

# Imbalances of Power in ADR: The Impact of Representation and Dispute Resolution Method on Case Outcomes

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*In recent decades, alternative dispute resolution processes have gained worldwide recognition, a growing role in legal practice, and increasing academic attention. Despite their professed advantages, they have also faced fierce opposition. In a seminal article, Owen Fiss argued that ADR exacerbates imbalances of power between the parties. But while the theoretical argument has been widely developed, empirical evidence has remained scant. This article empirically examines the impact of representation patterns and dispute resolution methods on case outcomes. Arguably, professional representation of weaker parties may reduce the effects of inequality, whereas less formal, transparent, and adjudicatory processes may exacerbate them. The article focuses on small claims settlement conferences, using the Israeli labor courts system as a test case. The main findings are that representation increases the probability of a successful settlement conference, and that the more formal the process, the greater the ratio between the sum obtained by the plaintiff and the sum claimed.*

## I. INTRODUCTION

In recent decades, a diverse range of dispute resolution methods short of litigation, commonly known as alternative dispute resolution (ADR) processes, has gained worldwide recognition, a growing role in legal practice, and academic attention. This development has been especially pronounced with respect to nonadjudicatory ADR methods, such as mediation and settlement conferences, in which the parties attempt to resolve their dispute with the aid of a third party who has no power to decide the disputed issues. The primary difference between mediation and settlement conferences lies in the purpose of each method, hence in the degree of its complexity and the array of potential outcomes. Mediation is designed to expose the parties' true needs and emotions, target the root of the problem, and help formulate a creative forward-looking solution (Fuller 1971, 325–26). A settlement conference focuses on the parties' claims as set out in their pleadings and is intended to induce a compromise between the formal

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starting points in light of each party's assessment of the outcome in court. The importance of nonadjudicatory ADR has grown considerably over the years, particularly in areas like employment or family law, where conflicts typically arise between parties involved in a multifaceted long-term relationship with deep emotional overtones that often outlives the conflict itself (McEwen and Maiman 1981, 251; Kandel 1994).<sup>1</sup>

Despite its professed advantages, like minimizing the parties' economic and emotional hardship, obtaining more satisfactory outcomes, and reducing judicial caseload, ADR has also faced fierce opposition. In his seminal article, "Against Settlement," Owen Fiss (1984) put forward a strong case against the emerging pro-ADR movement: "I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated instead as a highly problematic technique for streamlining dockets" (Fiss 1984, 1075). Fiss argued, *inter alia*, that ADR exacerbates the imbalance of power between indigent and well-off parties (Fiss 1984, 1076–77). In his view, resource disparities between the parties can affect the settlement in three ways (Fiss 1984, 1076). First, poorer parties may be less informed and less able to predict the outcome of litigation. Second, poor plaintiffs may be in more immediate need of money, making them more vulnerable to pressure to settle. Third, weaker parties might be forced to settle because they lack the needed resources to litigate. Although the imbalance of power may also affect the outcome in court, Fiss believed that the formal judicial process could mitigate its effect (Fiss 1984, 1077). Although the theoretical argument has been widely discussed and developed in academic literature (Delgado et al. 1985, 1367–75, 1387–1404; Luban 1985, 412–14; 1995; Brunet 1987, 45–46; Norton 1989, 497–99; Grillo 1991, 1588–90; Menkel-Meadow 1997, 1920–21; Welsh 2004, 57–58), empirical evidence has remained scant.

This article purports to bridge the gap. It empirically examines the impact of two seemingly relevant factors in inherently imbalanced legal disputes: the representation pattern and the dispute resolution method. Arguably, professional representation of weaker parties may reduce the effects of inequality, whereas ADR may exacerbate them. We use small claims settlement conferences in the Israeli labor courts system as a test case. Mediation and settlement conferences have become an integral part of the labor courts system down the years and their role in resolving legal disputes is still on the rise. At present, small claims are automatically referred to settlement conferences. Our study examines the impact of representation on the outcome of small claims settlement conferences and the effect of using this type of alternative dispute resolution method on case outcomes. It thereby contributes to the growing literature and public debate on ADR methods in general and small claims settlement conferences in particular.

Part II explains the essence of small claims settlement conferences and the underlying imbalance of power. It then sets out our hypotheses in light of the relevant theoretical and empirical literature. Part III explains the research design. Our dataset is

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1. McEwen and Maiman (1981, 251) explain: "Another way of classifying disputants is according to whether or not they are engaged in a continuing personal or business relationship with the opposing party which predates their present disagreement and will continue beyond the dispute. Most of what is known and thought about mediation is based on observation of dispute mediation between parties with such relationships." Note, however, that most employment disputes arise with respect to employment termination payments, namely, after the employment relationship is over.

based on more than three hundred summary hearing cases in which the plaintiff was an employee and the defendant was an employer. The data collected for each case consist of information about the representation of each party (self-representation, representation by a lawyer who does not specialize in employment law, and representation by a specialist), the outcome of the case (a successful settlement conference, a court-facilitated settlement, or a judicial decision following full trial), the amount claimed by the plaintiff, and the amount obtained at the end of the process. The data enable us, *inter alia*, to compare case outcomes under various combinations of representation. Part IV sets out the results of the study. The most salient and interesting findings are that representation increases the probability of a successful settlement conference but reduces the ratio between the amount obtained by the plaintiff and the sum claimed. Perhaps even more importantly, the more formal the process and the less it is based on settlement, the greater the ratio between the sum obtained and the sum claimed. Part V analyzes and explains the results. The conclusion summarizes the findings and the conclusions, discusses normative implications, and proposes directions for further research.

## II. THE THEORETICAL FRAMEWORK

### A. Small Claims Settlement Conferences

The term ADR refers to dispute resolution processes that differ from, and therefore serve as alternatives to, traditional court proceedings. In adjudicatory ADR, like arbitration, a third party is empowered to decide the issues in contention and his or her decisions are enforceable. In nonadjudicatory ADR, like mediation and settlement conferences, a third party may help the parties settle, but has no power to impose a resolution.

The primary difference between mediation and settlement conferences, two forms of nonadjudicatory ADR, lies in the purpose of each method, hence in the degree of its complexity and the array of potential outcomes. Mediation or, more accurately, facilitative mediation, is designed to expose the parties' true needs and perhaps the emotions underlying them, target the root of the problem, and help formulate a creative forward-looking solution (Fuller 1971, 325–26). Accordingly, it is based on in-depth discussions with each party. The mediator in facilitative mediation does not confine him- or herself to examining the contentions raised in the pleadings and their relative weight, or to the manner in which the pleadings delineate the problem, and he or she may propose innovative solutions (Main 2005, 362). This process may be complex, tedious, and expensive and is therefore deemed inappropriate for very small claims (Wirth-Livne 2001, 10).

In contrast, in a settlement conference the mediator focuses on the parties' claims as set out in their pleadings and attempts to induce a compromise between their official starting points in light of each party's assessment of the outcome in court. A settlement conference is thus somewhat similar to evaluative mediation. The mediators in such a process do not attempt to unearth the parties' respective interests or conduct joint negotiations based on them, nor do they suggest possible solutions to the dispute that

exceed the scope of the pleadings, although they may use tools and skills taken from the field of facilitative mediation (Wirth-Livne 2001, 8–9).

The Israeli labor courts system is an autonomous judicial system specializing in labor and employment law and social security. Labor courts have exclusive jurisdiction over all cases involving employer-employee relationships, preemployment negotiations, labor union disputes (Labor Courts Act, 1969 S.H. 70, § 24(a)), claims under the National Security Act (1995, S.H. 210, § 391), and under the National Health Insurance Act (1994, S.H. 230, § 54(b)). In this system, all cases of summary hearing<sup>2</sup> are automatically referred to settlement conferences, without any screening. More specifically, all cases are classified by the court's case routing department (CRD) according to the sum claimed and the nature of the dispute. The CRD then refers each case to one of three ADR procedures. Summary hearing cases, namely, cases in which the plaintiff claims a small sum (up to NIS 25,000; about \$7,000), are referred to settlement conferences (Wirth-Livne 2001, 11). These small claims generally involve simple factual questions and no legal complexities. A typical small claim is brought by an employee after the termination of employment. The employee claims sums allegedly owed by the employer, like severance pay, notice pay, withheld wages, and so forth. Small claims rarely raise allegations of discrimination or other constitutional questions and never involve union issues. More complex cases are referred to one of two mediation channels.<sup>3</sup>

Settlement conferences are nonjudicial processes conducted under the auspices of the labor courts. Unlike mediation, they are offered to the parties at no cost. As explained above, the parties in a settlement conference attempt to resolve their dispute with the aid of a mediator who has no power to decide the issues in contention. In the specific context examined here, such a process is managed by a single mediator, who is either a lay judge or a legal clerk of a labor court judge. Lay judges have diverse backgrounds. Some have experience in facilitative mediation, some are familiar with employment law, and some are directors of large companies. The legal clerks are familiar with employment law but are not experts in mediation and are not required to undergo special training in this area.

