediation processes to the evaluative end, expecting the mediator to communicate her ideas about the strengths, weaknesses and prospects of a party's claims in court to one or more of the parties, as well as to share her view about what is a fair or reasonable outcome in the dispute.¹⁸³ The vast majority think it is *important* (59%) or *preferable* (32.5%) that the mediator give the parties an evaluation of the value and merits of the case (N=105). In addition, half of the lawyers think it is at least *important* (11%) or *preferable* (40.5%) that the mediator has had experience as a judge (N=109). This response could be understood as communicating a preference for a trial-like evaluation of the case, and, most certainly, reflects disregard for a mediator's facilitative skills. This conclusion is supported in part by the fact that almost 85% of the lawyers thought it is *important* (40%) or *preferable* (44%) that the mediator will have a reputation as "case closer," a term commonly used to describe a third party who assertively leads parties to a quick settlement of the case (N=107).

The survey responses are consistent with some available anecdotal evidence and with the prophecies of the literature in the field regarding the strong preference of lawyers for an evaluative mediation style. At the same time, the expectations for a disregard for facilitative elements were met in a less explicit manner. Proponents of facilitative mediation generally assert that attorneys are less likely to structure mediations as a purely facilitative, non-evaluative, process whose fundamental goal is party self-determination,¹⁸⁴ and in which the principals take responsibility for both the process and

¹⁸³ Riskin, *supra* note 13, at 24

¹⁸⁴ See the Kovach & Love articles *supra* in note 149; Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1331 (1995)

substantive aspects of the mediation.¹⁸⁵ For example, it is argued that the ability of many lawyers to recognize the value of mediation is restricted because their standard cognitive and rational worldview concurs with the practice of either reducing most non-material values to amounts of money or “sweeping them under the carpet.”¹⁸⁶ Contrary to these predictions, 51.5% of the attorneys said that mediation is *less* adversarial than litigation (compared to 7% who said it was more adversarial, and 41.5% who estimate the adversariness of the two processes to be the *same*, N=97). Moreover, attorneys also recognize the importance of facilitated communication to identify both legal and non-legal interests. More than 90% of the attorneys said that it is *important* (61%) or *preferable* (31.5%) that the mediator help the parties identify their *non-legal* interests (N=108).

These pro-facilitative views, however, should not be over stated: As mentioned in Section VIII(A), the data do not indicate greater party self-determination and autonomy in the process, since attorneys reported that clients generally do not show greater involvement in the mediation process, do not invest more time in it, and do not exert a greater degree of influence on it (in contrast the majority of lawyers report that they do not exert less influence in mediation compared to adjudication). Moreover, the vast majority of lawyers do not believe that mediation is fairer than litigation (59% estimate the two process to be *similarly* fair, 9.5% believe mediation is *less* fair), and only one in three lawyers (31.5%) feels mediation is *more* fair compared to adjudication. The reported outcomes of the mediation processes are not conclusive enough to determine the debate: more than half of the attorneys reported that mediation agreements *never* (17%)

¹⁸⁵ Riskin, *supra* note 13, at 24

¹⁸⁶ Riskin, *supra* note 38, at 45

or *rarely* (36%) include more non-monetary elements (such as an apology or change in practices), compared to settlements that were reached without the use of mediation, while (41% said that mediation agreements *sometimes* include more non-monetary elements, and 5.5% said they *often* do (N=111). Thus, although we should not be too quick to reject the prediction about the fate of non-monetary claims and remedies in lawyer-dependent mediations, it seems that these elements are often not included in the mediation final settlement agreement.

It appears from the reported views that most attorneys both prefer and actually use the evaluative mediation style. Whether \evaluative, facilitative or even transformative mediation style should be used in a case is not a clear cut question; it is a preference that is influenced by the process and outcomes that (ideally) the client is interested in. However, if the strong tendency for evaluative mediation is explained by the inability or unwillingness of lawyers to use any mediation style other than evaluative (possibly due to their “standard philosophical map”), then this barrier causes a particular kind of agency problem. It would mean that because of attorneys’ personal preferences, their clients might miss out on the mediation process that would have benefited them the most. From the point of view of a legal system that wishes to offer disputants a wide array of dispute resolution modes, it is also a problem, since the gatekeepers of dispute resolution offer disputants variations on only one theme.

To conclude this chapter, the data proves that attorneys exert a great degree of influence, or even control, over the decision whether mediation will be used. Whether the factors and considerations that shape their decision regarding the referral of a case to

mediation are tainted by some kind of an agency problem remains unclear. The data certainly shows that there is *potential* for such influence. Although the responding attorneys did not voluntarily admit having been influenced by their own considerations in their decision not to use mediation, the data might leave the conscious reader with some doubt, which justifies further examination of these issues in a more elaborate study.

IX. THE IAC PROGRAM IN VIEW OF THE SURVEY RESULTS

The introduction of a large scale mandatory mediation program in three of the busiest courts in Israel¹⁸⁷ demonstrates the importance policy makers attribute to implementing mediation in Israel, as well as the high hopes for the success of the IAC program. However, as apparent from the Commission's report, the discussion on whether courts should offer court-connected mediation, and if so – what goals and approaches should be incorporated into the designed system¹⁸⁸ – typically involves disagreement among different stakeholders, system designers and academic critics, particularly when

¹⁸⁷ See: THE ISRAELI COURT SYSTEM – SEMI-ANNUAL REPORT: 1.1.08-30.6.08, *supra* note 63, at 24-25

¹⁸⁸ There is much discussion and debate among scholars and practitioners on the question of whether courts should offer court-connected mediation programs at all. Deborah Hensler, for example, argues that in the end of the day, there is no empirical evidence showing that court-connected mediation programs bring something different to the table, and perhaps even the contrary is true. If this is the case, argues Hensler, then there is room to questions whether mediation should be funded by public funds and whether parties should be asked to pay more for a similar service to the one they would have received paying less (see: Hensler, *supra* note 2, at 192-193 (but see in response: Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, J. DISP. RESOL. 101 (2002)). Brazil contends that the vast majority of ADR services will continue to be provided in the private sector, since “the number of disputes for which ADR services could be useful always will exceed, by huge margins, the limited resources of public agencies” (Brazil, *supra* note 10; at 73). Bush suggests that publicly sponsored court-connected mediation oriented towards efficiency and private benefits alone, would supersede other versions of mediation and reduce the chance for the educational vision of mediation to develop (Bush *supra* note 16, at 24). Bush alerts from a broader effect of institutionalization: “rather than being *alternative* dispute resolution, mediation will wind up... as adjunct or *supplementary* dispute resolution... [thereby losing] the potential to offer something truly different.” (Bush, in: Alfani et Al, *infra* note 189, at 310-311).

the legal system encourages or obliges parties to participate in it.¹⁸⁹ The data gleaned from this survey present empirical information that was lacking from the Commission's report, and thus presumably from the Commission's considerations. It is the first (of hopefully more) evidence on Israeli attorneys' views of mediation, and their reported mediation referral practices and experiences.

