When Mandatory Mediation Meets the Adversarial Legal Culture of Lawyers: An Empirical Study in Italy

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This paper presents the findings of a qualitative research study that assessed how lawyers enculturate mediation in their professional practice, and what role, if any, pro-mediation policies play in mediation enculturation. The study was conducted in Italy where, since 2010, a statute has mandated a pre-trial introductory meeting on mediation for a wide range of civil disputes. The author held semi-structured interviews based on an anthropological model of enculturation, and analyzed the data from twenty interviews of civil lawyers who were exposed to quasi-mandatory mediation. The study found that the Italian model of quasi-mandatory mediation significantly influenced lawyers' mediation enculturation process. Quasi-mandatory mediation induced many lawyers to learn about mediation, and encouraged them to take action to better understand the mediation process. But in the process, some misconceptions about mediation emerged.

The few lawyers who had preexisting collaborative attitudes toward dispute resolution demonstrated the most important behavioral changes. For those lawyers, the legal requirement to attend an informational mediation meeting encouraged them to suggest that their clients opt-in and mediate their disputes. Absent any legal obligation, even lawyers with a positive attitude toward mediation were reluctant to suggest mediation to their clients. In general, the study found that

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lawyers suggested mediation to their clients on a case-by-case basis based on a combination of factors that significantly limited the potential use of mediation. Lawyers often described mediation as a settlement-oriented process, and made no reference to other objectives of mediation. Relatedly, some lawyers showed a tendency for mediation co-optation: adopting a mediation process rooted in distributive logic and expecting an evaluative or directive role from the mediator. The author concludes that, although Italian lawyers significantly altered their practice in response to the quasi-mandatory mediation law, it remains unclear if they fully and appropriately enculturated mediation.

CONTENTS

I. INTRODUCTION

Since 2010, an Italian statute has mandated a pre-trial mediation meeting in a wide array of civil disputes.[1] At the meeting, a mediator informs parties about the mediation process, and parties are free to try mediation or opt out. This statute represents an important shift in Italian mediation policy. Before 2010, Italian law did not provide for mandatory mediation of any kind. Parties mediated their disputes on a completely voluntary basis. The Italian statute thus affects the nation's legal practice by forcing legal professionals to consider mediation as an option in solving their clients' disputes.

1. Decreto Legislativo 4 marzo 2010, n. 28, G.U. Mar. 5, 2010, n. 53.

This research paper assesses the impact of Italian quasi-mandatory mediation policies on the practice of Italian lawyers. It addresses the following research questions: First, how has the 2010 law (and its 2013 modification) influenced the mediation enculturation process among Italian lawyers? Second, how do lawyers enculturate mediation in their professional practice? These questions are important because mediation institutionalization is a global trend,[2] different models of institutionalization are likely to have different impacts on local legal cultures,[3] and lawyer involvement is critical for the effectiveness of mediation programs.[4]

The study at the heart of this article involved extensive interviews with twenty-three civil litigators who practiced before and after Italy's 2010 law came into effect. On a general level, the new legislation encouraged lawyers to educate themselves about mediation, and most interviewees had a positive opinion on quasi-mandatory mediation. But subtler analysis revealed trends indicating that mediation's potential as a dispute resolution method had been undermined. Limitations came in two forms: as circumstances and conditions that discouraged lawyers from *suggesting* mediation, and as the lawyers' own

2. *See* BRYAN CLARK, LAWYERS AND MEDIATION 6–25 (2012) (providing an outline of mediation regulation across countries); THE VARIEGATED LANDSCAPE OF MEDIATION 13–18 (Manon A. Schonewille & Fred Schonewille eds., 2014) (outlining a comparative perspective on mediation regulation in sixty jurisdictions worldwide).

3. *See, e.g.*, GIUSEPPE DE PALO ET AL., 'REBOOTING' THE MEDIATION DIRECTIVE: ASSESSING THE LIMITED IMPACT OF ITS IMPLEMENTATION AND PROPOSING MEASURES TO INCREASE THE NUMBER OF MEDIATIONS IN THE EU (2014) (outlining state legislation regulating mediation in the European Union and pointing out that quasi-mandatory programs, such as the one enforced in Italy, are ideal models of legislation that may increase the number of mediations while preserving a certain degree of voluntariness for parties), http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf [https://perma.cc/5KMA-XHW5].

4. *See, e.g.*, CLARK, *supra* note 2, at 33 (defining lawyers as the gatekeepers of the legal system); Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk In The Divorce Lawyer's Office*, 98 YALE L. J. 1663, 1679 (1989) ("divorce lawyers give clients reasons to rely on them by emphasizing the importance of their insider status"); Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations With Real Disputants About Institutionalized Mediation And Its Value*, 19 OHIO ST. J. DISP. RESOL. 573, 590 (2003) (pointing out that, in the U.S., decisions about mediation are often made by lawyers); Ayelet Sela, Attorneys' Perspectives of Mediation: An Empirical Analysis of Attorneys' Mediation Referral Practices, Barriers and Potential Agency Problems, and Their Effect on Mediation in Israel (April 2009) (unpublished J.S.M. thesis, Stanford Law School) (highlighting the important role of Israeli lawyers in suggesting mediation to their clients); Adrian Borbély, *Agency in Conflict Resolution as a Manager-Lawyer Issue: Theory and Implications for Research*, 4 NEGOT. & CONFLICT MGMT. RES. 129 (2011) (discussing the role of French lawyers in their clients' conflict resolution).

misperceptions of mediation that prevented them from *using* mediation to its full effect. Lawyers did not always suggest mediation because they often believed it would not help parties resolve their disputes. Factors influencing their analysis included the parties' attitude toward mediation, the type of dispute involved, the likelihood of winning in litigation, and the costs of litigation. Lawyers did not use mediation to its full effect because of their tendency to view mediation as a distributive tool rather than the integrative tool. Most lawyers described mediation as a haggling process where the goal is to get the biggest slice of a fixed-size pie. This approach, called a "co-opted" mediation approach, contrasts sharply with the integrative approach promoted in negotiation literature, which emphasizes mediation's potential to "expand the pie" by transforming the relationship between the parties. Together, circumstantial difficulties and the misperception of mediation's potential outline the limits of the Italian law's effects. The law alone is insufficient to properly enculturate mediation among lawyers, and carries the danger of perpetuating a distorted practice instead.

This article progresses as follows: Section II discusses the anthropological model of enculturation that guided the collection and analysis of data, and questions the capacity of law to create or modify culture. Section III overviews the Italian law requiring an informational meeting on mediation and summarizes relevant quantitative data on the law's effects. Section IV outlines the methodology used in this study and its limitations. Section V analyzes and discusses the data collected. Section VI concludes.

II. The Role of Law in Creating Culture and in the Enculturation Process[5]

Law has the potential to constitute or create culture.[6] When a practice is not naturally part of a given culture, a law created to promote the practice may catalyze cultural change.[7] Showing an awareness for law's potential to change culture, Italian lawmakers introduced mandatory mediation as "the main and probably the unique means of promoting mediation, itself an instrument for social pacification as well as for the deflation of civil litigation."[8] However, as always, context is important: In Italy, mediation clashed with local legal traditions, and Italian lawyers strongly opposed the new law.[9]

Enculturation is the process by which a person internalizes a given cultural norm, value, or belief.[10] The study at the heart of this article assesses the impact of the Italian mediation law on local legal culture eight years after its implementation, analyzing it through the lens of the anthropological model of enculturation. Melford Spiro argues that we must distinguish between learning and internalizing a culture: "to learn a culture is to acquire its propositions; to become enculturated is, in addition, to 'internalize' them as personal beliefs,

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5. Here, law is defined as an institutionalized rule of conduct, and culture encompasses the "practices, values, symbols, beliefs and ideas" of a given group of people. *See* Oscar G. Chase, Law, Culture, and Ritual: Disputing Systems in Cross-Cultural Context 125–37 (2005). Note that, because culture is neither static nor homogeneous, the findings of this paper are subject to contextual changes. Kevin Avruch, Culture and Conflict Resolution 10 (1998). The term *legal culture* refers to the ideas, values, attitudes, and opinions that a society's members hold with respect to their legal system. Laurence M. Friedman, The Republic of Choice: Law, Authority, and Culture 4 (1990). In this study, legal culture mainly points to the ideas, practices, and opinions that legal professionals have about dispute resolution methods.

6. *See* Chase, *supra* note 5; Clifford Geertz, Local Knowledge: Further Essays In Interpretive Anthropology 230–32 (1983) ("legal thought is constructive of social realities rather than merely reflective of them"); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 Hastings L. J. 814, 839 (1987) ("[Law] is the quintessential form of 'active' discourse, able by its own operation to produce its effects. It would not be excessive to say that it *creates* the social world. . .").

7. *See* Chase, *supra* note 5.

8. Camera dei Deputati xvii Legislatura, D.L. 69/2013 Disposizioni Urgenti per il Rilancio dell'Economia- Schede di Lettura 68 (2013) http://documenti.camera.it/leg17/dossier/Pdf/D13069DS2.pdf [https://perma.cc/LP9S-WCYK].

9. Owen Bowcott, *Compulsory Mediation Angers Lawyers Working in Italy's Unwieldy Legal System*, The Guardian, May 23, 2011, https://www.theguardian.com/law/butterworth-and-bowcott-on-law/2011/may/23/italian-lawyers-strike-mandatory-mediation [https://perma.cc/BTU5-QQXF] (reporting a five-day strike of Italian lawyers against the enforcement of mandatory mediation).

10. Melford E. Spiro, Culture and Human Nature 35 (1994).

that is, as propositions that are thought to be true, proper, or right."[11] Here, internalization points to a positive view about a belief, norm, or value shared in a social group. But internalization does not always indicate enculturation. Spiro specifies that, for enculturation to occur, an individual must internalize a norm or value, *and* the norm or value must inspire his or her actions.[12] In other words, an individual with a positive opinion about a norm without acting according to that norm has not enculturated it.[13]

For Spiro, enculturation implies a "cognitive salience" that includes learning, understanding, internalizing, guiding, and instigating actions.[14] This study collected and analyzed data with Spiro's cognitive process in mind, and focused on the way lawyers learned, understood, internalized, and used mediation in their legal practice.[15] Where lawyers adhered to Italian law's mediation requirements but failed to encourage their clients to mediate on a regular basis, this article does not consider them to have enculturated mediation.

On a different note, law also carries the power to *maintain* rather than change culture.[16] This is especially important in the context of mediation because lawyers forced to adopt mediation may "co-

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11. *Id.*

12. MELFORD E. SPIRO, GENDER IDEOLOGY AND PSYCHOLOGICAL REALITY 7 (1997).

13. *Id.* at 8. *But see* Claudia Strauss, *The Complexity of Culture in Persons*, *in* ADVANCES IN CULTURE THEORY FROM PSYCHOLOGICAL ANTHROPOLOGY 109, 114–16 (Naomi Quinn ed., 2018) (positing that enculturation occurs even when the actor is merely acquainted with a norm or belief, or holds it as a cultural cliché).

14. SPIRO, *supra* note 10, at 38.

15. To the author's knowledge, this is the only study on mediation in the legal practice that used a specific model of enculturation to assess how lawyers assimilate mediation in their professional practice. *See, e.g.*, Andrew Agapiou & Bryan Clark, *Scottish Construction Lawyers and Mediation: An Investigation into Attitudes and Experiences*, 3 cfs]Int'l J. L. Built Env't 159 (2011); John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137 (2000)*;* Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2 J. DISP. RESOL. 241 (2002); Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L. REV. 401 (2002); Bobbi McAdoo & 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); Morris L. Medley & James A. Schellenberg, *Attitudes of Attorneys Toward Mediation*, 12 MEDIATION Q. 185 (1994); Julian Sidoli del Ceno, *An Investigation into Lawyer Attitudes Towards the Use of Mediation in Commercial Property Disputes in England and Wales*, 3 INT'L J. L. BUILT ENV'T 182 (2011).