A settlement conference usually starts with an introduction of the procedure and its benefits, followed by a presentation of the parties' claims. Next, the mediator may hold a private meeting with each party, highlighting the flaws and weaknesses in his or her initial position. Finally, the parties reconvene and put forward their proposals and the mediator endeavors to bridge the remaining gaps and facilitate a settlement. The entire process may take less than thirty minutes (Wirth-Livne 2001, 7–8). In the event of a settlement conference failing, the case is returned to the labor court, which may propose a judge-facilitated settlement or hold a full hearing and deliver a judgment.

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2. Summary hearings are defined by Section 31 of the Labor Courts Act and the regulations proscribed thereunder.

3. Mediation conducted by lay judges employed by the labor court system is known as "internal mediation" and mediation conducted by professional mediators or at a mediation center outside the precincts of the labor courts is known as "external mediation." External mediation is not common, so ADR is primarily pursued in one of two tracks: a settlement conference or internal mediation, depending on the amount of the claim.

## B. The Underlying Imbalance of Power

In an employment relationship, the employee is generally in an inferior position. The power imbalance is maintained when a legal dispute arises between the two sides. First, the employee is often financially weaker, hence interested in the swiftest possible resolution—because of the pressing need for resources to cover living expenses and the financial burden associated with prolonged proceedings (Fiss 1984, 1076). Dragging out the proceedings may be a negotiating ploy of the defendant employer.<sup>4</sup>

Second, the employer itself is a repeat player. It may have complex employment relations with numerous employees over a long period of time, and therefore enjoy greater knowledge and experience in employment disputes, which can be exploited at almost every stage. Moreover, as a repeat player, the employer may be concerned not only with the individual case but also with its impact on future cases and on its relations with other employees (Galanter 1974, 99–100). In many cases this will cause the employer to conduct tough negotiations with the aim of limiting future legal risks and retaining its superior position in the long run.<sup>5</sup>

Third, the parties' states of mind differ. As explained above, psychological incentives, such as the pursuit of justice and fairness, play a significant role in employees' decisions throughout the process and this is particularly so when the expected financial benefit is low, as in summary hearing cases.<sup>6</sup> For the average plaintiff, the matter is almost always one of principle and substance, whereas for the defendant it is often financial. Thus, a nonfinancial gesture, such as an apology or show of sympathy, may lead to a reduction in the settlement sum (Zimmerman 2004; Etienne and Robbennolt 2007, 303–05).

The article empirically examines the impact of two seemingly relevant factors on these inherently imbalanced legal disputes: the parties' representation and the choice of dispute resolution method. Arguably, professional representation of weaker parties may reduce the effects of inequality, whereas ADR may exacerbate them.

## C. Hypotheses

The probability of success of a settlement conference (i.e., its conclusion in an agreed settlement) and the ratio between the sum obtained and the sum claimed in the case of success (hereafter, the settlement ratio)<sup>7</sup> depend on a variety of factors, including the provisions of substantive law applicable to the particular dispute, the amount claimed and its reasonableness, the mediator's skill, the nature of the relations between the parties, the employer's policies, the available evidence, and more. This article seeks

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4. However, the employer must use this tactic cautiously because systematically exhausting employees might impair the employer's reputation among current and potential employees.

5. Of course, tough negotiations may be detrimental to the employer where the employee's entitlements are undeniable.

6. One of the lawyers we interviewed noted that employees sometimes reject good settlement offers because they feel the employers' attitude is disrespectful or insolent.

7. This ratio has no conventional label. For example, in LaFree and Rack (1996, 772), this ratio is labeled "monetary outcome ratio."

to isolate the representation factor. Our purpose is to examine whether and to what extent the parties' representation influences settlement probability and ratio. We primarily probe for differences between cases where both parties are represented, cases where neither is represented, and cases where only one is represented. Likewise, we look for differences between representation by lawyers who are repeat players in the labor court system and representation by lawyers who are not.

Our first hypothesis was that representation of both parties would reduce the probability of settlement. This hypothesis is supported by commonsense and empirical studies conducted in other Anglo-American legal systems. Arguably, representation of weaker parties may reduce the power imbalance (McEwen et al. 1995, 1360–61), making them tougher negotiators, less inclined to settle. Additionally, empirical evidence suggests that mediators tend to exert more pressure on plaintiffs (Metzloff et al. 1997, 122). Representation may reduce that pressure. McEwen et al. (1995, 1360–61) reported that lawyers in divorce mediation believed that their presence was needed to protect “against mediator pressures or unfair bargaining advantages that the other party may have.” If representation reduces pressures to settle in relatively symmetrical divorce disputes, it must have an even greater impact in asymmetrical labor disputes.

Moreover, many lawyers in adversarial systems regard the legal dispute as a “zero-sum game,” namely, a battle zone in which they must “vanquish” their opponents by diverting the output to their client at the expense of the opposite side (Mnookin and Kornhauser 1979, 986; Menkel-Meadow 1984, 755–56, 765–66, 778; Sato 1986, 510–12). The dominant view, therefore, is that “lawyers magnify the inherent divisiveness of dispute resolution” (Gilson and Mnookin 1994, 510–11). We believed that lawyers with adversarial training and state of mind would consider a settlement involving a concession of certain rights as a type of failure they would rather avoid. In addition, lawyers who participate in processes that may be followed by trial might be reluctant to reveal information that can facilitate a settlement, including their clients' preferences and needs (Menkel-Meadow 1984, 780–81).

Finally, if the lawyer's fees depend on his or her efforts and in particular when payment for appearing in court is higher than payment for conducting negotiations, the lawyer will be less willing to recommend a settlement (Gilson and Mnookin 1994, 532). The same is true if the lawyer's fees are contingent on the outcome of the process, as is usually the case,<sup>8</sup> and the lawyer believes he or she can induce the court to award his or her client a greater sum without investing a greater effort (Bingham et al. 2002, 353).

Studies in other adversarial legal systems have shown that the probability of settlement is in fact greater when neither party is represented. One study of mediation in the area of family law in the United States found that when neither party was represented, 75 percent of the cases were settled, whereas when one or both parties were represented, only 48 percent were settled (Stuart and Savage 1997, 15). Another study of domestic relations mediation found that full settlement “was more likely when

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8. This comment comes from an interview with Yair Eren, a leading practitioner in labor and employment law, who frequently represents employees in the Israeli labor court system, Haifa, Israel, Oct. 1, 2011.

neither party (58 percent) or only one party (56 percent) had a lawyer present in mediation than when both parties had a lawyer present (44 percent)” (Wissler 2010, 458). A study of Equal Employment Opportunity mediation cases similarly found that the likelihood of settlement was highest when both parties were unrepresented (68 percent) and lowest when both parties were represented (31 percent) (McEwen 1994, 42–43). A study conducted in England found that when neither party to the facilitative mediation process was represented, 76 percent of the cases were settled, whereas when both parties were represented, 55 percent were settled (Genn 1998, 53). Admittedly, however, these studies examined processes that differ in some aspects from the small claims settlement conferences discussed here.<sup>9</sup>

In hindsight, our hypothesis was somewhat naïve. Several studies found that lawyers involved in ADR might actually be “cooperative” and facilitate settlement (Menkel-Meadow 1993, 375; Gilson and Mnookin 1994, 541–50; McEwen et al. 1995, 1366). Lawyers also alleviate some of the obstacles to settlements (such as clients’ information deficiencies, cognitive biases, and emotional issues), thereby encouraging clients to settle (Kritzer 1998a, 801–12). Moreover, we may have miscalculated the possible impact of lawyers’ fee arrangements on their incentives. Plaintiffs’ lawyers’ fees are usually contingent on the outcome. Given the small sum claimed, the difference between the expected fee following litigation and the expected fee in the case of a successful settlement conference might not outweigh the cost of litigation for the lawyer.<sup>10</sup> Defendants often have lawyers on retainer or in house, with a strong incentive to reduce their workload by settling. We will elaborate on these and related points in Part V.A.

The second hypothesis is that when a party is represented, the outcome of the process will swing in his or her favor.<sup>11</sup> For instance, if only the plaintiff is represented, the settlement ratio will be greater than in other cases, and if only the defendant is represented, the settlement ratio will be lower than in other cases. The underlying rationale is once again related to the power imbalance. In a settlement conference in which only one party is represented, the lawyer will presumably exert pressure on the unrepresented party to agree to a settlement that favors his or her client and discourage the client from accepting unfair proposals (Engler 1999, 1988; Wissler 2010, 463). The mediator may also exert more pressure on the unrepresented party. Often, the unrepresented are economically weaker parties who may prefer unfair settlements to trial, or less sophisticated parties who mistakenly believe that unfair settlement offers are fair (Engler 1997, 103–04). Furthermore, an attorney can prepare the client and his or her witnesses for the process and is better equipped to obtain relevant information, to present it systematically, and to entertain legal arguments (Kritzer 1998b, 38; Sternlight

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9. See also Wissler (2010, 462): “lawyers’ presence in mediation correlated with a lower rate of settlement in most, but not all, studies.”