Based on the data that was presented in the previous chapters, as well as on the preliminary reports of the attorneys about their experience in the IAC Program, it is possible to evaluate the design of the program from the attorneys' perspective. Understanding attorneys' "take" on the matter is important because of their dominant role in the decision to use mediation and in the mediation process itself, and since eventually, the adoption of the new policy greatly depends on the constituency and cooperation of the relevant stakeholders.¹⁹⁰

The data presented in the paper demonstrate that the IAC Program does not necessarily remedy the problem its designers sought to resolve, in part because the Commission overlooked (or perhaps ignored) some important factors, and because it was at times misguided by the anecdotal evidence it gathered. Hopefully, this study, and others that might follow, will enable the design of policies that overcome the actual

¹⁸⁹ See James Alfini et al, *What Happens When Mediation is Institutionalized?: To the Parties, Practitioners, and Host Institutions*, 9 OHIO. ST. J. ON DISP. RESOL. 307 (1994). The choice of a particular "kind" of mediation is not merely theoretical, it has also financial and political ramifications both in the competition for public resources, and concretely for the different players involved: parties, lawyers, and mediators (of different schools). See: Hensler, *supra* note 44, at 233-237.

¹⁹⁰ Compare: Jacob Herbert SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 290-291 (1988)

barriers to the widespread adoption of mediation in Israel, and that incentivize the stakeholders whose cooperation is necessary for its success.¹⁹¹

A. Attorneys' Experiences and Impression of the IAC Session

The survey was administered only a few months after the IAC Program was launched. It is therefore not surprising that only 30% of the attorneys reported that their clients had been summoned to an IAC Session,¹⁹² and that the clients of only 27 attorneys (19%) have already attended the session. Given the small sub-sample size, the representativeness of the results is unclear. However, due to the novelty of the program, preliminary data is of interest, and where a distinctive pattern is apparent, or where responses are consistent with the general reported views and practices of the larger sample, the findings seem more valid.

The attorneys' reported experiences and views of the IAC program reflect, for the most part, indifference with a slight positive inclination to supporting the program. While the design of the IAC program seems to have focused on the disputants, attorneys generally said that they have participated in the process, and reported to have retained a high degree of influence on their clients conduct and decisions. These findings are consistent with the (thus far limited) existing empirical observations of what happens in

¹⁹¹ If mediation was not used in Israel in part due to the reluctance of attorneys to embrace it then the American experience proves that the situation can change. Over time American attorneys have developed increasingly positive views about using mediation to resolve law suits, particularly in business settings (John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV 137 (2000)); but also in other settings, and due to varying reasons (see Hensler, *supra* note 2, at 193 and n.110; Wissler *supra* note 47).

¹⁹² In preliminary interviews that were conducted in December 2008 (two months after the IAC program began to operate) several mediators who are included in the IAC roster indicated that the program has until then been only partially applied, and most cases that fall within the categories defined in the regulations are still not referred to IAC mediators. Some interviewees suggested that due to either technical or political reasons, case are either not referred to mediation at all or referred to private mediators directly instead of via the IAC program (Interview transcripts are on file with the author).

court-connected mediation, which have found that parties were generally little involved in mediations, and that mediators were generally focused on helping lawyers to negotiate more effectively.¹⁹³

Congruent with the generally observed high degree of involvement and influence of attorneys in mediation, and despite the fact that the Regulations do not require them to attend the IAC session,¹⁹⁴ 74% of the attorneys reported that they participated in the IAC sessions in *all* (63%) or *most* (11%) cases, compared to 26% who participated in *a few cases* (11%) or *never* participated (15%) in the session (N=27). The majority of the attorneys (66.5%) said that the IAC session made no particularly positive or negative impression on them, while 29.5% reported a *positive* impression and 4% reported a *negative* impression. The attorneys' general indifference with a slight positive inclination to the IAC session is reflected also in the counsel they subsequently gave to their clients: 48% of the respondents referred their clients to mediation in *most* or *all* cases, 33.5% recommended pursuing mediation in *a few* of the cases, and 18.5% of the attorneys advised all their clients *not* to continue with mediation following the IAC session.

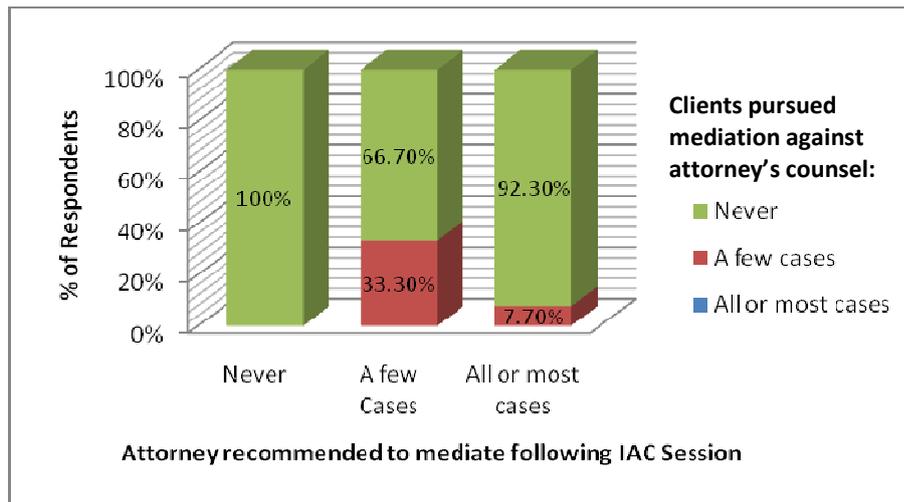
Most of the attorneys preserved a high degree of influence over their clients' decision whether to mediate: 85% of them said that following the IAC session, *none* of their clients pursued mediation against their advice (the remaining 15% said that their clients pursued mediation against their counsel in *a few* cases, N=27). The strong influence that attorneys have over their clients' decision whether to mediate is apparent from Figure 11, which generally shows that 100% of the attorneys who reported that they *never* advised their clients to mediate a case following the IAC session also said that their

¹⁹³ See: Hensler's summary of these findings, *supra* note 2, at 192.