16. *See* CHASE, *supra* note 5, at 131.

opt" fundamental aspects of mediation.[17] Over time, the same law that implemented mediation may perpetuate a corrupted form of mediation. In the Italian legal community, where co-optation tendencies emerged, the law that expanded mediation may have accidentally played a critical role in spreading a co-opted model of mediation.

III. A Quasi-Mandatory Form of Mandatory Mediation: Legislative Decree n. 28/2010

This section briefly describes the history of Italy's quasi-mandatory mediation law, Legislative Decree n. 28/2010, and provides an overview of its main provisions. Italy has been promoting the use of judicial conciliation and voluntary mediation since 1991.[18] However, despite earlier laws promoting mediation on a voluntary basis, the number of mediations held in Italy before 2010 was insignificant when compared with the total number of civil disputes filed in courts.[19]

Recognizing a clear reluctance by parties to engage in mediation, in 2010, Italian lawmakers introduced mandatory mediation legislation to help combat systematic delays in delivering justice. The main goal of the legislation was to divert certain types of civil disputes from the Italian courts to mediation. The statute took effect in 2011. Legislative Decree n. 28/2010 required compulsory mediation for disputes regarding condominiums, property, division of goods (or partition), family-business covenants and agreements, wills and

17. *See* Clark, *supra* note 2, at 73–79 (outlining the "co-optation thesis" in the field of mediation); Patrick G. Coy & Timothy Hedeen, *A Stage Model of Social Movement Co-optation: Community Mediation in the United States*, 46 Socio. Q. 405 (2005); Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 Wm. & Mary L. Rev. 5 (1996).

18. Giuseppe De Palo & Penelope Harley, *Mediation in Italy: Exploring the Contradictions*, 21 Negot. J. 469, 470–72 (2005) (recounting the history of mediation promotion efforts in Italy).

19. In 2009, just two years before Legislative Decree n. 28/2010 came into effect, around 19,000 demands were made for voluntary mediation, the vast majority of which (76%) were business-to-consumer disputes, or small claims, in telecommunication service. Of these demands, around one-third resulted in the parties accepting mediation. *See* Vincenza Bonsignore, *La diffusione della giustizia alternativa in Italia nel 2009: i risultati di una ricerca*, *in* Quarto Rapporto sulla diffusione della giustizia alternativa in Italia 61–69 (2011). But in the same year, more than 3.3 million civil disputes were pending in courts. *See* ISTAT, http://dati.istat.it/?lang=en# [https://perma.cc/N26T-725F] (select hyperlink "Justice and Security" and sub-hyperlinks "Civil Justice," "Civil proceedings," and "Flow," and then select the hyperlink "Select time" and insert "2009" in both dropdown menus for the range period).

inheritance, leases, loans, business rents, medical and paramedical malpractice, libel, insurance, and banking and financial contracts.[20]

The original version of the law was different from the one enforced at the time of this article's study. The original version did not provide opt-out mechanisms and parties were required to mediate their case and pay the mediator's fees before proceeding to court. That version encountered strong resistance from Italian lawyers.[21] Furthermore, the Italian Constitutional Court ruled that the original version of the law was unconstitutional.[22] In response to the Constitutional Court's ruling, the legislature amended Legislative Decree n. 28/2010 and softened the mandatory mediation requirement.[23]

The current version of the law requires parties to participate in a meeting (hereinafter referred to as the "introductory," "first," or "informational" meeting) with a mediator before proceeding with the case in court. According to the law, parties can only hire mediation providers accredited by the Italian Ministry of Justice.[24] At the introductory meeting, the mediator's duty is to explain the mediation process to the parties.[25] After the explanation, parties must state clearly whether or not they want to mediate the case.[26] The process thus operates with an opt-out mechanism to ensure that participation in mediation is always voluntary.[27] Failure to submit the case to a

20. D.Lgs. n. 28/2010, articolo 5, comma 1bis.

21. *See* Bowcott, *supra* note 9.

22. Corte cost., 6 dicembre 2012, n. 272, Foro it. 2013, I, 1091 (stating that the Italian Parliament directed the Italian government to enact a legislative decree for the regulation of mediation but never explicitly authorized the government to make mediation compulsory).

23. Legge 9 agosto 2013, n. 98, articolo 84, lettera h), G.U. ago 20, 2013, n. 194.

24. D.Lgs. n. 28/2010, articolo 16.

25. *Id*. at articolo 8, comma 1.

26. *Id*.

27. *See* Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program*, 11 CARDOZO J. CONFLICT RESOL. 479, 488 (2010) (outlining a spectrum of how mandatory mediation can be, and highlighting that an opt-out system may achieve an ideal balance between coercion and voluntariness). Note, however, that a few court rulings exist arguing that parties only fulfill the legal prerequisite when they actually mediate their disputes or at least start a mediation. As a result, judges in some cases fined or precluded the right of hearing for parties that attended the informational meeting and chose to not mediate their disputes. The premise of these fines or preclusions was that the parties' behavior did not conform to the (questionable) legislator's will that mediation must be effective. However, such cases remain a minority in Italian courts. *See, e.g.*, Tribunale Firenze, 15 ottobre 2015, n. 3497/15, and Tribunale di Napoli, ordinanza 6 aprile 2017.

mediation center or to attend the introductory meeting may preclude the parties from receiving a court hearing.[28]

Other important provisions should be briefly noted. Italian judges can order parties to mediate their dispute in the middle of the judicial process, even if parties already attempted mediation before filing the case in court.[29] Parties pay the costs for the compulsory assistance of lawyers in mediation.[30] Where they decide to opt in to mediation, parties also pay the mediator's fee.[31] The law provides tax benefits for those who mediate and penalties for those who fail to participate in the first mediation meeting without justification.[32]

It is worth noting that, during the 2017 and 2018 annual conferences of the Congresso Nazionale Forense (CNF), the analog of the Annual Meeting of the American Bar Association (ABA), lawyers formally approved important statements regarding Legislative Decree n. 28/2010. In both meetings, lawyers expressed appreciation for mediation and the Italian model of quasi-mandatory mediation (as amended in 2013), advocating its continuance and even suggesting some amendments to improve its effectiveness and reinforce the role of lawyers in mediation.[33] These meetings represent a shift away from the initial hostility in the Italian legal community. The reluctance to mediate that appeared immediately after the statute's passage seems to have subsided, and lawyers have begun to see mediation in a more positive light. Whether increased engagement in mediation is a sign of mediation enculturation or "an opportunistic maneuver designed to gain control of the field and usurp the role of other professionals in the process" has yet to be seen.[34] This study seeks to provide predictive and reflective insights.

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28. D.Lgs. n. 28/2010, articolo 5.

29. *Id*. at articolo 5, comma 2.

30. *Id*. at articolo 8, comma 1 (stating that the assistance of lawyers in mediation is compulsory). *See also* Decreto Ministeriale 10 marzo 2014, n. 55, G.U. Apr. 2, 2014, n. 77 (providing guidelines in determining lawyers' fees for their assistance in mediation).

31. Decreto ministeriale 18 ottobre 2010 n. 180, G.U. Nov. 4, 2010, n. 256, articolo 16, comma 3, Tabella A (stating that mediators are paid a one-time fee in advance based on the value of the dispute).

32. D.Lgs. n. 28/2010, articolo 20 and articolo 8, comma 4.

33. Marco Marinaro, "*Il Paese dove tutto finisce in tribunale." Riflessioni Sparse sulle Prospettive di Riforma della Giustizia Civile*, JUDICIUM (December 12, 2018), https://www.judicium.it/paese-finisce-tribunale-riflessioni-sparse-sulle-prospettive-riforma-della-giustizia-civile/ [https://perma.cc/N4NC-SAH4].

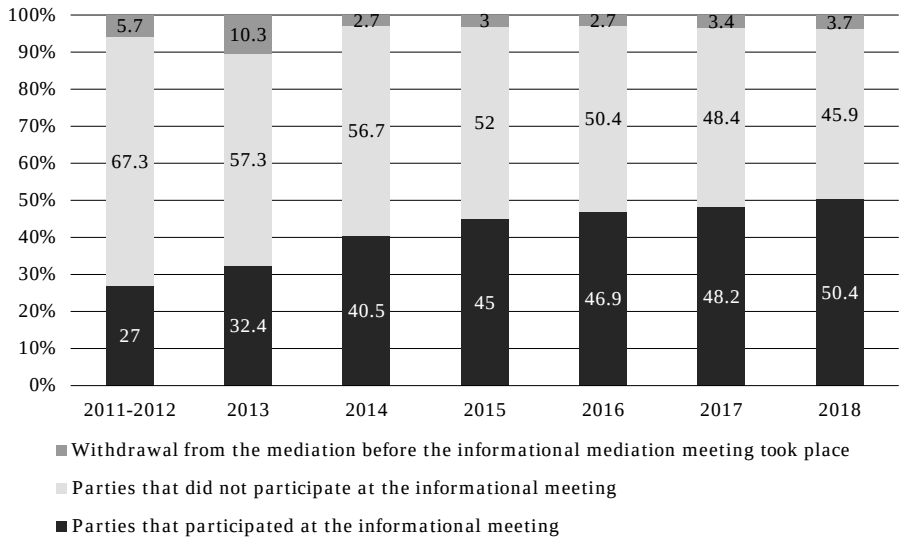
34. CLARK, *supra* note 2, at 71. *See also* Luigi Cominelli & Claudio Lucchiari, *Italian Mediators in Action: The Impact of Style and Attitude*, 35 CONFLICT RESOL. Q. 223 (2017) (conducting a quantitative study on Italian mediators in which lawyers represented a high percentage of mediators).

A. *Some Statistics about Mandatory Mediation in Italy*

The official website of the Italian Ministry of Justice periodically provides statistics, both in Italian and English, on the use of mediation.[35] Three sets of data published on the website deserve specific attention. The first set of data concerns parties' participation at the informational mediation meeting. Chart 1 shows that, between 2011 and 2018, a significant proportion of parties did not show up at the informational mediation meeting required by the law. The party that did not show up was likely the defendant. The plaintiff has a logical interest in participating in the informational meeting in order to prove to the judge, through a document called "verbale" released by the mediation provider, that he or she fulfilled the legal requirement of attendance at the meeting. Only with that document can he or she file the case in court. Existing scholarship in the area does not indicate if judges have fined or sanctioned the parties who did not participate in the introductory meeting. The fact that the trend did not significantly change over the years suggests that judges have rarely sanctioned parties who did not participate, or sanctioned them infrequently.