10. Cf. Eisenberg (1994, 284): “Once attorneys have maximized their return under a contingent-fee arrangement, there is little incentive to spend time on a contingency matter”; Kritzer (1998a, 801): “the economics of the contingency fee means that it is most advantageous for the lawyer to avoid trial in most cases.”

11. For a general survey of empirical studies concerning the impact of representation on case outcomes, see Eisenberg (1994, 281–84); for further discussion of the relevant literature, see Part V.B.

2010, 407–08). This process-related advantage can be translated into a more favorable outcome.

Although no previous article is directly on point, there is empirical evidence for differences between the achievements of represented and unrepresented parties in dispute resolution processes. A study of employment arbitration found that the employee success rate was higher where represented (22.6 percent, compared to 13.7 percent where unrepresented) and that represented employees obtained higher damage awards than unrepresented employees (an average of \$28,009, compared to \$13,222) (Colvin 2007, 433). Another study of consumers' arbitration showed that pro se consumers had a lower success rate (44.9 percent) than represented consumers (60.2 percent) and that represented consumer claimants received higher damage awards than unrepresented consumers (a median of \$6,702, compared to \$3,029) (Drahozal and Zyontz 2010, 904–06). Unsurprisingly, represented parties also obtain more favorable outcomes in courts (Kritzer 1998b, 32–37). Several studies have shown that lawyer-represented people are more likely to win in court than unrepresented people (Sandefur 2010, 69–71). However, one cannot ignore the likelihood of important differences in the nature of the dispute between cases involving lawyers and cases that do not. Such differences may account for at least some of the difference in case outcomes. We discuss this possibility in Part V.

The third hypothesis concerns the difference between representation by repeat players in the labor court system and representation by one-shotters in that system. Even though the distinction between these two types of players is not new, we believe it necessary to add a terminological clarification. Galanter (1974, 114) has referred to all lawyers as repeat players in view of their frequent interaction with the legal system, whereas we wish to use the two terms to distinguish two categories of lawyers. A repeat player is defined as someone involved in numerous proceedings of the same type over time (Galanter 1974, 97). By examining the activities of lawyers at a sufficiently high resolution, while distinguishing types of proceedings that are substantively different, it is certainly possible to determine whether a particular lawyer meets the definition of a repeat player in relation to a particular type of proceeding (Bingham 1997, 197–98; Lederman and Hrung 2006, 1241 and n.28). Thus, a repeat player in our study is a repeat player in the labor court system, which is a separate, unique, and largely autonomous system. Accordingly, a lawyer will be a “repeat player” if his or her primary specialty is employment law and the lawyer routinely represents parties to disputes that reach the labor courts.

When a lawyer representing one of the parties in a settlement conference is a specialist, we presume that (1) the probability of a settlement will increase and (2) the outcome of the process will tend to be more favorable to his or her client. This hypothesis, too, is supported by considerations of commonsense and empirical studies carried out in other legal systems. First, a repeat player possesses knowledge and experience (Galanter 1974, 98–101), is familiar with the system, and will more accurately assess the risks. He or she can anticipate the outcome of the process before the tribunal more accurately and will be able to recommend a fair settlement to his or her client. Second, where a lawyer is a repeat player, his or her interest in maintaining reputation may surpass the desire to maximize one-off profit and limit the agency problem (Lederman and Hrung 2006, 1242).

A study of the internal dispute resolution system in the US Postal Service (the REDRESS Program)<sup>12</sup> found that the proportion of proceedings that ended in agreement in cases where employees were represented by repeat players—possessing considerable experience in proceedings of the same type—was greater than in cases where the employees were represented by one-shotters (Bingham et al. 2002, 372). Another study on arbitration proceedings in employment cases found that the plaintiff employee's probability of winning was lower when faced with an employer who was a repeat player in these types of proceedings (Bingham 1997, 189, 209–10, 213). Moreover, if a judgment was given in favor of the employee, the ratio between the sum won and the sum claimed where the defendant employer was a repeat player (11 percent) was lower than where it was a one-shotter (48 percent) (Bingham 1997, 208–10, 213). Even though these studies examined ADR methods different from the one under consideration here, we assume that the representative's knowledge and experience will have a similar impact in settlement conferences.

The fourth hypothesis, following Fiss's (1984) theoretical argument, is that the outcomes of settlement conferences may be less favorable to employees than those of labor court trials. In employment relations, employees are often the weaker party and therefore the legislature has accorded them many inalienable rights. Nonetheless, the special statutory protection is beneficial only where there are adequate enforcement mechanisms. Many critics of ADR argue that contrary to the formal judicial process, the alternative procedures reproduce the existing power imbalance and consequently undermine the weaker party's ability to protect his or her rights. We hypothesize that these concerns are also justified in small claims settlement conferences. Indeed, a recent US study found that the average award in employment arbitration was significantly lower than in federal or state court employment discrimination trials (Colvin 2007, 424).<sup>13</sup> The theoretical literature provides reason to believe that the problem will be exacerbated in nonadjudicatory (hence less formal) ADR, such as settlement conferences.

### III. METHODOLOGY

Data were collected from the archive of the Haifa labor court, under special permission from the Deputy Director of the Courts.<sup>14</sup> For the purpose of this study we surveyed all summary hearing cases initiated during the first trimester of 2008—about 600 cases.<sup>15</sup> Of these, 305 remained after we filtered out cases that ended with a settlement outside the tribunal, cases in which judgment was given in the absence of a defense, and cases that were dismissed for inaction. The data recorded with respect to each case are set out in Table 1.

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12. "Resolve Employment Disputes Reach Equitable Solutions Swiftly." See [www.usps.com/redress](http://www.usps.com/redress).

13. Older studies found, however, that win rates and awards were not lower in employment arbitration than in courts (Bingham 1995; Howard 1995).

14. The special permission (on file with the authors) was granted under Section 5 of the Courts and Labor Courts Regulations (Access to Court Documents), 2003, K.T. 518.

15. Consequently, our findings are temporally and geographically limited. We have no reason to believe that our findings are characteristic of the particular period of time or of the particular district, but we cannot conclusively rule out these possibilities.

**TABLE 1.**  
**The Variables**

Variable	Values
1 Case number	Serial number/Year
2 Mediator	Law clerk/Lay judge
3 Plaintiff type <sup>a</sup>	Private/Corporate/Local authority
4 Plaintiff representation	Yes/No
5 Name of plaintiff's lawyer	Name
6 Plaintiff's lawyer repeat player	Yes/No/Irrelevant
7 Defendant type	Private/Corporate/Local authority
8 Defendant representation	Yes/No
9 Name of defendant's lawyer	Name
10 Defendant's lawyer repeat player	Yes/No/Irrelevant
11 Conference success	Yes/No
12 Sum claimed	Sum claimed, in NIS
13 Sum awarded	Sum obtained in a successful conference, in NIS
14 Court ruling	Sum awarded by the court in case of a failed conference, in NIS

<sup>a</sup>We collected data for variables 3 and 7 assuming that the classification of the parties might also have an effect on the outcomes (cf. Menkel-Meadow 1993, 375: "Settlement was considerably more difficult with institutional parties such as governmental agencies, insurance companies or very large landlords"). Ultimately, we realized that all plaintiffs were individual employees and that there were no noteworthy differences between case outcomes for various types of defendants.

We did not collect data on cases settled outside the court or dismissed for inaction. Because many claims are settled before an action is brought, we could not collect reliable data on settled cases anyway. Cases of early settlement or dismissal might be different from those that proceeded to settlement conferences. However, this lack of data does not undermine the validity of our findings with respect to the differences between settlement conferences and judicial proceedings. To compare the two, one only needs to control for possible differences between cases of successful settlement conferences and cases that went back to court, as we surely do. Even if the sample is not representative of all employment disputes, we can compare two subsets of a particular set that the sample represents, namely, cases that were handled by the labor courts system. The lack of information about earlier settlements might be more problematic when we examine the effect of representation on the probability of successful settlement conferences. This issue is discussed in Part V.

A more serious methodological problem could arise if the CRD had discretion with respect to referral to settlement conferences. In such a case it would be more difficult to determine which factors affected the outcomes of settlement conferences. But, as we explained, all summary hearing cases are automatically referred to settlement conferences, so there is no room for concern that the sample is slanted. True, a small number of settlement conferences fail because one of the parties fails to attend (from the files obtained we could not identify the cases where this was the reason for the failure); however, these are not cases where the parties were never referred to a settlement conference at all.