¹⁹⁴ See the discussion in Section III.B and *supra* in note 31.

clients *never* proceeded to a mediation process following the IAC session against their advice.

Figure 11: Clients' Decision to Pursue Mediation against Attorney's Counsel Presented by Attorneys Recommendation Following the IAC Session



Despite their lack of enthusiasm with the program, and regardless of whether they have attended an IAC session or not, 63% of the respondents think that the IAC program will lead to an *increase* in the use of mediation (about a third of the respondents thought that at the point they completed the survey, it was impossible for them to determine what would be the effect of the program).¹⁹⁵ Interestingly however, when asked what changes they thought should be introduced to the IAC program, only 30% of the attorneys said that they would keep the program in its current design. Curiously, most attorneys were clearer about what they do *not* want to see the program evolve to than what they would

¹⁹⁵ The distribution of responses among the entire sample was: Probably it will increase the use of mediation – 63%; probably it will not – 8.5%; it is impossible to tell at this time – 28.5% (N=140). The distribution among the sub-sample of attorneys who attended the IAC session: Probably it will increase the use of mediation – 63%; probably it will not – 3.5%; it is impossible to tell at this time – 33.5% (N=27). The observed decrease in the number of negative views cannot be viewed as significant or representative based on these data, since in the sub-sample, this percentage reflects a single respondent. These results might attest to the inability of the IAC program in its current design to change the lawyers' views.

like to see it become. Accordingly, 93.5% said that they did not support mandating a full mediation process (as opposed to the IAC session)¹⁹⁶ and the majority said that they would not like to see the program expand to all magistrate courts (67%) or district courts (72%). At the same time, only 36.5% of the respondents prefer that the Case Management Department will only *suggest* using mediation, contingent upon the consent of the parties, and few attorneys supported limiting or reducing the number of cases to which the program would apply,¹⁹⁷ or allowing a more discretionary referral of cases to mediation.¹⁹⁸ Most probably, at the time the survey was administered (February 2009), attorneys might simply not have had enough experience with the IAC program to make any substantial determinations.

B. Evaluating the Design of the IAC Program in View of the Results

The results of the survey provide a preliminary platform of empirically collected information on issues that are important for understanding how mediation is used by attorneys, what affects their decision to use it, and what role they play in the decision to use mediation, from the civil litigators' point of view. This new valuable information is relevant to the task that were entrusted to the Commission on Mediation: designing a system to increase the use of mediation in courts, which will contribute to the satisfaction of parties with the dispute resolution process and outcome, the strengthening of public trust in the courts, and the promotion of a more tolerant society in Israel. The following sections summarize the useful information that could, and perhaps should, influence the

¹⁹⁶ At the same time,

¹⁹⁷ For example, 97% did not think it is useful to raise the monetary bar for cases that must be sent to and IAC session, and 84.5% did not think it was necessary to limit the program only to certain categories of cases.

¹⁹⁸ For example, very few lawyers thought that only a judge should *suggest* (11.5%) or *order* (9.5%) the referral of cases to mediation.

final design of the IAC system, or any other court connected mediation that will succeed it in the future.

1. The Mandatory Element

Given the fact that the vast majority of attorneys reported that they do not discuss the possibility of using mediation with their clients unless the court suggests it, and considering that the frequency of party-initiated mediation is virtually non-existent, the idea of mandating an introductory mediation session in the litigation process seems to be a useful strategy. In contrast, the fact that only clients are obliged to participate in the process seems insufficient or irrelevant in two ways. First, given the high level of attorney-control over the decision whether to use mediation, focusing on influencing the clients' views might not bring about a substantial enough increase in the demand for mediation. Second, if the system designers intended to circumvent a presumable "anti-mediation effect" that attorneys have on their clients by not obliging attorneys to participate in the IAC session, then it failed: attorneys remain dominantly involved in the process. Along that vein, however, the IAC program, in its current form, seems ineffective in bringing about a real change in the views of attorneys.

2. The Structure of the IAC Session

Referring cases to the IAC session before the pre-trial session is held seems properly located on the timeline of the litigation process for several reasons. First, it seems that the pre-trial is the most natural point for attempting mediation, since in practice, the majority of the attorneys reported that prior to the IAC program mediation was first discussed by the pre-trial judge. Second, holding the mediation session before all trial-related sessions overcomes the reported tendency of many lawyers to wait for cases to settle during the

trial. Third, virtually all of the lawyers agreed that it is desirable that mediation processes will result in clarification of the points of contention. If, indeed, this is the result of mediation processes that did not end with a full mediation agreement, then the clarification of the contested issues in mediation will assist the resolution of the case in court.

3. *The Content of the IAC Session*

As for content, it seems useful to use the IAC session for creating a clear demarcation between mediation processes and other settlement mechanisms, and for encouraging both the clients and the attorneys to explore a variety of mediation styles. It is unclear whether a specific mediation paradigm guides the operation of IAC-produced mediations, but given the findings of this research, if the promotion of any process other than evaluative mediation is desired, then mediators should find ways to counter the lawyers' clear preference for an evaluative mediation style (Unless the parties also demonstrate such preferences). If party self-determination and autonomy are a goal at all, then a significant reconsideration of the overall content and dynamics of the IAC session is in order.¹⁹⁹

Contrary to the Commission's conclusion, at least as far as attorneys (who seem to make the call) are concerned, the professional level of mediators does not act as a barrier for using mediation. It therefore seems imperative to find out what are the actual barriers,

¹⁹⁹ See also the discussion on changing the "attorneys' standard philosophical map" in Section IX(C)(a)(iii) *infra*. Welsh suggests the introduction of a structural change to court-connected mediations which might result in a substantive change: "modifying the current presumptions regarding the finality of mediated settlement agreements and urges the adoption of a three-day, non-waivable cooling-off period before mediated settlement agreements may become enforceable. This modification would permit the continued use of evaluative techniques as a means to educate parties and inform their decision-making while rewarding the use of techniques (often facilitative) that increase parties' commitment to their settlement. The more committed parties are to their settlement, the less likely it is that they will withdraw from the settlement during the cooling-off period." (Welsh, *supra* note 150, at 6-7)

and attempt to overcome them in the IAC session. In addition, if the professional level of mediators is not a common problem, then it is possible to recruit a larger number of (perhaps slightly less qualified) mediators to provide services through the IAC program. Arguably, the fact that to date, only 70²⁰⁰ mediators were qualified to serve in the program in all of the three participating courts creates a bottleneck that prevents referring all the possible relevant cases to mediation.