CHART 1: PARTICIPATION RATE AT THE INFORMATIONAL MEDIATION MEETING, 2011 TO 2018

Source: Italian Ministry of Justice



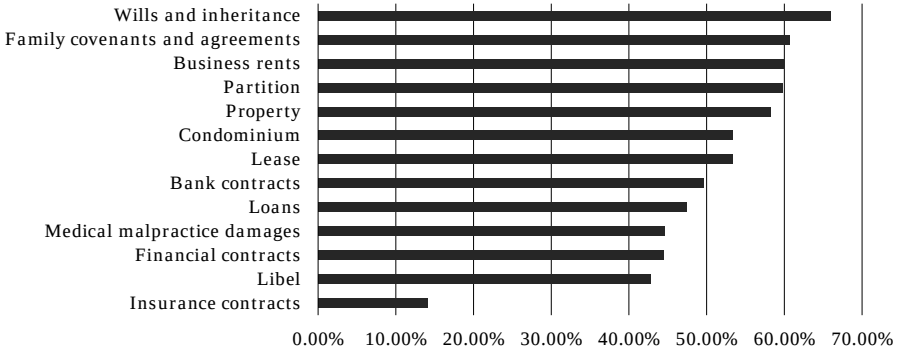
35. *Mediazione Civile*, MINISTERO DELLA GIUSTIZIA, https://webstat.giustizia.it/Analisi%20e%20ricerche/Forms/AllItems.aspx [https://perma.cc/XLF7-FU4D].

Unfortunately, the Italian Ministry of Justice does not provide data on the percentage of parties who decided to mediate their cases. In other words, there is no official data on the number of parties who participated in the informational meeting *and* decided to opt in and mediate their disputes. This lack of data precludes a meaningful understanding of the trend of effectively held mediations, which might provide a quantitative measure of lawyers' attitudes toward pre-trial mediation over time.

The second set of data that deserves attention shows that the participation rate at the first mediation meeting differs based on the substance of the dispute (Chart 2). For instance, while in will and inheritance disputes the participation rate in 2018 was 66%, in insurance contract disputes the rate was 14.1%. The statistics also highlight that in financial contract and medical malpractice disputes, in which banks and insurance companies are typically involved, the participation rate in informational meetings (44.5% and 44.6% respectively) was slightly below the participation rate for all mediations (50.4%).[36]

CHART 2: PARTICIPATION RATE AT THE INFORMATIONAL MEDIATION MEETING BY TYPE OF DISPUTE, 2018

Source: Italian Ministry of Justice



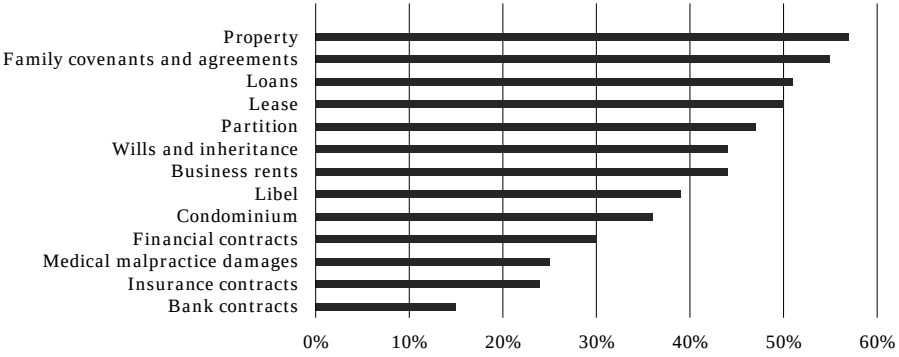
A document released in 2016 by the Italian association of insurance companies (Associazione Nazionale Italiana Assicurazioni) explicitly outlines the insurance companies' hostility toward mediation. In this document, insurance companies reject the Italian model of mandatory mediation and advocate the abolition of the mandatory

36. *Id.* at 6.

requirement to attend the introductory mediation meeting (ANIA 2016).[37]

CHART 3: SETTLEMENT AGREEMENT, OR "SUCCESS RATE" WHEN PARTIES AGREE TO MEDIATE THE DISPUTE, 2018

Source: Italian Ministry of Justice



The third set of data relates to the mediation settlement agreement (or "success") rate. Interestingly, in those few cases where banks and insurance companies mediated disputes, the percentage of mediations that resulted in agreements was very low: only 17% in bank contracts, 30% in insurance contracts, 22% in medical malpractice, and 27% in financial contracts. For areas such as property and family covenants and agreements, the success rates were 57% and 53% respectively, significantly higher than any other mediated disputes (see Chart 3).[38] This data indicates that agreement rates differ significantly based on the type of the dispute, which may affect lawyers' expectations of the value of mediation in certain cases.

IV. METHODOLOGY AND LIMITATIONS OF THE STUDY

Between February and July 2018, the author conducted twenty-three semi-structured interviews with lawyers practicing in Milan, the second largest Italian city. The author chose Milan because of its large number of practicing lawyers and of civil disputes annually

37. Associazione Nazionale Italiana Assicurazioni, Commissione per la riforma organica degli strumenti stragiudiziali di risoluzione delle controverise Audizione ANIA (May 11, 2016), https://www.ania.it/documents/35135/132353/Audizione-ANIA-ADR.pdf/eef50e53-7514-287c-3b61-1e267420449a?t=1575626008335 [https://perma.cc/5C65-GJYT].

38. MINISTERO DELLA GIUSTIZIA, *supra* note 35, at 9.

managed by its local court.[39] It was also noted that, in Milan, public mediation centers began operations before the enactment of Legislative Decree n. 28/2010.[40]

The author used a snowball sampling method to recruit civil lawyers. The author chose snowball sampling over random sampling because the former reduces the risk of recruiting civil lawyers with insufficient experience in mediation. The snowball method proceeded as follows: The researcher contacted six persons (including lawyers, mediation providers' staff, academics, and in-house counsels) who had numerous personal contacts with local civil lawyers, and asked them to refer lawyers who they thought would be capable of providing information related to the research questions. At the end of each interview with the referred individuals, the researcher asked the lawyers to name, in turn, other lawyers as interview candidates. After twenty-three interviews, the researcher stopped the data collection and started the data analysis.

The interview questions aimed to collect data about the mediation enculturation process of lawyers. Using Spiro's model of enculturation, these questions were divided into four clusters, namely *mediation learning*, *mediation understanding*, *mediation internalization*, and *use of mediation in legal practice*.[41] Other questions aimed to collect participants' professional demographic information, including prevalent areas of practice, law firm size, experience with mediation processes, and if they were practicing as mediators in addition to practicing as advocates. For each participant, the author also collected personal demographic information such as age, years of practice, and membership status from the Milan Bar Association's official website.

Once contacted, the researcher gave the interviewees three options: face-to-face interview, video-call interview, or phone interview. Five interviews were conducted face-to-face, eight by phone, and

39. *See* CONSIGLIO DELL'ORDINE DEGLI AVVOCATI DI MILANO, *Gli Iscritti all'Ordine di Milano*, LA RIVISTA DEL CONSIGLIO, Numero Annuale 2016–17 13, 2020, https://www.ordineavvocatimilano.it/upload/file/Pubblicazioni/2016-2017unico/Riv_2016-17_013-036.pdf [https://perma.cc/YW7M-5U2T] (reporting a total of 18,749 lawyers practicing in 2017). *See also* MINISTERO DELLA GIUSTIZIA, *Focus Contenzioso - Tribunali Ordinari a Confronto Anno 2016*, https://webstat.giustizia.it/Analisi%20e%20ricerche/Focus%20Contenzioso%20-%20elenco%20Tribunali%20con%20vari%20indicatori%202016.pdf [https://perma.cc/C7GB-H8VN].

40. *See Organismo di Conciliazione Forense and Servizio di Conciliazione Camera Arbitrale di Milano*, ORDINE DEGLI AVVOCATI DI MILANO, https://www.ordineavvocatimilano.it/it/organismo-di-mediazione-e-camera-arbitrale/p45 [https://perma.cc/TGM6-NEGF] (last visited Oct. 25, 2020).

41. The clusters are discussed in Sections V.A, V.B, V.C, and V.D respectively.

seven through video calls. All interviews were audiotaped and transcribed. The researcher used Nvivo to analyze the data. Interviews were conducted in Italian, and the quotes reported here were translated by the author into English. All participants signed a consent form, which granted confidentiality and anonymity for the participants' personal data, including the use of pseudonyms.

Due to the small sample size, it was difficult to make statistical generalizations.[42] However, it is possible to draw an analytical generalization of the findings and formulate qualitative data-based observations about the capacity of the Italian model of mandatory mediation to influence lawyers' dispute resolution practices.

V. Data Analysis and Discussion

Of the twenty-three interviews conducted, three were excluded from the data analysis. Two interviewees, although still members of the Milan Bar Association, became full-time mediators in 2011 and stopped practicing law. Their interviews did not significantly contribute to the present study and were excluded from the data analysis. The third excluded interviewee began was practicing family law exclusively, an area not subject to mandatory mediation. Therefore, the data analysis focused on twenty interviews, whose subjects comprised ten males and ten females. Among those twenty civil lawyers, six also practiced as mediators.

Lawyers were drawn from the age ranges of 30–39 (seven), 40–49 (seven), 50–59 (five), and 70–79 (one). Their years in legal practice ranged between six and thirty-seven years. Interviews lasted anywhere from thirty to ninety minutes, with an average of one hour per interview. All interviewees were lawyers with significant experience in civil disputes, who had expertise or specialized in an area of law in which pre-trial mediation was required. These areas included lease, real property, condominium, medical malpractice damage, bank, finance, and insurance contract, and will and inheritance law. Nineteen lawyers had represented their clients in mediation at least once. All of the interviewees worked as independent practitioners or in small law firms with one to ten lawyers.

A. *How Did Lawyers Learn about Mediation?*

The researcher asked the following questions: Have you ever heard of mediation? If so, when and how did you first learn about it? These questions were important in determining if Legislative Decree

42. *See* Steinar Kvale, Doing Interviews 126–28 (Uwe Flick ed., 2007).

n. 28/2010 was the lawyers' primary source of mediation education. Eleven lawyers reported that they learned about the existence of mediation as a dispute resolution method only when the statute took effect. Before the statute came into effect, they were not aware of mediation as a method of dispute resolution even though the Italian legal system had already provided for and promoted mediation on a voluntary basis. The remaining nine interviewees knew about mediation before the law was enacted. These interviewees had learned about mediation by attending workshops or seminars on mediation before the statute was enacted, through word-of-mouth among colleagues, and through professional contacts with local arbitration service providers that also provided mediation services.

In sum, all of the interviewed lawyers were aware that mediation existed as a method of solving legal disputes. Many of them learned about mediation as a result of the statute, which indicates that the statute heightened lawyers' awareness of mediation. This finding aligns with the researcher's expectation that the mandatory nature of the provisions would force lawyers (who had no prior experience with mediation) to become aware of the practice. Interestingly, one may infer that the Italian laws promoting voluntary mediation enacted before 2010 did not raise lawyers' awareness of mediation as effectively as Legislative Decree n. 28/2010 did.

Notably, none of the lawyers interviewed received mediation training in law school. This lack of education supports the argument that Italian legal institutions have not systematically incorporated a cooperative culture of dispute resolution.[43] However, in the past few years, Italian law schools have gradually begun to offer negotiation and mediation classes to their students. An increasing number of law schools are participating in the Italian Mediation Competition held annually in Milan and organized by the local Chamber of Commerce.[44] If the trend continues, mediation courses offered in law schools may become the primary source of mediation education for Italian lawyers.

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43. *See* Giuseppe Conte, *The Italian Way of Mediation*, 6 ARB. L. REV. 180, 195–200 (2014) (outlining the adversarial culture of Italian lawyers); De Palo & Harley, *supra* note 3.

44. *See Competizione Italiana di Mediazone*, CAMERA ARBITRALE DI MILANO, https://www.camera-arbitrale.it/it/mediazione/competizione-italiana-di-mediazione.php?id=499 [https://perma.cc/6ANT-UFW8].