Examination of settlement conferences in the labor courts system has an additional methodological advantage. In all cases in the sample, the plaintiff was an employee and the defendant was an employer. This uniformity reduces the likelihood that the findings ensued from different characteristics of the plaintiff and the defendant or from their respective roles in the process.

Representation was defined as the presence of a lawyer during the settlement conference on behalf of the party under consideration. Variables 4 and 8 (representation of the plaintiff and representation of the defendant) define a matrix of four possible conditions of representation: both parties were represented (values yes/yes); neither party was represented (no/no); the plaintiff was represented but the defendant was unrepresented (yes/no); and the plaintiff was unrepresented but the defendant was represented (no/yes). The probability of a settlement was examined in relation to each of these conditions by dividing the number of cases in which the settlement conference succeeded (cases given the value “yes” for variable 11) by the number of cases belonging to that condition in the matrix. The settlement ratio, that is, the ratio between the sum obtained at the end of the settlement conference in the event of success (variable 13) and the sum claimed (variable 12) was also calculated for each condition.

The probability of settlement and the settlement ratio were calculated once again after distinguishing representation by a repeat player from representation by a one-shotter (variables 6 and 10). This meant that for the condition where both parties were represented, four subconditions were examined: both parties were represented by a repeat player (variables 6 and 10 were given the values yes/yes), both parties were represented by one-shotters (no/no), the plaintiff was represented by a repeat player and the defendant was represented by a one-shotter (yes/no), and the opposite condition (no/yes). If only one party was represented, two subconditions were examined (representation by a repeat player or by a one-shotter). A repeat player was defined as a lawyer who specialized in employment law, and expertise was assessed through an online search for information about the lawyer. We could not find information on all the lawyers who appeared in the cases in the sample, so in the analyses concerning repeat players we treated any lawyer who we did not know was a repeat player as a one-shotter. This mechanism, of course, contains a certain element of arbitrariness. Conceivably, some of the defendants’ lawyers for whom we did not find information were repeat players, such as employees in the legal department of the defendant employer or associates in an office providing the defendant with routine litigation services.<sup>16</sup> The possible effect on the findings of classifying these lawyers as one-shotters will be discussed in the relevant contexts.

Where the settlement conference failed, we recorded the data about the outcome of the case, whether it ended through some court-managed settlement process<sup>17</sup> or with a regular judgment following full trial. Thus, we could examine the difference between outcomes of successful settlement conferences and proceedings in court. However, in

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16. We conjecture that these lawyers habitually represent their clients in the labor court system, although this might not always be the case.

17. This category includes cases in which the court itself facilitated a settlement, and cases in which the parties agreed that the court would decide the case by way of a compromise.

cases where the settlement conference failed, we could not obtain information about proposals made during the process, which would have enabled us to compare actual outcomes in court to these proposals.

#### IV. RESULTS

In 77 percent of the cases in the sample, the settlement conference was successful (i.e., a settlement was obtained). This finding is consistent with the statistical data provided by the Haifa labor court, whereby 74.3 percent of the cases were concluded in a settlement in 2008, validating the accuracy of our results. Table 2 presents the prevalence of different representation conditions in the sample.

The probability of settlement in each of the four representation conditions is set out in Table 3. Overall, 235 out of 305 settlement conferences were successful (77 percent). The table shows that contrary to the first hypothesis, representation actually increased the probability of a settlement. The probability of a settlement where neither party was represented was significantly lower than it was where both were represented; in fact, in the latter condition, the likelihood of a successful settlement conference was higher than in all other conditions.

Inferential statistics confirmed the *prima facie* finding. We performed a logistic regression on the outcomes of settlement conferences (success/failure), where representation was defined dichotomously (represented/unrepresented), controlling for the sum claimed by the employee. The variable "claim1000" represents the amount claimed in thousands of shekels. The results of the regression are presented in Table 4. The primary

**TABLE 2.**  
Frequency of Conditions (N = 305)

	Plaintiff Represented	Plaintiff Unrepresented
Defendant represented	122	63
Defendant unrepresented	43	77

**TABLE 3.**  
Settlement Probability (N = 305)

	Plaintiff Represented	Plaintiff Unrepresented
Defendant represented	88.5% (122)	76.2% (63)
Defendant unrepresented	72.1% (43)	62.3% (77)

Note: Group size in parentheses.

**TABLE 4.**  
**Analysis of Maximum Likelihood Estimates**

Parameter	DF	Estimate	Standard Error	Wald Chi-Square	Pr > ChiSq
Intercept	1	0.5490	0.2413	5.1744	0.0229
Employee represented	1	0.8321	0.3180	6.8486	0.0089
Employer represented	1	0.9320	0.2997	9.6706	0.0019
Claim1000	1	-0.0174	0.0143	1.4710	0.2252

**TABLE 5.**  
**Settlement Ratio (N = 235)**

	Plaintiff Represented		Plaintiff Unrepresented	
	M	STD	M	STD
Defendant represented	38.8%	21.3%	46.9%	29.7%
	(108)		(48)	
Defendant unrepresented	47.2%	24.7%	56.0%	33.6%
	(31)		(48)	

*Note:* Group size in parentheses.

control variable—the sum claimed—was not found to affect the probability of a settlement. Contrary to our hypothesis, both representation of the employee and representation of the employer increased the likelihood that the settlement conference would end in a settlement. These findings are statistically significant. It may be concluded, therefore, that where both parties are represented the likelihood of a successful settlement conference is higher than in any other representation condition. The condition where only the plaintiff was represented and the condition where only the defendant was represented evinced no significant difference in the probability of a settlement.

The average settlement ratio in successful settlement conferences ( $N = 235$ ) in each of the four representation conditions is set out in Table 5. As predicted, settlement ratios were lower when the defendant was represented. However, contrary to our second hypothesis, for any value of defendant's representation, the plaintiff achieved a more favorable settlement without representation. The settlement ratio where both parties were represented was the lowest (38.8 percent), making this state of affairs the most beneficial to the defendant employer. The settlement ratio where neither party was represented was the highest (56 percent), making this state of affairs the most beneficial to the plaintiff employee. However, as we explain below, these results may be attributed in part to other differences between cases of represented and unrepresented plaintiffs.

Successful settlement conferences in which the plaintiff effectively waived his or her claim were assigned a settlement ratio of 0 for the purpose of calculating the averages. Of the successful settlement conferences in which the plaintiff was unrepresented, in 12.5 percent the settlement ratio was 0. The probability of a settlement at the

**TABLE 6.**  
**Frequency of Conditions (N = 305)**

		Plaintiff Represented		Plaintiff Unrepresented
		Repeat Player	One-Shotter	
Defendant represented	Repeat player	27	22	25
	One-shotter	36	37	38
Defendant unrepresented		25	18	77

**TABLE 7.**  
**Settlement Probability (N = 305)**

		Plaintiff Represented		Plaintiff Unrepresented
		Repeat Player	One-Shotter	
Defendant represented	Repeat player	96.3% (27)	86.4% (22)	80.0% (25)
	One-shotter	83.3% (36)	89.2% (37)	73.7% (38)
Defendant unrepresented		72.0% (25)	72.2% (18)	62.3% (77)

*Note:* Group size in parentheses.

ratio of 0 in cases where the plaintiff was unrepresented was similar for both representation conditions of the defendant. In contrast, when the plaintiff was represented, the percentage of cases in which he or she agreed fully to waive his or her claim in a settlement conference was negligible (less than 1 percent).<sup>18</sup>

The frequency of various representation conditions, taking into consideration the character of the representative (repeat player/one-shotter), is presented in Table 6, and the probability of settlement in the various conditions is set out in Table 7. Table 7 shows that when both parties were represented by repeat players, almost all settlement conferences succeeded (i.e., concluded with an agreed settlement). This finding is *prima facie* consistent with our third hypothesis.

To examine whether the type of representation (by a repeat player or a one-shotter) affected the outcome, we conducted a logistic regression on the results of settlement conferences (success/failure) as dependent on the type of representation. We defined three types of representation (repeat player/one-shotter/no representation) using two dummy variables. To allow comparison of representation by repeat players and by one-shotters, we used representation by one-shotters as the reference group. We

18. If we disregard the cases in which the plaintiff settled at 0 percent of the sum claimed, the predicted negative effect of the plaintiff's representation on the settlement ratio is even greater than that reported in Table 5.