The data gleaned from this survey are clearly only preliminary and allow recommendations only for limited aspects of the IAC program and to a limited extent. However, they indicate the importance of collecting empirical information about the true practices of and barriers to mediation in Israel, and to enable the tailoring of real solutions to the real problems.

C. Increasing the Use of Mediation in Israel: Further Suggestions

The IAC Program, or any other court-connected program that might succeed it, is not the only means for increasing the use of mediation in Israel. Based on the results, several other avenues might be effective. While the analysis only points the existence of correlations, future supporting evidence could also establish causal connections that would justify advancing new policies. Many of the suggestions require an organized systematic change in attorneys' practices and training, in part by setting new standards and guidelines in the governing legislation and in the standards of conduct and practice established by the bar association. A window of opportunity for the incorporation of such changes, particularly with regard to professional training of lawyers, will soon be opened:

²⁰⁰ The public tender that was published to recruit mediators to the program referred to 100 mediators, but only 70 candidates met the requirements. See: Public Tender No. 39/07: Selection of Mediators for the Court system, *available at*: <http://elyon1.court.gov.il/heb/dover/html/drushim22.htm> (last visited December 14, 2008)

the Israeli Bar Association has recently announced an intended reform in the training of lawyers and the requirements for their admission to the bar.²⁰¹ Naturally, incorporating such changes would require the support of the bar, which, given its objection to the IAC program,²⁰² is certainly not to be taken for granted. However, these activities could begin under the auspices of the National Mediation Institute of the Bar Association, which is obviously supportive of mediation.²⁰³

a. Mediation Education and Training

i. Increasing Familiarity and Understanding

Considering the fact that more experienced lawyers generally reported a higher rate of mediation (see Figure 3 above), it is possible that lack of experience with both litigation and mediation is a source for perceptions that deter lawyers from using mediation. Given the low rate of mediation training and education, this lack of experience and the views associated with it are not yet overcome. If mediation education becomes a component of education in law schools, and mediation training becomes an integral part of the activities of the bar, then the chances that less experienced lawyers will use mediation would increase.

ii. Defining the Role of Lawyers in Mediation

Even though the majority of the lawyers do not report having less influence on their clients in mediation, it is possible that many of them are unclear as to how they should

²⁰¹ CONCLUSIONS OF THE BAR ASSOCIATION'S LEVEL OF THE LEGAL PROFESSION TEAM, HEADED BY ADV. YORI GEIRON, PRESIDENT OF THE BAR, Israeli Bar Association Press Release (March 24, 2009), *available at*: http://www.israelbar.org.il/article_inner.asp?pgId=78546&catId=6 (last visited: March 27, 2009)

²⁰² See Chapter III(C) and text associated with note 37 *supra*.

²⁰³ Attorneys from the National Mediation Institute have also expressed their support in the IAC Program, despite the formal objection of the bar association as a whole, see Report of the Commission, *supra* note 25.

operate in a mediation setting. This ambiguity might result in reluctance to engage in such processes, whether it is attributed to a feared inability to provide good professional services to the client, or to attorneys' own preferences. Defining the role of lawyers in mediation could help overcome this presumed barrier. On a policy level, it could also facilitate the better demarcation of the nature of mediation processes compared to adjudication and negotiation, and greater party self-determination and involvement in the process.

iii. Expanding the Lawyer's "Standard Philosophical Map"

The data supports the conclusion that attorneys prefer evaluative mediation. If these results mean that attorneys act as barriers for the occurrence of facilitative or transformative mediation processes, then a legal system that wishes that such processes would take place,²⁰⁴ should make an educational effort to expand the lawyers' "standard philosophical map." Such efforts could take the form of university education, bar association activities, or training offered by the NCMCR at the Ministry of Justice. Changes of that kind could increase the number of lawyers who are prone to cooperate with mediation styles other than "evaluative", thus allowing for a truly wider array of dispute resolution alternatives.

b. Setting Standards or Models for Attorney Fees in Mediation

The data suggest that attorneys frequently report a decrease in their profits if they refer a case to mediation instead of litigating it. Although almost all of the respondents indicated that this factor has not influenced their decision whether to refer a case to mediation, as was discussed earlier, there is reason to doubt the accuracy of their report.

²⁰⁴ Report of the Commission, *supra* note 25.

It is possible that the reduction in profits could be neutralized or moderated if the presumed ambiguity (due to the novelty of mediation advocacy) of setting the attorneys' fees in mediation is minimized. This result could be achieved either by setting standards for attorney fees in mediation (as has been previously done in other fields of legal practice),²⁰⁵ or by creating several recommended models for calculating fees that will serve as anchors and facilitate the process for both the lawyer and the client. Moreover, Fassina notes that the agent remuneration model that is chosen is linked, in different circumstances, to the ability to serve the principal's substantive and relationship-based interests: "by specifying the behaviors or outcomes that are expected of the agent, the agent is made aware of how he or she will be compensated... Accordingly, the agent is likely to extend greater effort in the interests of the principal."²⁰⁶

X. CONCLUSION

Law and society scholar Stewart Macaulay once noted the important role that lawyers play in advancing legal reforms:

Lawyers' own values and interests are reflected in the way in which they represent clients. As a result, reform laws which create individual rights are likely to have only symbolic effect unless incentives are devised to make their vindication in the long-range interest of members of the bar. Moreover, an understanding of the many roles played by lawyers also requires a more expanded picture of practice...²⁰⁷