B. *What Did Lawyers Understand Mediation to Be?*

To collect data on how lawyers understand mediation, the author posed the following questions to the interviewees: Did you ever attend courses, workshops, or seminars on mediation? Why? How would you describe the mediation process? How would you describe the mediator's role? The researcher asked follow-up questions designed to verify or obtain more information about participants' mediation education. Findings indicate that Legislative Decree n. 28/2010 motivated lawyers to take action to understand mediation. Most of the interviewees approached mandatory mediation as an issue of professional necessity, and several attorneys went beyond the basic training offered as continuing legal education. But certain misconceptions arose as the lawyers familiarized themselves with mediation which undermined mediation's potential. The lawyers predominantly understood mediation as a competitive, settlement-oriented process. They paid little attention to the transformative model of mediation, which highlights how mediation can be used to transform the relationship between the parties. As a result, many interviewees took a "directive" approach to mediation rather than an "elicitive" one, directing the parties toward a particular outcome rather than eliciting the parties' preferences and honoring them.

The vast majority of interviewees (eighteen) reported that, once mandatory mediation was implemented, professional need motivated them to understand mediation. Dario said that, for him, understanding mediation became a professional necessity when mediation became mandatory in banking and financing law, his area of practice. Similarly, Rossana and Elena asserted that mandatory mediation was a "fait accompli" that they had to take into consideration in their practice. Elena stated that, before the enactment of Legislative Decree n. 28/2010, she did not know what mediation was, but that she started to study it "because [it] came into effect as mandatory [mediation]." They were compelled to learn about mediation and attend trainings. Most of the respondents (fourteen) reported that their only source of mediation education was the courses, training, or workshops that took place immediately after the law's enactment, typically in the form of continuing legal education. These trainings tended to last a few hours on a single day.

The rest of the respondents (six) suggested that they went beyond the basic training offered as continuing legal education. They attended courses for mediators, which led them to work as mediators for mediation service providers registered at the Italian Ministry of

Justice. For example, Ilenia reported that after the statute was enacted, she attended mediation courses and conferences through which she "became passionate about mediation and later [became] a mediator as well."

However, two interviewees (Luisa and Fabio) did not approach mediation as a professional necessity. They did not seek to educate themselves about mediation through courses or training events, even though their area of practice included disputes subject to mandatory mediation, namely insurance and condominium disputes. Luisa and Fabio's understanding of mediation was limited to the legal provisions regulating the informational meeting and its opt-out mechanism.

Interestingly, lawyers who were already aware of mediation's existence took action to further familiarize themselves with mediation in response to the legal mandate. For instance, Alessio said, "I knew that there was something called 'mediation' as an alternative to litigation, but I never used it . . . and I never studied it. But when it became mandatory, I studied it." Luca, who had learned about mediation a few years before the law was enforced, remarked that he started attending courses "to get the meaning of mediation" only after 2010. Therefore, in some cases, Legislative Decree n. 28/2010 played a critical role in helping lawyers enculturate mediation, even for those lawyers who knew about mediation before the mandatory provision was enacted.

Regarding the definition of mediation, the majority of respondents (fifteen) focused on a purely distributive aspect, describing mediation as a process similar to haggling. These lawyers approached mediation as a dispute resolution process in which parties move away from their initial positions and lower their monetary claims with a mediator's help. For example, Roberta described that, in mediation, the "mediator helps parties to reach an agreement through asking parties to waive something." Annalisa and Alessio gave similar descriptions. Alessio defined mediation as a process "where parties participate in order to communicate to the mediator how much they are able to reduce their claims."

Five lawyers provided a materially different definition. They emphasized that, in mediation, parties can focus on certain aspects of the dispute that judges cannot consider because they are bound by the law. Stefania reported that "in mediation, [one] can obtain more than what [he or she] could get in litigation." Similarly, Matteo pointed out that mediation may "extend the issues at stake beyond

the legal relevance." Claudio held a similar view. In his opinion, "mediation is different from trial" because "it allows [parties] to solve other problems that legal disputes often entail," and, hence, to "expand on negotiable issues to prevent other disputes among parties."[45]

Four respondents stated that the ways parties communicate comprise a central component of mediation. For example, Luca defined mediation as a "non-contentious proceeding where one party is driven to converse open-mindedly with his or her counterpart." Relatedly, Marta said mediation contains "a moment where parties share each other's point of view with the purpose of reaching an agreement and without adopting a positional approach . . . a moment of clarification and in-depth understanding of the dispute, and a constructive discussion based on the shared interest of reaching a solution through common sense."

Elena and Ivano also emphasized the element of communication. For Ivano, "[m]ediation is an opportunity for a party to talk with his or her counterpart, before a third party who is neutral and does not pass judgement on the dispute." Claudio added that, "[w]hen negotiation is mired in a vicious circular dialogue, [the mediator] breaks the circle and steers the negotiation toward a more constructive framework."

When asked to define the mediator's role, the majority of the interviewees (sixteen) described the mediator as a person whose goal is conflict resolution. In other words, the mediator works with a settlement-oriented goal, and aims to encourage the parties to resolve the dispute and reach an agreement. According to the interviewees, the mediator: "is a facilitator working with the goal of solving the dispute" (Liliana); "tries to reach a compromise without taking into account who is right or wrong" (Tommaso); "is an impartial third party who tries to make two different positions meet in the middle" (Luisa); "is a facilitator who can hear from parties separately, understand their problems, and help them find a solution" (Mario); and "[is] an impartial third party who helps you to negotiate a solution to a dispute" (Matteo).

45. Claudio's view hints at mediation's capacity to create solutions by transforming the parties' relationship. Note, however, that most lawyers in this study approached mediation as a distributive process in which parties haggle to satisfy their interests at the expense of their counterparts. Section V.D. elaborates on the distributive approach and its implications.

Scholars and mediation practitioners often contrast the settlement-oriented approach to mediation with the transformative one.[46] The transformative model of mediation considers conflict resolution to be a secondary goal; the mediator's primary purpose is to change people and their relationships through empowerment and recognition.[47] This idea of transformation was largely absent from the interviewees' description of the mediation process and the mediators' role. Whether consciously or not, most interviewees expressed a purely settlement-oriented understanding of mediation, and adopted methods known as problem-solving mediation and evaluative mediation. In problem-solving mediation, parties reach an agreement by focusing on the parties' interests, not their positions.[48] In evaluative mediation, parties reach an agreement through the mediator's merit-based evaluations of the dispute.[49]

Some lawyers described the settlement-oriented mediator as a person who evaluates positions or exerts pressure on parties to accept offers, reach a resolution, or change attitudes about the problem. For example, Marta stated that a mediator "shows parties how they may solve their disputes, sometimes alerting a party when his or her position is irrational." Roberta added that the mediator's role is "[to] mak[e] the other party understand the limits of his or her position." Alessio pointed out that mediators "suggest ways to resolve the dispute." Ivano stressed that the mediator "tries to convince parties to find conflict resolution." Dario defined the mediator as "a facilitator without any decision-making power; he or she can only try to make [each] party be rational."

These definitions evoke the so-called "directive" approach to mediation rather than the "elicitive" one.[50] Mediators with a directive approach direct "the mediation process or the participants toward a

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46. *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION 75–79 (2004) (describing mediation as a process that should primarily help parties understand each other's perspectives and improve their decision-making skills).

47. *Id.*

48. *See* Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 246 (2002).

49. *See* Dorothy J. Della Noce, *Evaluative Mediation: In Search of Practice Competencies*, 27 CONFLICT RESOL. Q. 193, 194 (2009).

50. *See* Lorig Charkoudian et al., *Mediation by any other Name would Smell as Sweet—or would It? The Struggle to Define Mediation and its Various Approaches*, 26 CONFLICT RESOL. Q. 293, 293 (2009); Leonard Riskin, *Decision-Making in Mediation: The New Old Grid and The New New Grid System*, 79 NOTRE DAME L. REV. 1, 30 (2003).

particular procedure, perspective, or outcome."[51] In contrast, elicitive mediators "elicit the parties' perspectives and preferences, and then try to honor or accommodate them."[52] The interviewees, by emphasizing a directive role for mediators, hinted at their broader approach to mediation: they referred extensively to evaluative and distributive logics in characterizing the mediation process. Such an approach corresponds with literature in the field that highlights lawyers' tendency to co-opt mediation through a positional or adversarial approach to dispute resolution. The researcher elaborates on this topic in Section V.D.

Whatever the definition of the mediation process and the mediators' role, interviewees sometimes wrongly conceived of the potential of mediation. Guglielmo provided one such example, defining the mediator as an "intermediary between parties." He stated:

> Guglielmo: "I [represented a client in a mediation] that seemed to be a poker game because the counterpart did not want to show all the 'cards.' This is a limitation of mediation. [Mediation] allows parties to share some information only with the mediator and not with the counterpart . . . If one party shares information only with the mediator, and not with the counterpart, the mediator can do little . . . I am available to share all of my information with the counterpart, but only if my counterpart does the same . . . If my counterpart does not want to share information that he or she fears might be used in litigation, then I prefer to litigate the case."

Guglielmo did not articulate that mediation does not always require parties to share all relevant information with their counterparts. Parties may instead share information with the mediator and not with their counterparts if they fear that the counterparts will use that information against them in litigation. Indeed, even though Legislative Decree n. 28/2010 provides a confidentiality protection for parties' negotiation during mediation, counterparts might gather information for strategic use in litigation without violating the statute.[53] A mediator may be useful in this aspect, because a mediator can use the information in a way that is productive for the process and harmless for the parties. Parties may also share information with the mediator for the purpose of assistance. They may ask the mediator for suggestions on substance and about how and when to

51. Riskin, *supra* note 50, at 30.

52. *Id.*

53. D.Lgs. n. 28/2010, articolo 9.

share that information with their counterparts, in order to facilitate an effective mediation process.[54]

Guglielmo's quote suggests that workshops and continuing legal education on mediation may be an insufficient channel to educate participants about the mediation process and the mediator's role. Similarly, the information that lawyers gather during their first mediation meetings appears insufficient to help lawyers gain a full understanding of mediation.

Another interviewee reported critical confusion on the legal value of a mediated agreement. During her interview, Luisa wondered, "can the agreement be appealed in court?" It is clearly problematic that a lawyer does not know that a mediated agreement cannot be appealed in court, and is the result of the parties' will and not a judicial decision. Fabio also held misconceptions about mediation, which emerged through his terminology. He defined the mediator as an "authority who holds hearings." The idea of a mediator as an "authority" and mediation meetings as "hearings" diverges from the traditional concept of mediation. A mediator does not formally hold any power over parties, and mediation meetings are informal and operate outside of specific rule-bound procedures such as hearings

In sum, after Legislative Decree n. 28/2010 was enacted, many lawyers took action to learn about mediation by attending courses, workshops, or seminars. Some of the lawyers became mediators. Only a few lawyers were not compelled to learn about mediation. But lawyers often described mediation as a process dominated by the distributive or competitive dynamics of negotiation, where parties focus only on the distribution of fixed resources. Lawyers also showed a tendency to describe mediation as a typical problem-solving process, ignoring its transformative potential, with mediators playing a directive role rather than an elicitive one. Related misconceptions about mediation emerged during the interviews.

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54. *See* HAROLD I. ABRAMSON, MEDIATION REPRESENTATION: ADVOCATING AS A PROBLEM SOLVER 57–61 (3d ed. 2013); DWIGHT GOLANN, SHARING A MEDIATOR'S POWERS: EFFECTIVE ADVOCACY IN SETTLEMENT 181 (2013). *See also* CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 188 (2014) ("Often parties are more comfortable disclosing information to an intermediary if they are meeting alone with the mediator and not in the presence of people or groups with whom they disagree.").