**TABLE 8.**  
**Settlement Ratio (N = 235)**

		Plaintiff Represented		Plaintiff Unrepresented
		Repeat Player	One-Shotter	
Defendant represented	Repeat player	43% (26)	35% (19)	47% (20)
	One-shotter	41% (30)	35% (33)	47% (28)
Defendant unrepresented		52% (18)	42% (13)	56% (48)

*Note:* Group size in parentheses.

found no significant difference in the probability of a settlement between cases of representation by a repeat player and by a one-shotter, in relation to representation of either the employee or the employer. In view of the control for the amount claimed, it is difficult to determine whether the type of employee representation affects the likelihood of a settlement because the type of representation may also affect the amount claimed. Represented plaintiffs conceivably bring claims for larger amounts than unrepresented plaintiffs,<sup>19</sup> while the defendant's representation is less likely to exert a similar impact. In any event, no significant findings emerged regarding the influence of professionalism in employment law on the likelihood of a settlement.

The settlement ratio in cases of a successful process in the various conditions is set out in Table 8. The maximum settlement ratio, that is, that which was most beneficial to the plaintiff, was achieved where neither party was represented. Where only one party was represented, the maximum settlement ratio was achieved where only the plaintiff was represented and his or her representative was a repeat player. Where only the defendant was represented, the character of the representative (repeat player or one-shotter) did not affect settlement ratio (about 47 percent in both cases). On the other hand, where only the plaintiff was represented, the settlement ratio was higher when the representative was a repeat player (52 percent, compared to 42 percent in the case of representation by a one-shotter). When both parties were represented, the maximum settlement ratio (43 percent) was achieved if both representatives were repeat players.

More importantly, whenever the plaintiff was represented, the settlement ratio was higher if the representative was a repeat player. If both parties were represented, the settlement ratio was 42 percent when the plaintiff was represented by a repeat player and 35 percent when represented by a one-shotter (these numbers are not presented directly in Table 8), and if only the plaintiff was represented, the settlement ratio was

19. In fact, our data show that the average amount claimed by a represented plaintiff was NIS 13,733, whereas the average amount claimed by an unrepresented plaintiff was NIS 7,592. Of course, this does not necessarily mean that representation results in higher claims. It is possible that claimants are more likely to hire lawyers when the amounts claimed are higher.

**TABLE 9.**  
**Win Ratio in Different Processes<sup>a</sup>**

Procedure	N	Sum Obtained/Claimed
Settlement conference	235	45%
Judge-facilitated settlement	41	56%
Full trial	27	84%

<sup>a</sup>Two cases in the sample could not be classified with certainty. The number of cases reported in Table 9 is, therefore, 303.

52 percent for representation by a repeat player and 42 percent for representation by a one-shotter. We show below that these findings are suspect.

The last and most important finding concerns the relationship between the outcome of successful settlement conferences and the outcome of court hearings. When a settlement conference fails (because of inability to reach a settlement or because one of the parties does not attend), the case returns to the labor court where it is concluded in one of two ways: a judge-facilitated settlement—given the force of judgment<sup>20</sup>—or judgment following full trial. The average settlement ratio in settlement conferences was 45 percent. The ratio between the sum obtained and the sum claimed in a judge-facilitated settlement was 56 percent. Where full trial was conducted and judgment was delivered, the ratio between the sum awarded and the sum claimed was 84 percent. *Prima facie*, the more formal the proceeding, the greater the proportion of the claim won by the plaintiff (see Table 9).

To examine whether the method of case disposition, namely, through a settlement conference, in a judge-facilitated settlement, or by a regular judgment, affected the outcome, we used a variance analysis model. We tested the ratio between the sum won by the plaintiff and the sum claimed (hereinafter, the win ratio) for each type of case disposition, using the representation of each party and the sum claimed as control variables. Win ratios differed significantly among the various methods of disposition ( $F = 12.69$ ;  $DS = 7, 292$ ;  $P < 0.0001$ ). The plaintiffs' win ratio was lowest in settlement conferences; it was higher in judge-facilitated settlements and higher still in full trials. These differences were all statistically significant (see Table 10).

Because the employee was represented in only four full trial cases and the employer was represented in only four full trial cases, we reexamined the relationship between the type of disposition and the win ratio in the subset of cases in which the parties were unrepresented in order to neutralize the possible effect of representation on the method of disposition. The difference between win ratios in the various processes was statistically significant ( $F = 3.19$ ;  $DS = 3, 73$ ;  $P < 0.05$ ). However, while the difference between full trials and settlement conferences remained significant, the difference between judge-facilitated settlements and the other two methods no longer proved significant in this examination (see Table 11). Nonetheless, because of the exclusion of all cases in which at least one of the parties was represented, the sample was much smaller than the

20. See note 18.

**TABLE 10.**  
**Significance of Differences**

Type Comparison	Difference Between Means	Simultaneous 95% Confidence Limits		
Full trial—judge-facilitated settlement	31.098	15.328	46.868	*
Full trial—settlement conference	42.049	29.042	55.055	*
Judge-facilitated settlement—settlement conference	10.950	0.297	21.604	*

Note: Comparisons significant at the 0.05 level are indicated by \*.

**TABLE 11.**  
**Significance of Differences**

Type Comparison	Difference Between Means	Simultaneous 95% Confidence Limits		
Full trial—judge-facilitated settlement	18.192	-12.143	48.528	
Full trial—settlement conference	25.057	4.011	46.103	*
Judge-facilitated settlement—settlement conference	6.865	-20.126	33.856	

Note: Comparisons significant at the 0.05 level are indicated by \*.

sample in the first examination (about a quarter of its size). In the second examination, only ten cases remained in which a judge-facilitated settlement was achieved (compared to forty-one in the model that included cases with representation). This fact may explain the difficulty in finding a significant gap between judge-facilitated settlements and other types of cases.<sup>21</sup>

These findings negate the possibility that full trials and successful settlement conferences differ due to differences in representation or sums claimed. They strengthen the conclusion that the great advantage afforded to plaintiffs in court lies in the features of each process, particularly the levels of formality and transparency.

## V. DISCUSSION

### A. Probability of a Settlement

Contrary to our first hypothesis, when both parties are represented, the probability of a settlement is highest and when neither is represented, the probability of a settlement is lowest. Several explanations for these findings may be given. One possible explanation is that unrepresented parties are more likely than represented parties to

21. Multiple comparisons using Tukey tests did not show a significant difference. Using multiple *t*-tests to compare all pairs of proceedings showed a significant difference between a full trial and settlement conference.

settle before a settlement conference is held (and even before a lawsuit is brought). According to this line of argument, nonrepresentation cases are more frequently settled outside the labor court system, so the observed nonrepresentation cases constitute only a small subset, that is, relatively complex cases, which have been more difficult to settle. Arguably, this complexity of observed nonrepresentation cases, and not the lack of representation, explains the results.

Although we cannot discount this explanation, it seems unconvincing. First, a presuit letter from the employee's lawyer (in the case of representation) is more likely to incentivize the employer to settle than a letter from an unrepresented employee. Second, contingency fees, as well as flat fees, incentivize plaintiffs' lawyers to settle as quickly as possible without having to file lawsuits or extended negotiations. Third, variance between summary hearing cases is extremely small. As we explained above, these cases involve very small amounts and only simple factual disputes. There is little reason to believe that, within our sample, cases in which the plaintiff was unrepresented were systematically and significantly more difficult to resolve than those in which the plaintiff was represented. To some extent, the opposite is more likely because representation may indicate a more complicated case.

Another possible explanation is that a person who, for some reason, is more likely to settle, is also more likely to hire a lawyer. This predisposition of represented parties is arguably responsible for the higher settlement probability in the case of representation. While we cannot rule out this explanation, it is extremely weak. There is no reason to assume that people who hire lawyers are more cooperative or have a greater tendency to compromise.

A somewhat stronger explanation for our findings is that lawyers are more frequently hired in simpler cases that are more likely to settle. So the higher settlement probability in cases of representation reflects the different nature of the cases involved, not the impact of representation. Recall that we performed a logistic regression on the outcomes of settlement conferences (success/failure), where representation was defined dichotomously, controlling for the sum claimed by the employee. The primary control variable—the sum claimed—was not found to affect the probability of a settlement. Are there other differences between the two groups that can account for the results? Sandefur (2010, 71) opined that “cases that lawyers take may have more legal merit, more easily available evidence, or better facts than cases that lawyers turn away.” More merit and more evidence imply less uncertainty, which in turn facilitates settlement. However, because variance between labor court summary hearing cases is extremely small, it cannot account for such a significant difference between cases of representation and cases of nonrepresentation. Moreover, as we show below, plaintiffs achieved more favorable settlement ratios without representation, implying that cases of nonrepresentation did not have less merit.

A more plausible explanation relates to lawyers' economic incentives. We hypothesized that a lawyer whose fee depends on the amount of effort invested in the case will be less inclined to conclude the process in a swift settlement conference, whereas a lawyer whose fee depends on the outcome may prefer to pursue a better result in the labor court. We do not retract the hypothesis that lawyers seek, among other things, to maximize personal gain, but perhaps we did not attach sufficient importance to the unique characteristics of settlement conferences in summary hearing cases.