²⁰⁵ Rules of the Bar Association (Minimal Recommended Fees), 2000, *available at*: http://www.israelbar.org.il/UploadFiles/Bar_Association_Rules_recomended_minimal_tariff_updated_jan_2009.pdf (last visited: March 27, 2009)

²⁰⁶ Neil E. Fassina, *Constraining a Principal's Choice: Outcome versus behavior Contingent Agency Contracts in Representative Negotiations* NEGOT. J. 435, 436 (July 2004)

²⁰⁷ Macaulay, *supra* note 144, at 115

Macaulay's words are as relevant today as they were when they were first written 30 years ago, and seem in place also in the context of the role that attorneys need to play in order for mediation to become more widely used in Israel. This paper provided an expanded picture of what lawyers think about mediation and the role that they play in the decision to use mediation. It reflected a reality in which most civil litigators in the Tel Aviv District have had at least some limited experience with mediation, but that for the most part, attorneys 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 study also demonstrates that the way in which attorneys view mediation, as well as the effects of their views on various aspects of the dispute resolution process, has implications that extend beyond the attorneys' personal preferences and experiences. In other words, this study confirmed that Israeli lawyers act as "gatekeepers" to mediation, controlling which cases go to mediation and greatly influencing the nature of the mediation processes that take place.

It becomes clear that, for the institutionalizing of court-connected mediation in Israel to result in a substantial increase in the use of mediation, it is imperative that not only disputants, but also lawyers, be regarded as the consumers of mediation processes. It follows that a better understanding of what lawyers think and want is required. This paper provided some preliminary evidence on the matter that will hopefully assist policy makers in the design of future effective court-connected mediation programs. Clearly, further empirical evidence is needed not only with respect to lawyers, but also with

respect to the other relevant stakeholders in the process, like disputants, mediators and judges.

The paper went further than establishing that lawyers play an important role in the decision whether to use mediation, suggesting that an agency problem might exist in this context. Given the lawyers' dominant influence, or even control, over the decision whether to refer a case to mediation, and the potential financial and "philosophical" conflict of interest with their clients, there is reason to fear that attorneys might refrain from referring a case to mediation not because it is in the best interest of the client, but because it is their own personal preference. This problem, it was argued, calls for working on different fronts to remove those barriers to attorneys' use of mediation, and to minimize the risk for such an agency problem to effect the decision whether to use mediation. In accordance, several regulatory, financial and educational actions were recommended for increasing the use of mediation in Israel.

APPENDIX 1: ADDITIONAL FIGURES AND TABLES

Figure 1: Respondents' Age Distribution.....81

Table 1: Litigators' Clientele Distribution in Percentages.....81

Figure 2: Practice Area Distribution.....82

Table 2: Correlation between the Number of years Practicing Law and the Number of Cases Mediated in the Previous 2 Years.....82

Figure 3: Correlation between Mediation Training and Having Served as Mediators and Views on the Effectiveness of Mediation.....83

Figure 4: Views on the Effectiveness of Mediation by the Effect of Previous Negative Experience on Refraining from Using Mediation.....83

Figure 5: the Effect of Previous Negative Experience on Refraining from Using Mediation by Views on the Effectiveness of Mediation.....83

Table 3: Considering Litigation Related Settlement When Deciding Not to Mediate.....84

Table 4: Differences in Views on Attorneys' Long Term Profits in Mediation Compared to Litigation By Experience Practicing Law.....84

Figure 1: Respondents' Age Distribution

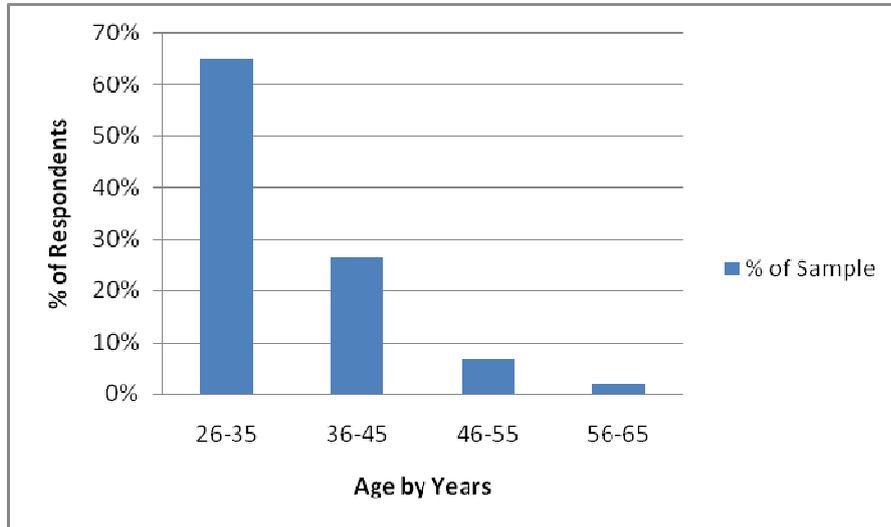


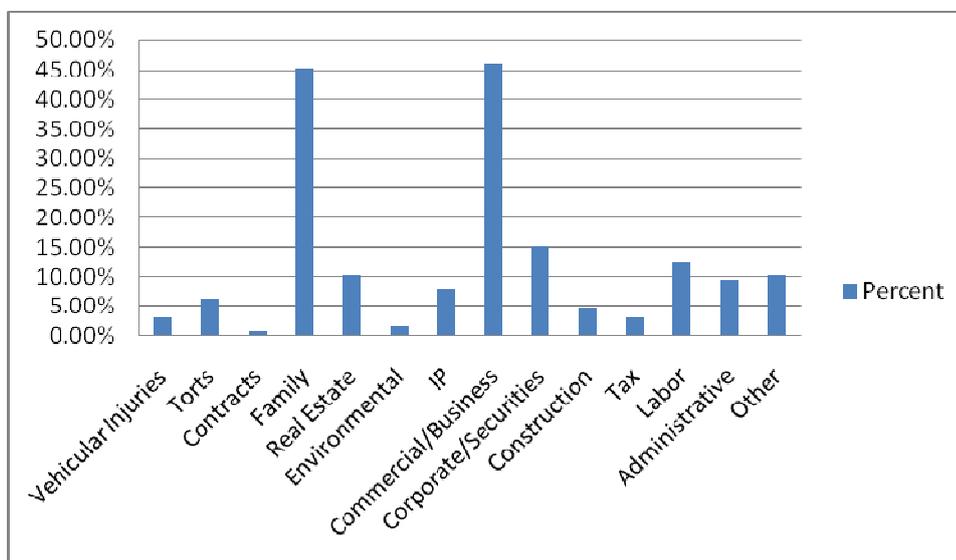
Table 1: Litigators' Clientele Distribution in Percentages