C. *How Did Lawyers Internalize Mediation?*

To assess if lawyers internalized mediation, and how they internalized it, the interviewer posed the following questions to interviewees: What do you think about mediation as a dispute resolution method? After Legislative Decree n. 28/2010 was implemented, did you perceive any changes in your colleagues' attitudes, ideas, or practice of dispute resolution? To determine what type of environment the lawyers were in, and whether they were open to internalizing mediation, the researcher asked these questions: Did your clients ever ask you to solve their disputes through mediation without being solicited? Did your opposing party's lawyers ever propose that you mediate a dispute? Interviewees' answers indicated that, in general, lawyers saw value in mediation, even as their clients were disinclined to make demands for mediation. In some cases, lawyers internalized mediation over time but remained skeptical about the value of mediation.

Most of the respondents (nineteen) stated that their clients never asked to mediate their disputes. Only one lawyer reported that a client, a condominium administrator, proposed mediation as a method of solving certain condominium disputes. Similarly, respondents reported that their colleagues never suggested mediation of their own accord. This data is important because the absence of external stimuli (such as a client demand for mediation or the counterpart lawyers' invitations to mediate) can discourage lawyers from internalizing mediation. It is difficult to enculturate a practice if the community does not consider its use on a regular basis.[55]

Despite the discouraging social environment, the majority of lawyers (fifteen) reported having a positive view of mediation. At a minimum, they held a neutral view—they did not reject the idea of mediation as a dispute resolution method. For some lawyers, mediation's intrinsic characteristics and potential combined with the lawyers' personal attitudes toward conflict generate a positive view on mediation. For example, Aldo reported the following:

> Aldo: "I like its informality, which distinguishes it from the formality of litigation. In addition, I like the idea that parties should be physically present [at a mediation]. I think courtrooms are usually uncomfortable for parties. Again, the typical deadlines or preclusions of the judicial process do not exist. I

55. *See* Fitz John Porter Poole, *Socialization, Enculturation and the Development of Personal Identity*, *in* COMPANION ENCYCLOPEDIA OF ANTHROPOLOGY 831, 831 (Tim Ingold ed., 1994) (emphasizing that socialization and enculturation are interdependent processes).

> like the confidentiality of mediation. . . Mediation is a step that deserves to be tried, and not only when it is mandatory. . . Mediation is advantageous in terms of time and costs for lawyers as well as clients. In absolute terms, [lawyers] do not earn the same amount of money they would earn for an entire judicial process, but they can be paid earlier because mediation is briefer than litigation. Furthermore, if clients see that you solve their dispute in a fast and cheap way, they will come back to you when they have another dispute."

Claudio and Luca had similar opinions. They added that, because mediation empowers parties to actively shape the contents of an agreement, lawyers enjoy the benefit of being less accountable for the outcome of a mediation. The parties make the final decision to accept or decline the settlement.[56]

Annalisa reported that mediation is valuable as a dispute resolution method because the mediator can deliver a reality check for her clients through mediation:

> Annalisa: "I think that mediation is helpful, especially in private sessions. The mediator can tell you what a convenient solution is or how to solve the dispute. He or she can make the party be realistic and make the party understand what they might get in court . . . the mediator [is a] super-party. If the mediator presents an evaluation to my clients, then that evaluation might have a positive impact on my clients."

The literature on mediation indicates that mediators can use reality checks to help parties set realistic expectations about the judicial outcome of their disputes and help them make more informed choices during mediation.[57]

The rest of the respondents did not elaborate on why they had a positive or neutral opinion about mediation. Rossana simply stated that, "at the end of the day, mediation helps [lawyers] be more pragmatic." Liliana found value in mediation because "every dispute

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56. It is worth noting that Dario, Claudio, and Luca had very positive opinions about mediation. However, they were not very experienced in mediation. Claudio, for instance, reported that he had mediated no more than 3–4 disputes in total. Dario and Luca stated that they rarely found counterparts willing to mediate disputes. The researcher suspects that their positivity toward mediation is based on an abstract ideal of mediation rather than experience in it. This is important because experience may not reflect the "ideal" mediation as depicted in trainings, and lawyers cannot internalize mediation without going through the actual process.

57. *See, e.g.*, Dwight Golann & Aaron Marjorie Corman, *Using Evaluations in Mediation*, *in* AAA HANDBOOK ON MEDIATION 327, 328 (Carbonneau & Jaeggi Eds., 2010).

brings a benefit when solved amicably." For Alessandra and Guglielmo, mediation could be "convenient" or a "valid method of dispute resolution."

Interestingly, the Italian law on mediation significantly impacted the professional practice of certain types of lawyers. These lawyers had a pre-existing preference for a non-adversarial approach to legal disputes, and sought a "match" in the cooperative nature of mediation. Marta was one such lawyer. She offered the following statement:

> Marta: "When I explained to my clients that their counterparts had some good reasons on their side, they reacted negatively or angrily, sometimes saying 'What? Are you with me or not?' I was sensitive to these reactions . . . it is the image of the lawyer as a litigator, the lawyer that always shifts the responsibility on the other side, who wants to destroy [the counterpart]. I always suffered from this image, this stereotype . . . they were asking me to be the typical aggressive lawyer. I never thought that was the right way [of assisting clients]. I thought that some degree of rationality should prevail. I saw aggressiveness as a weakness, and it was always difficult to make my clients understand that. [Legislative Decree n. 28/2010] allowed me to make sense of this personal discomfort and to legitimize my [non-traditional] approach to dispute. Before that, I thought that I was not meant to be a lawyer because I thought that always being aggressive was not the solution."

Marta had internalized mediation and its non-adversarial logics in her legal practice, and reported that the mandatory mediation provision played a critical role in her transformation. Internalizing mediation through the institutional frame of the law allowed Marta to legitimize the way she approached dispute resolution. The change helped resolve personal frustrations in her professional life. She stated: "After I . . . became more knowledgeable about mediation, I recognized myself in mediation, and now [when] I suggest mediation, I am very clear about this: if you want an aggressive lawyer, do not come to me . . . because aggressiveness for its own sake does not make sense."

Similarly, Elena and Ilenia reported that, once they came to understand mediation through Legislative Decree n. 28/2010, they embraced mediation's cooperative model and, like Marta, underwent significant changes in their professional lives. Elena emphasized that in her professional career she "never felt that the adversarial approach to disputes was the right one." After implementing mediation

in her practice, she significantly reduced her professional involvement in litigation. She clarified to her clients that she "follow[ed] only the negotiation stage of the dispute," and asked them to look to her colleagues for assistance in the dispute's litigation stage. She reasoned that she had "realized that [her] approach [was] not compatible with litigation." Her cooperative attitude toward disputes would have jeopardized her capacity to be effective in litigation. Ilenia pointed out that "before [the law on mandatory mediation was implemented], my approach [to resolving legal disputes] was more adversarial than [the approach I have] now." She stressed that she started "to have respect for the counterpart's position" in her practice. She added that she now clarified to her clients that she was a mediator, and that she was "greatly influenced by the practice of mediation." She reported that she had a different approach to disputes than litigators typically did. "If clients want to see 'blood flowing,' then I tell them that they chose the wrong lawyer."

To summarize, the law on mandatory mediation encouraged Marta, Ilenia, and Elena to make significant changes in their professional practices. In approaching clients, they identified themselves as lawyers with a cooperative approach to dispute resolution. They were the only interviewees who articulated a significant change in their behaviors as a result of internalizing mediation. Interestingly, all three of them were women. They re-structured their relationships with their clients in a way that explicitly challenged their clients' stereotype of lawyers as combative agents. They explicitly presented themselves as advocates of mediation and negotiation. None of the other lawyers with a positive view of mediation reported similar changes.

On the other end of the spectrum, some lawyers were skeptical of, or indifferent toward, mediation. They believed that lawyers already pursue the potential of an extra-judicial solution through direct negotiation. These lawyers observed that mediation often repeated the direct negotiation that parties had tried earlier through their attorneys. Luisa underlined that she always tried to solve the dispute out-of-court: "If I go through the judicial process and not mediation, it is because we as parties already know that the gap between the offer and the counteroffer that emerged [during direct negotiation] is huge . . . and mediation is just a waste of time." Fabio, Roberta, Ivano, and Alessio held similar positions. Ivano added that lawyers already have an ethical duty to find an amicable solution through direct negotiation, and "litigation is always the last step." He was "not necessarily

favorable to mediation" because he saw mediation as repeating the negotiation that lawyers already try.

However, the data from this study suggests that mediation is sometimes gradually internalized, with lawyers shifting from an initial skepticism to a more accepting attitude over time. Tommaso, an insurance lawyer, stated the following:

> Tommaso: "In the beginning, I perceived [mandatory mediation] as a sign of distrust toward attorneys. I thought that [the Italian legislature introduced mandatory mediation because] it did not trust attorneys to have a conciliatory attitude, although I believed that attorneys always try to reach a conciliatory outcome for their clients. Later, I thought that [mandatory mediation] was an attempt to provide more work for lawyers [because the law was amended to provide for the compulsory assistance of lawyers], in a moment where the legal profession was suffering from the problem of a work decrease. Finally, I partially reevaluated [mediation] because I mediated a couple of cases and, with the help of the mediator, was able to reach an agreement that satisfied or dissatisfied the parties . . . anyway, it was a positive experience. I don't view mediation negatively anymore, although I always wait and see how the mediator moves first."

Guglielmo and Claudio both internalized mediation gradually. Guglielmo said that mediation "was a nuisance in the beginning." He changed his mind after experiencing some mediations. He added that mediation was a valuable dispute resolution method "[of] overcome[ing] the problems of the Italian judicial system."[58]

Other interviews indicated a gradual internalization of mediation. Luca perceived that his colleagues were expressing "less criticism about mediation" than they did immediately after mandatory mediation was implemented. Liliana reported that, in her opinion, mandatory mediation was "an improvement on the ways lawyers approached alternative dispute resolution methods."

The idea that lawyers may change their attitude toward mediation over time is not new. Studies highlight that experience in mediation is a critical factor that induces lawyers to accept and accommodate mediation. The more the lawyers mediate disputes, the less resistant they become.[59] Although the majority of the interviewees (fifteen out of twenty) reported that they did not yet perceive a

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58. Note that Guglielmo's view, unlike the other views acknowledging mediation's positive potential, did not refer to the intrinsic characteristics of mediation. Rather, it was associated with the flaws of the court system.

59. *See* MacFarlane, *supra* note 15; Leonard L. Riskin, Mediation and Lawyers, 43 OHIO ST. J. DISP. RESOL. 29 (1982); Rosselle L. Wissler, *The Effectiveness of Court-*

positive change in their colleagues' attitudes, Italian lawyers may come to internalize mediation as they are increasingly exposed to mediation.

In sum, a significant number of interviewees expressed a positive or neutral view on the idea of mediation as a dispute-solving method. A few lawyers reported interesting behavioral changes. They re-defined their role as lawyers and presented themselves as mediation advocates to clients, challenging the traditional stereotype of lawyers as combatants who always fight in courts to advance their clients' interests. But many other interviewees, despite having a positive or neutral opinion of mediation, did not report undergoing such changes. One may infer that those who reported changes better implemented mediation in their practice. Lawyers who expressed a negative view of mediation believed that mediation is a waste of time because it repeats the direct negotiation that occurs earlier in the dispute resolution process. Finally, some lawyers accepted mediation through a gradual process of internalization. They were initially skeptical about mediation, but as they gained experience in mediation, they came to view mediation as a valuable dispute resolution method.