A settlement conference session is relatively short. According to the report published by the steering committee on mediation in the labor courts system, such a session lasts fifteen to thirty minutes, although the parties are occasionally summoned to an additional session (Wirth-Livne 2001, 7, 9–10). Failure of the settlement conference brings the parties back to the labor court for a much longer and wearisome process. The lawyers we interviewed reported that their fee depended on several variables, such as the expected effort, the general workload, the prospects of the case, potential risks, and the identity and characteristics of the specific client; still, the fee was usually based on some combination of a fixed rate and a percentage of the client's recovery and, less frequently, on one of the two.<sup>22</sup> If the plaintiff's lawyer receives a fixed fee for handling the case, any additional effort is not worthwhile. Under a contingency fee agreement, the lawyer may obtain higher remuneration by going back to court, but because settlement conferences are conducted in summary hearing cases, where the sum claimed is small (up to \$7,000), the difference would be negligible. So the lawyer will prefer to conclude the proceedings as swiftly as possible. Indeed, empirical evidence suggests that in small claims cases, a contingency fee agreement motivates the lawyer to seek quick disposition of the case, compared to an hourly fee (Kritzer et al. 1985, 267; Kritzer 2002, 1968). On the other hand, if the lawyer's fee depends on effort, the pressure to agree to a swift settlement may actually come from the client because a longer process will entail greater costs to the litigants (Lederman and Hrung 2006, 1261).

Another plausible explanation concerns the lawyer's experience and knowledge. Because of ignorance or absence of information, an unrepresented party may believe that a fair settlement offer is in fact unfair, while relying on the labor court for a fair deal. In contrast, a lawyer, being familiar with substantive law and procedural rules, as well as with actual court (or jury) decisions, can assess the available evidence and understand which factual and legal issues are in dispute. A lawyer can make a more educated and objective assessment of the risks and expected benefits of a full hearing in court and may be better equipped to determine whether a settlement offer is consistent with the expected outcome in court (Mnookin and Kornhauser 1979, 985–87; Kritzer 1998a, 801; Lederman and Hrung 2006, 1247–50; Sternlight 2010, 406).<sup>23</sup> McEwen et al. (1995, 1360–61) reported that lawyers in divorce mediation believed that their presence was needed “to provide a check on fairness.”

A related argument is that an unrepresented party may reject a fair settlement offer because of cognitive biases. Biases that may frustrate a settlement conference in the absence of representation may include, for example, overoptimism, overconfidence, and a self-serving bias (Loewenstein et al. 1993, 140–44; Tor 2008, 254–57). These biases result in overestimating one's expected advantages and achievements while underestimating the risks to which one is exposed (Sunstein 1997, 1182–84). In our context, people tend to evaluate their stakes and the likelihood of winning in court as higher than

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22. We interviewed about a dozen lawyers who took part in settlement conferences in the labor court system in recent years.

23. However, it may well be that lawyers have wrong perceptions of expected outcomes in court because they more heavily rely on the outcomes of settlements. This possibility must be left for future research.

they really are, so a gap may develop between the parties' respective assessments, hindering settlement (Loewenstein et al. 1993, 138–39; Eisenberg 1994, 295–96; Babcock and Loewenstein 1997, 110). Admittedly, lawyers may also be overoptimistic or overconfident (Loftus and Wagenaar 1988; Eisenberg 1994, 296; Goodman-Delahunty et al. 2010; Eigen and Listokin 2012).<sup>24</sup> However, studies have shown that experts in a particular field, particularly lawyers, are less likely to be affected by these biases than their clients (Korobkin and Guthrie 1997, 87–88, 137; Sternlight 2010, 406–07; Wissler 2010, 457). Accordingly, representation may reduce—but not eliminate—the gap originating from cognitive biases and encourage settlements.<sup>25</sup>

Additionally, plaintiffs are often emotionally motivated (Loewenstein et al. 1993, 139). For example, Lind et al. (2000, 580–81) found that psychological motives, more specifically “feelings of unfair, insensitive treatment” by the employer, had the strongest effect on employees' decisions to sue. Bies and Tyler (1993, 352–66) similarly found that employees' decisions to go to court are influenced largely by the perceived fairness of their dealings with the organization.<sup>26</sup> Presumably, in the absence of representation, emotionally charged employees may reject objectively reasonable settlement offers. An analogous argument was made by Gilson and Mnookin (1994, 542) with respect to divorce: the strong emotions associated with divorce may pose a barrier to “collaborative rational problem-solving” and cooperative divorce lawyers may help overcome it.

However, any argument concerning lawyers' superior capacities (more knowledge and experience, less cognitive and emotional biases) seem to be a weaker explanation here: As our data show, unrepresented plaintiffs were more inclined to go to court than represented ones, and when they did, they actually obtained more, indicating that plaintiffs are not patently less capable of assessing their chances.

Finally, lawyers, repeat players in particular, may tend to adopt a cooperative approach in negotiation even when a more competitive aggressive approach can yield more for their clients (Menkel-Meadow 1993, 369–71). Researchers looking at divorce lawyers found “a desire to settle cases quickly for the ‘going rate’ and not to bargain too hard, especially . . . [where] the lawyers were repeat players” (Menkel-Meadow 1993, 370). Gilson and Mnookin (1994, 541–50) provided a theoretical analysis of this phenomenon. In their view, divorce bargaining is not a zero-sum game: in some cases cooperation can create value and improve the outcome for both parties. However, for various reasons, the parties cannot devise the mutually beneficial cooperative resolution on their own. Now, because family law practice is usually localized and specialized, lawyers repeatedly interact with each other and many endeavor to maintain a reputation of being cooperative and trustworthy. A similar argument may be applicable to labor law practice in Israel.

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24. Cognitive biases, such as overoptimism, cognitive conservatism, and the commitment bias, may lead lawyers to underestimate risks (Langevoort and Rasmussen 1997, 422–23). However, other cognitive biases, such as defensive pessimism, the accountability bias, and self-interest may lead lawyers to overestimate risks (Langevoort and Rasmussen 1997, 423–30).

25. For a discussion of the role of lawyers as de-biasers in a different context (plea bargaining), see Bibas (2004, 2519–27).

26. For a survey of relevant literature, see Meili (2011, 85) and Tyler and Thorisdottir (2003, 377–78).

## B. Settlement Ratio

In an employment relationship, the employee is generally in an inferior position. The power imbalance is maintained when a legal dispute arises between the two sides, for reasons stated above.<sup>27</sup> Thus, where neither party is represented and, a fortiori, where only the defendant is represented, the employer would seem to have the upper hand. Representation of the employee by an independent expert may reduce some of the power gaps and information asymmetries and improve the employee's relative position (McEwen et al. 1995, 1360–61; Landsman 2010, 291; Mironi 2010, 373; Sternlight 2010, 384–85, 395–96).

The relative power of the parties is presumably reflected in the settlement ratio. Consequently, the fact that settlement ratios were lower when the defendant was represented is no surprise. In contrast, it is quite puzzling that for any value of defendant's representation the plaintiff achieves a more favorable settlement without representation.<sup>28</sup> It is even more surprising in light of the connection between the lack of plaintiff's representation and the probability of submission of a claim that is insufficiently founded in legal and evidentiary terms. That such a connection exists is indicated by our interesting finding that in one out of every eight settlement conferences in which the plaintiff was unrepresented, he or she was persuaded to withdraw the claim completely, whereas when the plaintiff was represented, the probability of withdrawing the entire claim in the settlement conference was less than 1 percent. If we disregard the cases in which the plaintiff settled for 0 percent of the sum claimed, the expected negative effect of the plaintiff's representation on the settlement ratio is even greater.

A possible explanation for this is that in the absence of representation, the assessment of the fairness of the offered settlement is intuitive and not based on a realistic assessment of the expected outcome of the legal process. Arguably, people perceive a compromise as an averaging concept: a compromise between all and nothing is the mid-point between two extremes, which in a legal action is 50 percent of the sum claimed. This may be the anchor around which most compromises are concluded where at least one of the parties is unrepresented.<sup>29</sup> When one of the parties is represented, he or she can perhaps assess the risks and probability of success of the legal process more accurately, but his or her opponent will still be captive to the perception of a compromise as an averaging concept. When both parties are represented, a professional effort is made to adjust the compromise to the risks and expected benefits of litigation and therefore greater willingness exists to deviate from the mid-point. This argument, however, is inconsistent with the very high standard deviations reported in Table 5. The data may be more consistent with the possibility that the sum claimed serves as the real anchor and has a weaker anchoring effect when the parties are represented.

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27. See Part II.B.