	N*	Min.	Max.	Median	Mean	SD
individuals	107	0	100	15	18.6	17.483
small business	81	0	55	15	15.95	11.094
medium-large companies	119	5	100	70	63.47	24.615
state / public	63	0	50	10	11.86	11.403
NGO / Non-profit	60	0	50	5	8.8	10.557
Other	29	0	20	5	6.34	5.863

N=126

N* = number of lawyers who reported representation of the type of client in some rate, the minimum and maximum columns report respectively the lowest and highest rate of clientele reported by a single attorney in a given category)

Figure 2: Practice Area Distribution



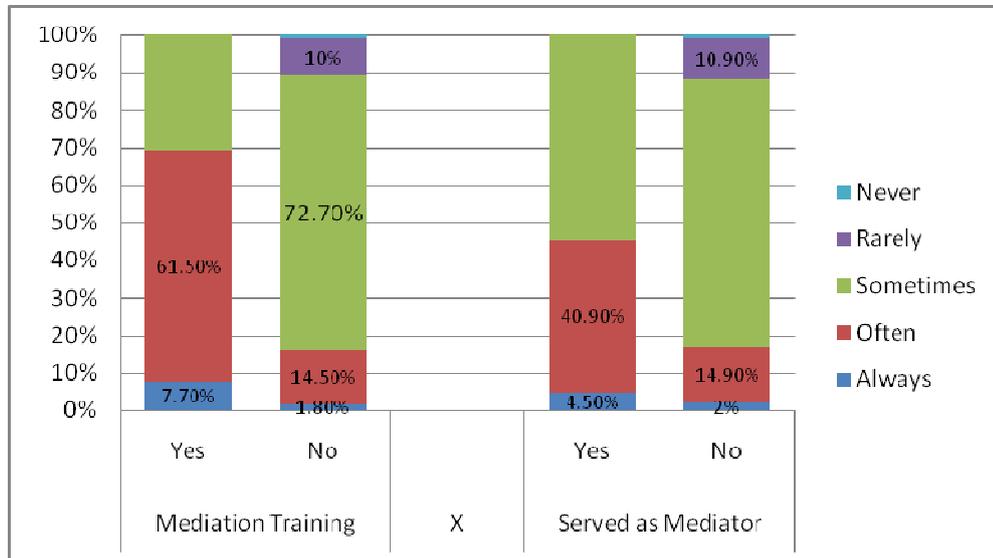
N=126. Note: Responses add up to more than 100% since respondents could choose two responses if they have more than one dominant practice area.

Table 2: Correlation between the Number of years Practicing Law and the Number of Cases Mediated in the Previous 2 Years

Cases Mediated	Years of Experience				
	<2	2--5	6--10	11--15	16+
0	23.10%	11.10%	3.80%	18.80%	6.30%
1--2	26.90%	29.60%	15.40%	31.30%	6.30%
3--5	50%	33.30%	34.60%	37.50%	37.50%
6--10	0%	14.80%	34.60%	6.30%	18.80%
11--20	0%	7.40%	7.70%	6.30%	12.50%
21+	0%	3.70%	3.80%	0%	18.80%
Total	100%	100%	100%	100%	100%

N=111, in chi square test: p=0.001, Linear by linear association=10.372, df=1.

Figure 3: Correlation between Mediation Training and Having Served as Mediators and Views on the Effectiveness of Mediation



Mediation Training: chi-square test, $P < 0.001$, linear by linear association=14.515, $df=1$ (N=123)
Served as Mediator: chi-square test, $P = 0.003$, linear by linear association=8.794, $df=1$ (N=123)

Figure 4: Views on the Effectiveness of Mediation by the Effect of Previous Negative Experience on Refraining from Using Mediation

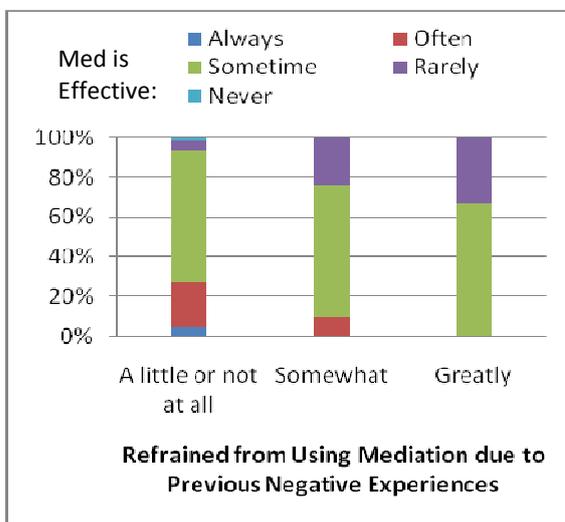
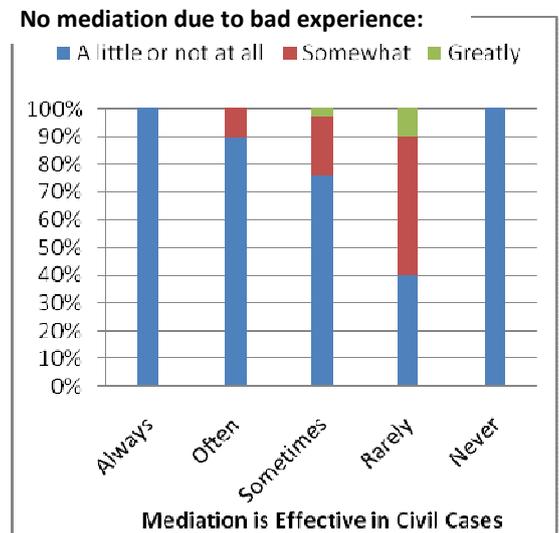