D. *Lawyers' Use of Mediation in Practice*

To collect data on how lawyers actually used mediation, the researcher asked the following questions: Have you ever suggested that your clients mediate their disputes? When and why? Would you suggest mediation for disputes that the law does not require to be mediated? Why? The data collected provides valuable insights into how lawyers decide to suggest mediation. The interviews demonstrated that Legislative Decree n. 28/2010 provided a significant incentive for lawyers to suggest that their clients opt-in and mediate. However, a combination of factors (other than the legal requirement for an informational meeting) affected the lawyers' decisions. Certain circumstances substantially limited the use of mediation. These circumstances included their counterparts' and clients' attitudes toward mediation, the area of law or type of dispute involved, the chance of winning the case in court, the costs of litigation, and the costs of mediation.

Connected Dispute Resolution in Civil Cases, 22 CONFLICT RESOL Q. 55 (2004); Rosselle 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).

As specified in Section III, Legislative Decree n. 28/2010 requires that parties attend a pre-trial meeting (also known as an informational or introductory meeting) where a mediator educates the parties about the mediation process. After the mediator introduces and explains the mediation process, parties are free to proceed with mediation or opt-out and file the case in court. In other words, once parties attend the meeting, the statutory requirement for mediation is satisfied. The statistics from the Ministry of Justice outlined in Section III.A indicate that the requirement for a pre-trial meeting has helped increase the number of mediations held in Italy. Since the law was enacted, the volume of mediations has significantly increased, although the number is still small compared to the total number of civil cases pending in courts. The researcher infers from the data that mandatory mediation encouraged parties to mediate their disputes, although a great number of parties remained ignorant to mediation's potential and did not participate in the first meeting.

In this study, nineteen interviewees had assisted clients in a mediation at least once. Their accounts referred almost exclusively to their experience with the mandatory informational meeting, and rarely mentioned voluntary or court-ordered mediations. Among the lawyers who were able to recall how many disputes they had mediated, Alessio reported the highest number. He recalled mediating 20–30 disputes.

Some lawyers reported that the requirement for an informational meeting influenced their decision to suggest mediation. Specifically, Ilenia, Stefania, Marta, Liliana, Elena, and Luca reported that the legal requirement was an important argument that they used to persuade their clients to mediate. Liliana said that, to persuade her clients, she emphasized that mediation was "a step required by the lawmaker," although, as noted earlier in this paper, the law does not require that parties actually mediate. Marta added that the Italian form of mandatory mediation made her "comfortable" encouraging clients to mediate on a regular basis. When asked to explain why, she reported that the existence of a legal requirement reduced her fear that the client might blame her for suggesting mediation if "mediation eventually failed and increased the costs of [resolving] the conflict." Stefania said she "always" considered mediation as a valid alternative to litigation, especially when the law required attendance at the introductory meeting.

Ivano and Alessio referred to the law in a different light. When suggesting mediation to their clients, they emphasized their concerns

about a possible penalty if their clients did not participate in mediation. Ivano reported that "judges have sometimes interpreted the law on mediation in a way that sanctioned [those] who did not want to mediate the case." He sometimes used this observation to encourage clients to mediate. Alessio stated that "if the counterpart wants to mediate the case, then I suggest that my client offer to mediate as well because I do not want the judge to see my client as the one who vetoed mediation while the other party was willing to mediate." Similarly, Roberta and Luisa assisted clients in mediation even though they were not convinced about mediation's benefits.

Ivano, Alessio, Roberta, and Luisa shared a common view in that they were not especially enthusiastic about mediation. They used mediation without advocating it, because they feared that non-participation would induce judges to sanction them. In other words, they suggested mediation even though they did not internalize it. It is difficult to assess how statistically relevant it is that some lawyers participate in mediation without having internalized it. As this study contains a limited number of subjects, the results can hardly be generalized. But the author tentatively infers that use does not indicate enculturation. In other words, the effective use of mediation in jurisdictions that have adopted a similar form of mandatory mediation as Italy's does not necessarily indicate that lawyers there have internalized or enculturated mediation.

Other data collected in this study supports the argument that the requirement for an informational meeting incentivized lawyers to suggest mediation. Many lawyers reported that they used mediation less in disputes for which mediation (including the informational meeting) was entirely voluntary. Of the nineteen lawyers who had suggested mediation to their clients, only nine reported that they encouraged clients to mediate when mediation was entirely voluntary. Notably, five of them reported that they suggested mediation less frequently for disputes not covered by Legislative Decree n. 28/2010 compared to disputes that are covered. Marta referred explicitly to the challenges involved:

> Marta: "I have rarely suggested mediation in cases where [parties are not required to attend an informational meeting]. It is already difficult to find a counterpart who wants to mediate a dispute [in cases where the law requires attendance at the informational meeting], so finding one who agrees to voluntarily mediate a case is even more difficult, if not impossible."

Stefania reported that she "always" suggested mediation to her clients when the law required attendance at the informational meeting. For other disputes, she presented mediation as an alternative to litigation only "in the very rare cases that the situation would have allowed [her] to do so." Liliana and Luca were in a similar position in that they suggested voluntary mediation only "in a few cases" or "once in a while." Despite Italy's efforts to encourage mediation, most interviewees (eighteen) reported that they had never experienced voluntary mediation.

Apart from the legal mandate, other factors motivated lawyers to suggest mediation to their clients. The majority of lawyers (eighteen) reported that they judged the appropriateness of mediation on a case-by-case basis. At least ten out of twenty lawyers, most of whom had a positive view of mediation or were self-proclaimed mediation enthusiasts, reported that their decision to mediate a case depended on their counterparts' attitude. They placed particular emphasis on their counterparts' willingness to mediate the dispute, or the likelihood that counterparts would re-consider their initial claims.

Luca reported that he considered suggesting mediation "only if the colleague [who represented the counterpart persuaded him] that there is a chance of finding a solution." Guglielmo stated that "in order to suggest mediation to my clients, the counterparts have to be willing to lower their claims." Luca, Roberta, Tommaso, Luisa, and Matteo, who referred to their counterparts' positional approaches as a reason for not suggesting mediation, took similar positions. Elena emphasized the importance of a "willingness to mediate" from her counterparts, without which she tended not to suggest mediation to her clients. Marta stated, "If I do not have an agreement to mediate with my counterpart before I go to the informational meeting, then I do not suggest that my client [go beyond the informational meeting and mediate the dispute]." She added that, in her experience, her counterparts were rarely available to mediate the dispute, demonstrating how difficult it was for her to mediate regularly, despite being a mediation advocate herself. Similarly, Stefania underlined the importance of her counterpart's attitude, saying that it is "always important to verify early if the counterpart wants to mediate the dispute . . . and if he or she does not want to mediate, then it does not make sense to encourage your client to go to the informational meeting and opt-in."

Concerns regarding a counterpart's positional approach to disputes, as described above, reflects the classic "it takes two to tango"

problem in negotiation literature."[60] This problem occurs when parties adopt an uncooperative or positional approach to a conflict, which threatens to preclude negotiation (or mediation).[61] If a party perceives that the other party does not want to change his or her position, or that he or she has adopted an aggressive negotiation strategy, the party may infer that negotiation is unlikely to result in resolution. This perpetuates the view that mediation is a waste of time, and that litigation is the only way for a party to reach his or her goals. Furthermore, parties may perceive their positional counterparts as untrustworthy, and fear that the other side would exploit the information they share (such as their interests or documents) to the other party's advantage. Lawyers may also advise against mediation in the above-described situations, believing that mediation is unlikely to resolve the dispute.

But consensual dispute resolution advocates and scholars have argued that a party should not refrain from negotiation based solely on their counterparts' positional negotiation strategy.[62] Prepared negotiators should be aware that game-changing negotiation strategies can steer their counterparts toward a more cooperative, integrative, or collaborative approach.[63] Moreover, a party's interests are not necessarily threatened by the counterpart's uncooperative attitude. Educated negotiators can constructively deal with the other side's aggressive or competitive strategies and protect their client's interests. For example, they may exert special care in sharing certain information, or leave the table if the proposed solutions do not satisfy their client's interests.[64] Furthermore, mediation is useful because even lawyers well-trained in negotiation experience difficulties in objectively analyzing their situations. They may misinterpret the actual

60. *See* Bruce Patton, *Negotiation*, *in* THE HANDBOOK OF DISPUTE RESOLUTION 279, 297 (Moffit & Bordone eds., 2005).

61. *Id*.

62. *See* JOHN LANDE, LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY 107–110 (3d ed. 2013) (suggesting how to deal with uncooperative counterparts in negotiation and avoid litigation); ABRAMSON, *supra* note 54, at 84–88 (suggesting formulating an exit plan if mediation fails to resolve the dispute); Patton, *supra* note 60, at 297.

63. *See* DAVID A. LAX & JAMES K. SEBENIUS, 3-D NEGOTIATION: POWERFUL TOOLS TO CHANGE THE GAME IN YOUR MOST IMPORTANT DEALS 7–19 (2006) (advocating negotiation strategies that help overcome the differences between negotiators); *see also* Linda Putnam, *Communication as Changing the Negotiation Game*, 38 J. APPLIED COMMC'N RSCH. 325, 325 (2010); Patton, *supra* note 60.

64. *See* ABRAMSON, *supra* note 54, at 351; ROY LEWICKI ET AL., NEGOTIATION 595–96 (2014); Patton, *supra* note 60, at 297.

motivations underlying what they perceive of as the other party's positional approach, since lawyers themselves fail to "fully escape the adversarial dynamics" at times.[65] Seeking the help of a mediator can address such concerns. In private sessions, parties can share confidential information that mediators may use for the sake of the mediation process without exposing parties to the risk of exploitation. With the help of a mediator, lawyers and their clients may discover valid points underlying their counterpart's positional approach that they had previously overlooked. The process reduces the information asymmetry between the parties, and increases the likelihood of negotiating an agreement.

On a similar note, mediation helps lawyers and their clients manage the temptation to become adversarial when the situation gets tense. Mediators, as neutral parties, can foster a problem-solving atmosphere and reduce positional approaches, encouraging a more cooperative process and overcoming impasses.[66] As Bruce Patton stated, "[a] problem-solving approach will tend to trump by force of logic and legitimacy" and only "sociopaths by definition [can remain] indifferent" to the human driver of legitimacy.[67] For these reasons, lawyers should not be discouraged from suggesting mediation in spite of their counterparts' positional attitudes.

Secondly, client attitude was a factor that lawyers mentioned regularly. Although nine lawyers reported that their clients usually followed their advice on dispute resolution methods, six others stated that clients sometimes pushed back against the idea of mediating the case, or expressed that agreeing to mediate was a sign of weakness. Fabio, a mediation skeptic, recounted that his clients "typically expect[ed] to solve the dispute in court," and that he accommodated these expectations by preparing the case for litigation and foregoing mediation. Luca, who was generally supportive of mediation, reported that he did not suggest mediation when the client was making "a matter of principle out of the dispute" or when the client pointed out that "[he or she had] already attempted many times to solve the dispute [out-of-court]." In these cases, Luca respected his clients' desire for litigation. Stefania and Matteo discussed clients who viewed mediation as a sign of weakness. Stefania's statement provides an example:

> Stefania: "It depends on the attitude of the client. There might be a client for whom you can easily suggest mediation because

65. LANDE, *supra* note 62, at 116.
66. LANDE, *supra* note 62.
67. PATTON, *supra* note 60, at 298.

> lawyer-to-lawyer negotiation starts and develops naturally, or because you understand that the counterpart is willing to reduce the distance [between the parties' positions]. However, there might also be that client who does not want to mediate the dispute because he or she believes that mediating the dispute is a sign of weakness. In this case, you can explain to him or her that mediation is not necessarily a sign of weakness, but you cannot ultimately push him or her to mediate if it is against his or her will."