28. Drahozal and Zyontz (2010, 907) had a similar finding, but did not attempt to explain it: "pro se consumer claimants recovered a higher percentage of the amount claimed than consumers who were represented by attorneys. . . . We have no clear explanation for this finding."

29. Tversky and Kahneman (1974, 1128) discuss the concept of anchoring. See also Tor (2008, 251): "In many situations decision makers make estimates by starting from an initial value, based on information provided by the environment or a partial computation, then adjust the estimate to reach their final answer . . . different starting points lead to different estimates that are biased toward the initial value, or 'anchor.'"

A second possible explanation is that the cases in which neither party was represented were materially different from other cases. In our sample, the average sum claimed in cases of successful settlement conferences was NIS 4,908 where neither party was represented, NIS 13,663 where both were represented, NIS 14,250 where only the plaintiff was represented, and NIS 8,319 where only the defendant was represented.<sup>30</sup> Plaintiffs may be less inclined to hire lawyers when the stakes are lower and lawyers may be less inclined to take smaller cases. Either way, the smaller the sum claimed, the smaller the concession required of the defendant in absolute terms when the settlement ratio is increased. A 5 percent increase in the settlement ratio in a case where the sum claimed is NIS 5,000 means an addition of only NIS 250 and the defendant's willingness to absorb this sum will undoubtedly exceed its willingness to bear the cost involved in an increase of the settlement ratio in heavier cases. It may therefore be argued that but for the difference in the sums claimed, the theoretical expectations regarding the effect of representation would be met.

A third possible explanation is that plaintiffs' lawyers inflate the amount claimed as a means of achieving a better return (Chapman and Bornstein 1996).<sup>31</sup> *Prima facie*, this hypothesis is supported by the findings presented above: the average sum claimed when the plaintiff was represented was indeed higher than the average sum claimed when the plaintiff was unrepresented. However, although these findings indicate some correlation between representation and the sum claimed, they do not prove the existence and direction of a causal link between the two variables. As explained above, the employee's inclination to hire a lawyer conceivably depends on the amount he or she believes is due to him or her. Accordingly, the possibility of inflation remains speculative. In any event, if representation leads to inflation of claims (the denominator in the definition of settlement ratio), but has only a marginal effect on the ultimate sum obtained (the numerator), represented plaintiffs will presumably receive a smaller proportion of the amount sought than unrepresented plaintiffs. Thus, difference in settlement ratios may be a misleading gauge of the effect of representation. Representation may marginally help the plaintiff, although our crude findings suggest otherwise. In fact, while the settlement ratio for represented plaintiffs was lower, the sum obtained by represented plaintiffs was higher (NIS 4,995, compared to NIS 3,148 for unrepresented plaintiffs). Therefore, whether representation assists the plaintiff in settlement conferences cannot be conclusively determined by our data. On the other hand, the defendant cannot inflate the claim, so inflation does not tilt the findings concerning the effect of defendant's representation on the outcome. As predicted, defendant's representation improves its position by reducing the settlement ratio.

A fourth possible explanation concerns the status of the unrepresented plaintiff employee in the labor courts system. In discussing the legitimacy of an autonomous labor courts system, a committee headed by former Justice Itzhak Zamir clarified that one of the justifications for the existence of this special system was the desire to care for

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30. The average sum claimed in all cases was NIS 10,804. A similar phenomenon was reported by Drahozal and Zyontz (2010, 907): "consumer claimants who filed claims and were represented by attorneys sought an average of \$57,529 in compensatory damages, while pro se claimants sought an average of \$31,774."

31. See also Eisenberg (1994, 285), explaining that according to Herbert Kritzer's findings, this phenomenon is less prevalent than most people believe.

weakened and impoverished parties who, by the nature of things, are unable to pay for their own representation (Zamir 2006, 52, 68, 87, 141–42). For example, the labor court is not bound by the rules of evidence and rules of procedure applied in other courts (Zamir 2006, 87–88). Traditionally, special sympathy has been shown by professional and lay judges for the rights and interests of employees whose relative weakness has been aggravated due to lack of representation.<sup>32</sup> Presumably, this sympathy also permeates settlement conferences conducted by agents of the same system. So if the plaintiff employee is unrepresented, the mediator will conceivably help him or her more than if he or she were represented. Such help might tilt the settlement ratio slightly in favor of the plaintiff.<sup>33</sup>

### C. Repeat Players and One-Shotters

We found that when both parties in settlement conferences were represented by repeat players, the probability of a settlement was highest (96.3 percent). Several explanations may be posited for this outcome. We have already explained why the effect of representation on success rates may be positive, contrary to our first hypothesis. The issue we consider now is the added value of representation by repeat players.

First, a repeat player in the labor court system is accustomed to ADR, settlement conferences in particular, and is familiar with the purpose and characteristics of these methods. As a result, this lawyer's basic attitude to the dispute and the attempts to resolve it differs from that of the archetypal adversarial lawyer, on whom representation studies have previously been carried out. In addition to changing a lawyer's attitude, familiarity with the process may make his or her tactics more compatible with the cooperative spirit of nonadjudicatory ADR (Sternlight 1999).

Second, within relatively small, specialized, and cohesive communities of practitioners, repeat players have an incentive to maintain a reputation of being fair and trustworthy by not creating unnecessary obstacles to fair and efficient dispute resolution. This is so in US family law practice (Gilson and Mnookin 1994, 543–50) and is presumably the case in Israeli labor law practice.

Third, repeat players are better able to assess the risks and expected benefits of litigation and they know when a settlement offer is fair and consistent with their clients' interests. When both parties are represented by repeat players, both are able to calculate accurately the risks and expected benefits and they understand that their opponent is capable of making the same assessment. Accordingly, when a fair and reasonable settlement offer is made, both will tend to recommend it to their clients.

Fourth, we have explained that in ordinary situations, the manner of calculating fees on the one hand, and the amount of effort required to handle the case on the other, may give rise to a conflict of interest between the lawyer and the client. When the

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32. While there is no official acknowledgment of a tendency to assist unrepresented employees, such a tendency seems to be implicit in the case law.

33. But see Sternlight (2010, 410), explaining that "while both arbitrators and mediators may be able to help the unrepresented, neither . . . can help substantially in conducting legal or factual research, organizing factual information, [and] presenting legal arguments."

lawyer is a repeat player, this conflict of interest is presumably reduced because his or her reputation as an expert in the field who attends first to the interests of the client may be more important to him or her than a negligible addition to his or her income in a single case.

Again, we cannot rule out completely the possibility that repeat players and one-shotters represent parties in somewhat different cases and that this difference is responsible for at least some of the difference in settlement probabilities. However, as explained above, we used an extremely homogeneous sample. We have no reason to believe that a real difference between the groups of cases truly exists; even if it does, it cannot be sufficiently large to have an observable impact on settlement probabilities.

We also found that if the settlement conference succeeded and at least one of the parties was represented, the settlement ratio was highest when the plaintiff was represented by a repeat player and the defendant was not represented at all (52 percent); the only condition more favorable to the plaintiff was neither party being represented. We saw that in all the defendant's representation conditions (unrepresented, represented by a one-shotter, represented by a repeat player), the plaintiff achieved a better result without any representation at all; but if, nonetheless, he or she chose to be represented, he or she obtained a more favorable result if his or her representative was a repeat player. In contrast, in all the plaintiff's representation conditions (unrepresented, represented by a one-shotter, represented by a repeat player), the defendant obtained a better result if it was represented. Moreover, from the defendant's point of view there was no significant difference between representation by repeat players and one-shotters.

Accordingly, irrespective of the defendant's representation condition, representation by a repeat player will put the plaintiff in a better position than representation by a one-shotter (Table 8).<sup>34</sup> This finding is not surprising. We previously explained that a power imbalance exists between the employer and the employee and that representation may alleviate it. Representation by a repeat player probably has a stronger impact. Note, however, that there is some correlation between the parties' characteristics (repeat players or one-shotters) and their lawyers' (Galanter 1974, 116–17). An employer who is a repeat player, that is, involved in a number of employment disputes over time, will probably have an in-house lawyer or retain a law firm with specific expertise in these disputes. In other words, the repeat player (the employer) will generally be represented by a repeat player (a lawyer specializing in employment law).<sup>35</sup> Moreover, a lawyer providing routine services to the same employer will develop a long-term commitment to that employer that mitigates the inherent conflict of interest

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34. This is also true if we examine the amount obtained instead of the settlement ratio. When the plaintiff is represented by a repeat player, the average amount obtained is NIS 5,197. When represented by a one-shotter it is NIS 4,765.