Figure 5: The Effect of Previous Negative Experience on Refraining from Using Mediation by Views on the Effectiveness of Mediation



In Chi-Square test, $N=101$, $df=1$, $P = 0.011$, linear by linear association= 6.448 (N=99)²⁰⁸

²⁰⁸ The N of each of the independent variables in this test (namely, view on mediation) was: Always=3; Often=19; Sometimes= 66; Rarely=10; Never=1. The apparent discrepancy in the results in the “never effective” category is probably misleading since this sub-sample consisted of a single respondent

Table 4: Considering Litigation Related Settlement When Deciding Not to Mediate

Influenced by Settlement Prospects		Number of Cases Mediated in the Past 2 Years					
		0	1-2	3-5	6-10	11-20	21+
Trial	Rarely, or Never	37.50%	52.20%	54.80%	68.80%	87.50%	60%
	Sometimes	12.50%	39.10%	38.10%	31.30%	12.50%	40%
	Often	50%	8.70%	7.10%	0%	0%	0%
	Total (%/Count)	100%/8	100%/23	100%/42	100%/16	100%/8	100%/5
Pre-Trial	Rarely, or Never	25%	52.20%	55.80%	68.80%	62.50%	60%
	Sometimes	37.50%	47.80%	27.90%	31.30%	37.50%	40%
	Often	37.50%	0%	16.30%	0%	0%	0%
	Total (%/Count)	100%/8	100%/23	100%/43	100%/16	100%/8	100%/5

Trial: N=102, Chi-Square test: Df=1, P = 0.006, linear by linear association = 7.682

Pre-trial: N=101, Chi-Square test: Df=1, P= 0.044, linear by linear association = 4.061

Table 4: Differences in Views on Attorneys' Long Term Profits in Mediation Compared to Litigation By Experience Practicing Law

Profits	Experience	
	<5 Years	>5 Years
Less	57.70%	31.60%
Same	34.60%	44.70%
More	7.70%	23.70%
Total (%/Count)	100%/26	100%/38

Chi Square test: df=2, P=0.068, Likelihood ratio = 5.391 (N=64)

APPENDIX II: THE QUESTIONNAIRE

(English Translation)

Part I: Personal Information and Background

1. How many years have you been practicing law:
 1. Less than 2 years
 2. 2-5 years
 3. 6-10 years
 4. 11-15 years
 5. Over 15 years

2. What is your sex?
 1. Female
 2. Male

3. How old are you? (please complete in numbers) _____

4. How many lawyers work at your law firm (excluding interns):
 1. I practice solo
 2. 2-5 Attorneys
 3. 5-15 Attorneys
 4. 16-25 Attorneys
 5. 26-40 Attorneys
 6. 41-60
 7. 61-80
 8. Over 80 Attorneys

5. Please estimate the distribution of your clients by the following sectors in percents:

Individuals	
Small Businesses	
Medium-Large Companies	
State Bodies / Public Agencies	
NGO's or Non-Profit Organizations	
Other (please specify):	
TOTAL:	100%

6. In the past 2 years, in which geographical jurisdiction were most of your cases handled?
 1. North
 2. Haifa
 3. Tel Aviv
 4. Centre

5. Jerusalem
6. Beer Sheva

7. Do you usually represent plaintiffs or defendants?

1. Generally, I do not litigate
2. Mostly plaintiffs
3. Mostly defendants
4. About equal

8. In the past 2 years, approximately how many cases have you filed or litigated in the Tel Aviv Magistrate court? [Respondents of 7(1) branched out]

1. 0 cases
2. 1-5 cases
3. 6-10 cases
4. 11-25 cases
5. 26-40 cases
6. Over 40 case

9. In the past 2 years, in which instance were most of the civil cases you handled litigated (or filed)? [Respondents of 7(1) branched out]

1. Magistrate court
2. District court
3. The Supreme Court
4. Administrative court
5. Special courts (Family court, Labor tribunal, Standard contracts court, etc.)

10. From the following list, which 2 fields reflect the highest percentage of your litigation load in the past 2 years (please select up to 2 options): [Respondents of 7(1) branched out]

1. Vehicular Injury
2. Torts
3. Family
4. Contracts
5. Real Estate
6. Environmental
7. Intellectual Property
8. Commercial/Business
9. Corporate/Securities
10. Construction
11. Taxation
12. Labor
13. Administrative
14. Other (please specify): _____

Part II: Experience, Training and Practice in Mediation

11. Have you taken any formal training in Mediation?

1. Yes
2. No

12. What type of formal mediation training have you taken? (please mark all relevant options)

[Respondents of 11(2) branched out]

1. University mediation course
2. Course in a mediation center (approx. 40-60 hours)
3. Bar Association mediation course (approx. 40-60 hours)
4. Advanced mediation course / Practicum
5. Other (please specify): _____

13. Have you taken any formal training in Negotiation?

1. Yes
2. No

14. What type of formal negotiation training have you taken? (please mark all relevant options)

[Respondents of 13(2) branched out]

1. University negotiation course
2. Course in a negotiation center
3. Bar Association negotiation course
4. Advanced negotiation course
5. Other (please specify): _____

15. Have you ever served as a mediator?

1. Yes
2. No

16. Do you tend to include a mediation clause in contracts that you draft? (If you do not draft contracts, please select the last option)

1. Never
2. Rarely
3. Sometimes
4. Often
5. Always
6. I do not draft contracts

17. Do you tend to discuss with your clients the possibility of turning to mediation?

1. Never
2. Rarely
3. sometimes
4. Often
5. Always

18. Do clients ask you independently to examine the option of turning to mediation [Respondents of 17(1) branched out]:

1. Never
2. Rarely
3. sometimes
4. Often
5. Always

19. Most commonly, who initiates the discussion on the possibility of turning to mediation?

[Respondents of 17(1) branched out]:

1. My client or opposing client
2. I or opposing council
3. MANAT (Case Management Department)

4. Case Management Judge
5. Pre-trial judge
6. The Panel

20. Do you tend to discuss mediation with your clients if the court has not suggested it?
 [Respondents of 7(1) and 17(1) branched out]