These quotes reflect how cautious lawyers are in suggesting mediation, and how they accommodate the adversarial nature of the dispute if that is ultimately their clients' desire. Literature on the lawyer-client relationship suggests that a client's resistance to mediation can prevent the use of mediation, a barrier that Fabio, Luca, Matteo and Stefania encountered.[68] Note, however, that Fabio, Luca, and Stefania lacked the mediation-advocative attitude that Marta, Ilenia, and Elena exhibited during their interviews. Despite having a positive view of mediation, Fabio, Luca, Matteo, and Stefania accommodated their clients' adversarial, anti-mediation attitude without much resistance. In contrast, Marta, Ilenia, and Elena clearly communicated to their clients that their practice was mediation-oriented, and did not report issues related to their clients' resistance to mediation. Nevertheless, this data suggests that, for a mediation program to be effective, a change of culture among lawyers may not be enough, and the dispute resolution culture of the public must also change.

Lawyers working for insurance companies or banks presented a peculiar type of lawyer-client relationship. They emphasized how lawyers exert significant influence over the companies' decision to mediate. Matteo, for example, stated the following:

> Matteo: "The bank only consults me when the first informational meeting [required by the law] has already taken place. They often do not show up, and when they do, some in-house counsel represents them, [because the law that regulates mandatory mediation] requires the assistance of lawyers. Usually what they give me is a document saying that mediation did not take place, [the so-called "verbale negativo"]. Often, the bank's counterpart starts the mediation procedure under Legislative Decree 28/2010's provision for the first meeting, and I get involved only when [they have opted out]."

68. *See* CLARK, *supra* note 2, at 36–39.

Despite his pro-mediation position, Matteo stated that the banks' reluctance to mediate discouraged him from suggesting mediation to them. He added:

> Matteo: "I do not insist that they mediate because I am afraid of invoking hostility [from the bank] . . . actually, my contacts [in the company] do not even have the power to decide to mediate the dispute . . . my communication with them is focused only on litigation strategies."

Tommaso and Guglielmo reported similar experiences in representing insurance companies. As Tommaso reported:

> Tommaso: "When they grant me the power of an attorney for their disputes, the plaintiff [has] already filed a dispute in court, [after the mediation informational meeting has taken place]. Before that, the case is handled internally by the company . . . they require my legal opinion, but the decision to mediate or not is made by their claim adjuster, not by me."

Tommaso added that he "would suggest mediation if the company gave [him] some negotiation power or the power to make offers higher than the ones the claim adjusters made earlier." He stated that "claim adjusters have limited [negotiation] powers because they have to rely on the evaluations made by the expert witnesses . . . any offer of money a claim adjuster makes must be justified to his or her supervisors." Interestingly, Tommaso asserted that "sometimes a manager asks the claim adjusters to close as many agreements as they can because there are too many ongoing claims, and that means that their offers can be higher than the evaluation of the expert witnesses. However, this happens only rarely and for a limited period." This last statement is interesting because it helps explain why, in a few cases, insurance companies agree to mediate the disputes and empower lawyers to mediate the dispute.

Finally, Tommaso reported that insurance companies usually allowed him to close agreements only after the discovery stage. He concluded that "[he] settled the vast majority of bank disputes before the sentence, but not in mediation." Guglielmo's experience also shows that lawyers play a relatively insignificant role regarding the choice to mediate insurance disputes. As Guglielmo put it:

> Guglielmo: "The willingness to mediate belongs to the company, the company gives me instructions. In most cases, the company does not want to mediate. I usually examine the case, and if the prospect is [that the company will] lose the case, I recommend resolving the case in mediation. Only in one case did they follow my suggestion to mediate . . . and unfortunately, that case was

> not settled in mediation. In many cases, [the companies] did not want to mediate because they thought that the insured person was not liable."

In deciding whether to suggest mediation, Matteo, Tommaso, and Guglielmo were critically affected by the insurance companies' reluctance to mediate. Matteo reported that he did not suggest mediation to banks because he feared that he would lose his bank clients. Tommaso did not suggest mediation to insurance companies because they did not grant him negotiating power in the early stages of the dispute. Guglielmo did suggest mediation despite the companies' reluctance, but only under limited circumstances, such as when the chance to win in court was slim.

Thirdly, lawyers mentioned the costs of litigation as a factor affecting their decision to suggest mediation. Seven lawyers asserted that litigation was inferior to mediation in terms of money, outcome, and timely delivery of justice, and said that mediation's cost-effectiveness was one of the main reasons why they suggested it to their clients. However, there was not a clear consensus on the topic. While five lawyers expressly reported that the costs of mediation were affordable, four interviewees had a different opinion. Roberta stated that "mediation costs are not that cheap," and that the costs made her hesitate before suggesting mediation to clients. Guglielmo, despite believing that litigation was more costly than mediation, wondered later in the interview, "What if the dispute does not settle in mediation? The costs of mediation would increase the total costs for my clients who eventually have to litigate the case." Fabio and Ivano gave similar responses.

Mediation's cost-effectiveness is not a new topic in the literature. Some studies emphasize that there is no statistical evidence of mediation's cost-effectiveness.[69] Other studies report that lawyers believe mediation to be cost-efficient for parties.[70] Moreover, the belief that the overall costs of the dispute would increase if mediation fails and the dispute is litigated is questionable. The process of mediation, even when it does not result in a settlement, can still provide benefits. A significant number of parties involved in mediations that end without a settlement nonetheless believe that their participation was

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69. *See* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Reshaping Our Legal System*, 108 PENN. ST. L. REV. 165, 196 (2003).

70. *See* Agapiou & Clark, *supra* note 2, at 14; Bryan Clark & Dawson Charles, ADR and *Scottish Commercial Litigators: A Study of Attitudes and Experience*, 26 CIV. JUST. Q. 228, 232–33 (2007).

worthwhile, having improved the parties' mutual understanding and/or resulted in a partial settlement of the dispute.[71]

Fourthly, five lawyers mentioned that the area of law of the dispute influenced their decision to suggest mediation. Some lawyers were skeptical about whether mediation would be appropriate for insurance and condominium disputes. But opinions diverged on the matter. Alessandra affirmed that condominium disputes may be mediated, because the long-term relationship between the parties facilitates mediation. Alessio and Ivano disagreed. Alessio described a condominium dispute in which his client built a balcony and his counterpart claimed that the balcony's construction violated certain condominium rules. Alessio did not see the value of mediation in such a dispute because "if one party built a balcony and the other party wants that balcony removed, where is the possibility for an agreement? . . . [I]ssues like that cannot be resolved [through conciliation]."

Some lawyers including Maria, Luisa, and Alessandra mentioned that mediation is not appropriate for insurance disputes. They referred to ministerial statistics outlining insurance companies' tendency to ignore mediation. However, Maria and Alessandra's reluctance to suggest mediation was likely unrelated to the intrinsic characteristics of insurance disputes. For them, what mattered was not the type of dispute, but the attitude of insurance companies toward mediation. In contrast, Luisa specified that she did "not suggest mediation for insurance disputes because with insurance companies [things never go] anywhere." She added that, in her opinion, civil liability issues embedded in medical malpractice disputes "are not negotiable" because "if one party claims civil liability while the other denies it, how can you negotiate?" Guglielmo and Alessandra also focused on the type of the dispute but gave different assessments. Guglielmo stated that mediation "may be a valid dispute resolution method in medical malpractice," which is a type of dispute that involves insurance companies.

Alessio and Luisa's beliefs represent another example of lawyers' misconceptions about the potential of mediation. Whichever belief lawyers have about who will win in court, there are typically some legal risks that do not allow lawyers to predict the judicial outcome

71. *See* DAME HAZEL GENN ET AL., TWISTING ARMS: COURT REFERRED AND COURT LINKED MEDIATION UNDER JUDICIAL PRESSURE 99–100, 161 (2007).

with certainty.[72] Mediation can help assess the risk of litigation and more deeply explore the reasons that led parties to adopt certain positions. Knowing these reasons might help solve the dispute. It follows that issues should be negotiable to the extent that parties recognize that there is always the possibility to lose the case in court. Alessio and Luisa appeared unaware of the aspect of legal risks, which likely affected their perceptions of the potential of mediation.

The probability of winning the case in court was a fifth factor that lawyers considered in suggesting mediation. Guglielmo reported that "if I believe that the case is strong and we are likely to win in court, I do not mediate." Fabio stated that "if my client is right, I would never suggest mediation." Roberta, Alessandra, and Alessio reported having similar attitudes. Studies also show that when parties believe they will win in court, they tend not to mediate, and instead choose litigation. However, lawyers often make predictions about the outcome in court based on false assumptions.[73] Lawyers tend to underestimate their counterparts' positions, and tend to assume that their cases contain unique features that would allow favorable rules to be applied.[74] It follows that the lawyers are undermining mediation's potential when they choose not to mediate because they believe they will win in court. Lawyers can rarely predict a case's outcome with accuracy. A certain degree of risk is inevitable in litigation; this risk should function as an incentive to give mediation a chance, so that the process may reduce information asymmetry between the parties and bring up potential solutions with a mediator's help.[75]

On a different note, Claudio provided unique arguments about the probability to win in court. He asserted that "if I believe that the risk of losing is high, I do not suggest that my client mediate because I am not interested in settling the case early." The idea behind this statement is that, by spending time in litigation, the client may delay paying money to his or her counterpart (which the client will have to,

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72. *See* MICHAELA KEET, HEATHER DIANNE HEAVIN, & JOHN LANDE, LITIGATION INTEREST AND RISK ASSESSMENT: HELP YOUR CLIENTS MAKE GOOD LITIGATION DECISIONS 3-17 (2020); Michaela Keet, *Litigation Risk Assessment: A Tool to Enhance Negotiation*, 19 CARDOZO J. CONFLICT RESOL. 17, 20–23 (2017).

73. *See* RANDALL KISER, BEYOND RIGHT AND WRONG: THE POWER OF EFFECTIVE DECISION MAKING FOR ATTORNEYS AND CLIENTS 89–139 (2010) (reporting studies that discuss psychological biases affecting lawyer-litigant decision making); Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgment: Is Mediation Training De-Biasing*, 21 HARV. NEGOT. L. REV. 1, 8–17 (2015) (outlining the cognitive and motivational biases that affect lawyers' decision-making process).

74. Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, *in* PREFERENCE, BELIEF, AND SIMILARITY 729 (2004).

75. *See* Keet, *supra* note 72.

if he or she loses). To Claudio, litigation is the better option in such cases. He added that "if I think that my clients are likely to win the case in court, I suggest mediation because I am interested in settling the case soon." In this case, litigation would delay the moment his client wins the case and receives money from his or her counterpart. But there is something wasteful about not settling the case in mediation when the chance to win in court is slim. Settling the case early is more convenient, and it makes little sense to go through a costly judicial process if it is likely to result in defeat. For this reason, Claudio presented a misguided approach to the role of lawyers in mediation, who should be helping their clients reduce the costs of dispute resolution.[76]

In sum, this study provided evidence that the Italian model of mandatory mediation, and in particular the legal requirement to attend an informational mediation meeting, positively contributed to lawyers' decisions to suggest mediation to their clients. Interestingly, lawyers sometimes suggested mediation to their clients even though they were skeptical about mediation's effects. Potential sanctions on non-participation by judges likely influenced the decision to suggest mediation. A combination of other factors also influenced lawyers' decisions; but some of those factors were the result of misconceptions about mediation.