1. Never
2. Rarely
3. Sometimes
4. Often
5. Always

21. Most commonly, at what point do you discuss with the client mediation options? (please refer in your response to the situation before the IAC Program was launched in October 2008)
 [Respondents of 7(1) and 17(1) branched out]

1. Before filing the lawsuit
2. After submitting arguments (before pre-trial)
3. During pre-trial
4. After pre-trial
5. Close to the trial
6. After filing testimony affidavit and/or Expert reviews
7. During the trial

22. In the past, did your clients tend to take your advice whether to turn in a particular case to mediation?

1. Thus far I was not required to advise on the matter
2. Never
3. Rarely
4. Sometimes
5. Often
6. Always

23. In the past 2 years, did you use mediation at least once?

1. Yes
2. No

24. In your experience, is mediation an effective tool in litigation?

1. Never
2. Rarely
3. Sometimes
4. Often
5. Always
6. Unknown / irrelevant

25. Did the following factors influenced in the past your decision NOT to use mediation?
 [Respondents of 7(1) branched out]

		Often	Sometimes	Rarely, or never	Unknown/ irrelevant
1	My clients refuse to use mediation				

2	There are not enough good mediators in the market				
3	The cases I handled were not suitable for mediation				
4	Mediation increases client expenses				
5	Courts do not encourage using mediation				
6	Appropriate cases will settle in pre-trial anyway				
7	Appropriate cases will settle in trial anyway				
8	A similar or better settlement can be reached in direct negotiation with the other party				
9	It is difficult to enforce mediation agreements				
10	Insurance companies do not support using mediation				

26. In Cases in which you preferred not to use mediation, to what extent did the following factors influence your decision? [Respondents of 7(1) branched out]

		greatly	somewhat	A little, or not at all	Unknown/irrelevant
1	Generally, I prefer to litigate				
2	I do not want to provide "free discovery"				
3	There is no point in mediation because the mediator cannot decide the case				
4	Mediation is less profitable for me than litigation				
5	Mediation is less profitable for me than direct negotiations				
6	You cannot create precedents in mediation				
7	I have had bad experience with mediation, or have heard negative stories from others				
8	My firm does not encourage using mediation				

27. In approximately how many cases have you used mediation in the past 2 years? [Respondents of 23(2) branched out]

1. 1-2
2. 3-5

3. 6-10
4. 11-20
5. Over 20 cases

28. In the past 2 years, to what extent, relatively, did you use the services of the following mediators? [Respondents of 23(2) branched out]

	Large	Small	Never
Internal mediators in courts			
External mediators the MANAT referred to			
External mediators the court referred to			
External mediators chosen independently			

29. Please rate the importance you attribute to the following traits of a mediator: [Respondents of 23(2) branched out]

		Important	preferable but not necessary	Not important	Preferably not	Unknown/irrelevant
1	The mediator is a lawyer					
2	The mediator has experience as a judge					
3	The mediator is knowledgeable in the relevant legal fields					
4	The mediator has a reputation of a "case closer"					
5	The mediator helps identifying the non-legal interests of the parties in the case.					
6	The mediator gives the parties an evaluation of the value and merits of the case					
7	The mediators is able to clarify issues in the case					
8	The mediator is included in the court's roster of mediators					

30. Civil cases are generally settled with a monetary remedy/agreement. In your experience, do settlements reached through mediation include more non-monetary elements (e.g. apology, change in practices, etc.) than settlements reached without mediations? [Respondents of 23(2) branched out]

1. Never
2. Rarely

3. Sometimes
4. Usually
5. Always

31. In your experience, compared to litigating a case in court, how does using mediation influence the following elements? [Respondents of 23(2) branched out]

		More	same	less	Unknown / irrelevant
1	Time I need to invest in the case				
2	Time the client needs to invest in the case				
3	My short term profits				
4	My long term profits				
5	Client's expenses				
6	Client's involve in the case				
7	Time required to conclude the case				
8	Client's satisfaction				
9	Fairness of the process				
10	Adversary nature of the process				
11	Probability of preserving the relationship of the parties				
12	My influence on the process				

Part III: The IAC Program

32. So Far, in how many cases were your clients summoned to an IAC meeting?

1. None
2. 1-3 cases
3. 4-9 cases
4. 10-15 cases
5. Over 15 cases

33. Did you advise your client, as a result of the IAC meeting, to proceed with the case to mediation?

[Respondents of 32(1) branched out]

1. My clients did not attend the IAC meeting yet.
2. In none of the cases
3. In a few cases
4. In about half of the cases
5. In most cases
6. In all cases

34. When you clients attended an IAC session, did you participate as well? [Respondents of 32(1) and 33(1) branched out]
1. Never
 2. In a few cases
 3. In about half of the cases
 4. In most cases
 5. In all cases
35. If you did not advise the client to proceed to mediation following the IAC meeting, did the client nonetheless wish to pursue mediation? [Respondents of 32(1) and 33(1) branched out]
1. Never
 2. In a few cases
 3. In about half of the cases
 4. In most cases
 5. In all cases
36. How would you describe your experience in the IAC meeting itself (as opposed to the mediation process which might have proceeded it)? [Respondents of 32(1) and 33(1) branched out]
1. Positive
 2. Negative
 3. The meeting did not leave any kind of impression on me.
 4. In some cases positive, in others negative.
37. In your opinion, will the new IAC Program lead in the future to an increase in mediation processes (as distinct from IAC meetings)?
1. Probably it will
 2. Probably it will not
 3. It is not possible to tell (unknown...)
38. The new IAC program orders the direction to IAC session of all civil cases under magistrate court jurisdiction that are valued at over 50,000 NIS, less vehicular tort cases and summary proceedings. What changes, if any, do you think should be introduced to the program? (please mark all relevant options)
1. I support the program as it is.
 2. Case management department should suggest mediation contingent on parties' agreement (same as before the IAC program)
 3. Only a judge should suggest a case to mediation
 4. Only a judge should order a case to mediation based on discretion.
 5. Cases should be mandated to a full mediation session, not an IAC session, at the same time.
 6. Lower the monetary bar for cases that are directed to mediation
 7. Raise the monetary bar for cases that are directed to mediation
 8. Expand the program to all magistrate courts in Israel
 9. Expand the program also to district courts
 10. Limit the program only to certain categories of cases / less cases.
 11. Other (please specify):

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