E. *Lawyers' Co-Optation Tendencies in Mediation*

In this subsection, the author discusses the tendency of lawyers to focus mainly, if not solely, on the distributive dimension of negotiation with respect to mediation. The author also outlines lawyers' tendency to distort the use of mediation by adopting an evaluative approach to mediation. Finally, the author explains how these tendencies generate a phenomenon of co-optation.

Earlier in the paper, the author identified a recurrent issue in the interviews: mediating parties negotiate, or think they should negotiate, in a purely distributive way. After recognizing the issue in the first few interviews, the researcher added questions specifically addressing the negotiation dynamics that lawyers experienced in mediation. The questions were designed to give the author a better

76. *See* Codice Deontologico Forense [Ethical Code for Italian Lawyers], Section 23.4 (2014) (requiring lawyers not to recommend unnecessary, burdensome legal actions to their clients); *see also* John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L. J. 1317–18 (2003) (mentioning that minimizing clients' costs is one of the ethical duties of collaborative lawyers); LANDE, *supra* note 62.

sense of how lawyers use mediation in practice. Specifically, the author asked the interviewees: "What is or was the focus of your negotiations in mediation?" This question aimed to find out whether a cooperative/integrative approach was used in negotiation. Literature on negotiation systematically favors this approach, as do mediation proponents who emphasize the possibility for it to generate win-win resolutions. However, the data collected in this research indicated that lawyers relied on dynamics significantly divergent from the integrative one mainstreamed in the literature.

The integrative approach to negotiation requires that parties focus on their interests, not positions;[77] that they re-orient their communication skills to make negotiation more effective and relationship-oriented;[78] that they consider their best alternatives to a negotiated agreement;[79] and that they build creative options that satisfy the interests of all parties.[80] Win-win strategies are deeply correlated with the quality of the agreement.[81] Integrative negotiation should lead to pareto-efficient agreements, and satisfy one party without worsening the position of other parties.[82] Win-win strategies stand opposite to win-lose strategies, also known as the distributive or competitive approach to negotiation. The distributive approach to negotiation focuses on parties' positions, promotes self-interest, and relies on an adversarial logic to resolve disputes. It implies that parties may only satisfy their self-interests to the detriment of others.[83]

The majority of interviewed lawyers (fifteen) approached mediation as a distributive process. Alessandra pointed out that, in mediation, "you always have to waive something." Rossana said that "the final outcome [of mediation] is the distribution of [a fixed] amount of money." Marta highlighted that mediation often meant "giving up" something. Luca gave a similar description, referring to a mediation

77. *See* ROGER FISHER ET AL., GETTING TO YES 42–57 (2011).

78. *Id.* at 35–39.

79. *Id.* at 99–108.

80. *Id.* at 58–81.

81. *See generally* Hal Abramson, *Fashioning an Effective Negotiation Style: Choosing between Good Practices, Tactics, and Tricks*, 23 HARV. NEGOT. L. REV. 319 (2018); *see* Carrie Menkel Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 799–800 (1984); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 973–74 (1979).

82. *See* HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 139 (1982) ("The efficient frontier—sometimes called the Pareto Optimal Frontier, after the economist Vilfredo Pareto—is defined as the locus of achievable joint evaluations from which no joint gains are possible.").

83. *See* LEWICKI ET AL., *supra* note 64, at 34–74.

in which the parties negotiated a "monetary agreement that was 30% less than the initial offer." Annalisa, Roberta, Rossana, Elena, Ilenia, and Liliana mentioned similar experiences. In Tommaso's opinion, it is impossible to mediate with a focus on non-monetary issues in cases such as insurance disputes because of the lack of a personal relationship between the insurance companies and the damaged person. When asked about mediation's integrative potential, Guglielmo replied, laughing "Creative solutions? I heard about them, but I never saw one!" Interestingly, Alessio emphasized that the mediation training sessions he attended did not reflect the reality of mediation's dynamics because, in his experience, parties never adopted an integrative approach. As he reported:

> Alessio: "When you go to workshops on mediation, they show nice videos where parties find creative solutions. For example, they outline possible scenarios where your client's son is unemployed, and your counterpart is a businessperson that can offer a job to your client's son as part of the final agreement . . . or stuff like that. They show solutions that you can reach thanks to mediation, but this is not what happens in the real [mediations I participated in]. [The few agreements I reached in mediation] were always about who renounces what. And even in the other cases [where I did not reach an agreement in mediation] the parties and the mediator were focused on the amount of money to be negotiated, and not on creative solutions."

On a similar note, Matteo, who was also a mediator, acknowledged that mediation rarely resulted in the integrative outcomes that ADR trainers and supporters advertise.[84]

Dario, Fabio, and Luca asserted that mediators should always keep in mind the legal issues or the "possible outcome in the judicial process," as Dario stated. Liliana also pointed to lawyers' tendency to focus on legal issues during mediation, and reported that the interactions between lawyers in mediation "seemed to be an evolution of litigation" because the "discussion was focused only on the [applicable]

84. However, he still considered mediation to be valuable because, "even though some premises underlying mediation [such as the promise for integrative outcomes] are rarely realized, [mediation] is still a valid method of dispute resolution." He described a mediation case in which his client reached an agreement allowing the parties to continue doing business together, illustrating that mediation may solve the dispute in unconventional ways. *See* Lin Adrian & Solfrid Mykland, *Creativity in Court-Connected Mediation: Myth or Reality?*, 30 NEG. J., 421, 422–25 (2014) (outlining literature on the satisfaction of parties' interests and needs in mediation).

law." Other studies underline a similar tendency and describe how heavily lawyers rely on legal issues in mediation.[85]

Only a few lawyers reported that mediation generated integrative solutions. Stefania stated that she had reached integrative solutions in the majority of her mediations. Ilenia and Mario had also experienced mediations resulting in integrative solutions, with the caveat that integrative solutions remained a minor part of the agreement. However, none of them were able to provide concrete examples of integrative outcomes in mediated agreements. For example, Mario mentioned that he sometimes reached agreements that did not require parties to renounce a portion of their claim, but he was unable to recall an example. Marta reported that mediation sometimes helped restore a relationship between parties. However, she asserted that "those relationships remained fragile." Rossana identified that mediation may indirectly help parties reach an agreement on side issues. She described that, in some condominium disputes, parties went beyond monetary issues to negotiate things such as "desirable behaviors to follow in order to avoid mutual annoyance or to prevent further conflicts between tenants." In her opinion, these agreements were creative because "parties would not be able to obtain similar outcomes in the judicial process."

On a different note, lawyers who use mediation for strategic purposes may distort the purpose of mediation as a dispute resolution method. Mario sometimes referred to mediation as an opportunity to see "what cards the counterparts have and to anticipate their strategies in litigation." Ivano, Tommaso, and Guglielmo reported that they always preferred to work with mediators with legal expertise in the subject of the dispute, and with the power to suggest proposals and evaluations and, as Tommaso put it, to "persuade the party in the weakest position to accept the proposal."

Luca approached mediation as a tool with which lawyers can reduce their accountability toward their clients. He specified that "if the client is present [at the mediation table], then he or she cannot possibly blame me later if they did not like the settlement reached. Because the client was present, he or she participated in the process too and could intervene if he or she did not like the settlement." Similarly, Claudio pointed out that mediation is valuable for lawyers because "if an agreement is reached, then lawyers are less exposed to professional malpractice lawsuits."

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85. *See, e.g.*, Olivia Rundle, *Lawyers' Perspectives on 'What is Court-Connected Mediation for?'*, 22 INT'L J. LEGAL PROF. 33, 33 (2013).

Distributive approaches to and distorted usage of mediation invite the phenomenon of co-optation. Co-optation is a "complicated process of social interaction" through which innovations generated by social movements or challenging groups are reshaped in a way that "better fits the interests and comports more naturally with the practice and cultural norms" of a powerful group.[86] In this study, many lawyers perceived mediation in a reshaped form that conforms to the adversarial dispute resolution culture dominating the legal profession in Italy, instead of adopting a cooperative or integrative culture more fitting with mediation theory. Carrie Menkel-Meadow argued that an adversarial culture of dispute resolution "is so powerful a heuristic and organizing framework for [legal] culture that, much like a great whale, it seems to swallow up any effort to modify or transform it."[87] This quote aptly describes the challenges exposed during the interviews.

Mediation co-optation helps explain why interviewees often referred to mediation as a process dominated by competitive logics, where parties focus on distributive issues like the distribution of a fixed amount of money. Even the idea of choosing mediators with legal expertise in certain areas of law is a sign of mediation co-optation. Importantly, these co-optation tendencies steer lawyers toward a form of mediation that prevents parties from reaching mutually satisfying agreements.[88]

In sum, the interviews indicate that many Italian lawyers approach mediation not as the integrative process described in relevant literature, but as a process that mainstreams competitive negotiation strategies. Many lawyers believed the mediator's role to be a third party who serves evaluative purposes or pressures parties to reach an agreement. In other words, many interviews relied heavily on a co-opted model of mediation.

VI. Conclusion

This study addressed the following questions: How did Italian lawyers enculturate mediation in their professional practice? What role, if any, did the law play in the mediation enculturation process?

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86. Coy & Hedeen, *supra* note 17, at 409; Clark, *supra* note 2, at 73.

87. *See* Menkel-Meadow, *supra* note 17, at 40.

88. *See* Lorig Charkoudian et al., *What Works in Alternative Dispute Resolution? The Impact of Third-Party Neutral Strategies in Small Claims Cases*, 37 Conflict Resol. Q. 101, 118–19 (2019) (describing positive effects of elicitive strategies, rather than directive or evaluative ones, on parties' satisfaction in small claims mediation programs).

Even though the vast majority of lawyers expressed a positive or neutral opinion about the idea of mediation, it is questionable whether the lawyers actually enculturated mediation. On one hand, lawyers who promoted mediation conditioned the use of mediation on several factors that undermined mediation's potential. Notably, some of these conditions, such as counterparts' positional attitude or the likelihood to win in courts, relied on the questionable assumption that mediation was contextually inappropriate or went against client's interests. Many interviewees had not internalized the idea that norms other than legal and competitive strategies might be applied to solve disputes in mediation. In light of the widespread tendency to undermine mediation's potential, this article hopes to guide trainers in designing mediation courses that counteract the emerging misconceptions of mediation. Such an effort would encourage lawyers, current and future, to overcome common misconceptions and make more frequent use of mediation. Without a fundamental change in the way lawyers view mediation, the Italian statute will likely stray from its original purpose and entrench a co-opted form of mediation.

Despite these significant misconceptions about mediation, Legislative Decree n. 28/2010 had a positive impact on lawyers' awareness of mediation. The legal requirement for an informational meeting encouraged some lawyers to suggest that their clients opt-in and mediate, and helped several lawyers present themselves as mediation advocates to their clients. That lawyers find it harder to suggest mediation in the absence of a legal requirement has significant implications. First, the requirement for an informational meeting increases the number of mediations held while preserving a degree of voluntariness for parties. Second, although the law alone does not ensure that lawyers adequately educate themselves on mediation and internalize mediation, legislation like Legislative Decree n. 28/2010 facilitated important pre-requisites for lawyers' mediation enculturation. In approaching the law, however, one must recognize that many lawyers will gravitate toward a co-opted approach to mediation, rather than the integrative approach that policymakers and conflict resolution scholars favor.