35. Seemingly, our findings do not support this conjecture. As shown in Table 6, the defendant was represented by a one-shotter in 111 cases (36.4 percent) and by a repeat player in seventy-four cases (24.3 percent), whereas the plaintiff was represented by a one-shotter in seventy-seven cases (25.2 percent) and by a repeat player in eighty-eight cases (28.9 percent). But as we explained above, we could not find information about the types of representatives in all cases and treated any lawyer whose classification was unknown as a one-shotter. Presumably, some of the lawyers who represented defendants and in respect of whom we did not find information were repeat players, such as employees in the legal department of the defendant employer or associates in an office providing the defendant with routine litigation services. So the numbers presented in Table 6 cannot conclusively refute Galanter's proposition.

between a lawyer and a client. In contrast, employees will generally be one-shotters in the labor court and will probably retain lawyers they can afford; those may handle a miscellany of cases and have no concrete expertise in employment law. Such lawyers will focus on the specific case and will primarily weigh short-term considerations. For the lawyer, this is a once-only client so the agency problem is more acute (Galanter 1974, 116–17). When the lawyers' and the clients' characteristics correlate, the power imbalance between the parties is maintained at least in part (Galanter 1974, 119).

This gap might be narrowed and the employee can be better off when represented by a repeat player, whereupon the employer loses some of its relative advantages. For example, when the lawyer is a repeat player in employment disputes, he or she is interested in establishing his or her reputation in the field, being regarded as an authority, and attracting more clients (Lederman and Hrungrung 2006, 1242). To achieve these goals, he or she must satisfy clients with his or her handling of their cases and with the outcomes of the proceedings. In this case, an identity of interests emerges between the lawyer and the client: both are interested in maximizing the client's welfare. A lawyer who is a repeat player will make a greater effort for the client than a lawyer who is a one-shotter.

An interesting feature that has already been discussed is that irrespective of the defendant's representation condition, the plaintiff will be best off without representation, even if we take into account the differences between representation by repeat players and by one-shotters (Table 8). The explanations offered above hold here as well. In particular, the average sum claimed when the plaintiff was represented was NIS 13,733, whereas the average sum claimed when the plaintiff was unrepresented was NIS 7,592. This gap may be caused, at least in part, by the defendants' lawyers inflating the claims, as explained above. In addition, the smaller the sum claimed, the less of a concession an increase in the settlement ratio requires from the defendant in absolute terms. So it may be argued that the settlement ratio where the plaintiff is unrepresented is relatively high primarily because the sum claimed is low, not because of the lack of representation. When the sum claimed is higher, the plaintiff is represented, and in that case he or she has a clear preference for a repeat player. Consequently, we cannot and do not argue that the representation condition, by itself, affects settlement ratios.

We further found that for the defendant, who prefers the settlement ratio to be as low as possible, it was best to be represented, whatever the plaintiff's representation condition was. Additionally, there was no real difference between the defendant being represented by a repeat player or by a one-shotter. This may be explained by the fact that often the defendant is itself a repeat player and therefore enjoys at least some advantages accorded by this status, even if its lawyer is a one-shotter. Another possible explanation is a methodological difficulty. We have clarified that lawyers for whom we did not find data were classified as one-shotters. Conceivably, some of the lawyers who represented defendants in the cases examined in this study, and for whom we did not find information, were in fact repeat players, such as in-house lawyers or lawyers working in firms providing routine legal services to the employer. These have a particularly strong incentive to act fairly and efficiently on behalf of the client. With full information, we might have identified a difference in the settlement ratio between cases in which the defendant was represented by a repeat player and cases in which it was represented by a one-shotter.

#### D. Settlement Conferences and Proceedings in the Labor Court

Our most important finding, which seems to support Fiss's (1984) theoretical argument, is the difference between the outcomes of settlement conferences and of cases heard by the courts when an attempt to settle has failed or was never initiated.<sup>36</sup> Plaintiffs obtain about 45 percent of the sum claimed in settlement conferences, but in judge-facilitated settlements this ratio increases to 56 percent. When a decision is made by a labor court judge after full trial, the plaintiffs' average win stands at 84 percent of the sum claimed, almost twice the settlement ratio in successful settlement conferences. The question is whether our findings may be attributed to a selection bias. Put differently, is there reason to believe that cases heard by the courts differ in a crucial aspect from settled cases? We believe there is none.

To begin with, the average sum claimed in cases that ended in settlement conferences (NIS 10,938) was not significantly different from the average sum claimed in cases that went back to the labor court for decision (NIS 11,011), so the different outcomes cannot be attributed to the sums claimed. This finding is even more noteworthy considering that in proceedings before the labor court, plaintiffs' rate of representation was lower than in settlement conferences. That is, even though most plaintiffs who came before the courts (62 percent) were unrepresented and in settlement conferences only a minority (41 percent) were unrepresented, the average outcome in the labor court was much more favorable to the plaintiffs than the average outcome in settlement conferences. Recall that the differences in win ratios remained statistically significant after controlling for the sum claimed and for representation.

It may be argued that the wide gap between the outcomes of settlement conferences and court processes stems from a difference in the relative strength of the cases in either setting. For such a large gap to open up, one has to assume that stronger cases, namely, those in which employees' assertions are legally and factually well founded and their likelihood of success in court is higher, are less likely to be settled. An intuitive explanation for this assumption may be that a plaintiff is less willing to settle knowing he or she has a strong case. However, this is unconvincing. After all, the defendant is also aware of the relative strength of the case. In stronger cases, plaintiffs may be less willing to settle for low sums, but defendants will probably offer higher sums to induce settlement. As long as both parties are rational and make similar assessments of the expected outcome in court, there should not be a significant difference between the probabilities of successful settlement conferences in stronger and weaker cases. Only if the parties' assessments of the expected outcome in court differ, employers may not make sufficiently generous offers to induce settlement. Different assessments may result from information problems or cognitive biases and may indeed subvert settlement. However, to explain our finding it is necessary to show that for some reason the assessment discrepancy in strong cases is greater than in weaker cases. We have not succeeded in identifying such a reason.

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36. But cf. Eisenberg and Hill (2003), finding no significant difference between employee win-rates in arbitration and in litigation; note that the authors use the term win-rate to denote the ratio of successful claims.

Alternatively, stronger cases will be less likely to be settled if employers envisage some benefit from litigating particularly strong cases. However, this seems unlikely.<sup>37</sup> When the employer identifies a strong case and the outcome is known in advance, it is better to settle and save the costs of litigation.<sup>38</sup> Moreover, particularly in strong cases, where the probability that the employer will fail is high, the employer will presumably lean more heavily toward a settlement to avoid a public process and a judicial determination that may attract negative publicity and impair its bargaining power vis-à-vis other employees.<sup>39</sup>

In sum, it is unlikely that the gap between the respective outcomes of settlement conferences and trials lies in the fact that stronger cases are less likely to be settled. The unreasonableness of this selection bias explanation validates our conjecture that the employee's relative weakness has a lesser effect in more formal, transparent, and adjudicatory processes. Put differently, the average compensation awarded to employees in settlement conferences is lower than what they could have obtained at trial.

We should note that unlike the variance in settlement conference outcomes, which could be attributed, at least in part, to differences in representation, the differences between outcomes in different processes could not. The differences between the three types of disposition remained statistically significant after controlling not only for the sum claimed but also for representation. Moreover, when we reexamined the relationship between the type of disposition and the win ratio in the subset of cases in which both parties were unrepresented, the difference between win ratios in the various processes was still statistically significant.

Our findings thus seem to support the assumption of many critics of ADR methods that these methods favor the strong (in this case, employers) and harm the weak (here, employees). Critics argue that in confidential processes the weak party may unconsciously waive rights in the negotiation room in a manner that is not subject, even retrospectively, to public criticism (Fiss 1984).<sup>40</sup> The settlement conference, in which the mediator aspires to bring the case to a close, encourages pressure to be placed on the weaker party, who can more easily be persuaded to agree; less pressure is exerted on someone who shows knowledge and understanding of his or her rights and who will therefore be more reluctant to make significant concessions (Wissler 1997, 573; Landsman 2010, 295). Moreover, an employee, being the weaker party, is probably more sensitive to risk than the employer and may be ready to accept a settlement that is less

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37. In some cases, the employer can benefit from withholding payment to an employee. For example, if the sum claimed is high, investing that sum during the process may yield some benefit. However, in this article we focus on summary hearing cases in which the sums claimed are very small, so investment profits are irrelevant. Another possible benefit for employers might be a chilling effect on employees' willingness to sue. But while this may be useful in cases of vexatious or frivolous claims, doing this to employees with strong claims for small sums may cause unrest and resentment among employees.

38. True, an employer represented by an in-house lawyer, or a lawyer "on retainer," might not be concerned about the duration of legal processes in the short run. In this case, the incentive to settle is the lawyer's. Still, repeated refusals to settle may increase the employer's legal costs in the long run.

39. Beyond the specific context of this article, another consideration may arise: an employer may wish to evade unfavorable precedents on broad and recurring issues. Such precedents, however, are highly unlikely in summary hearings.

40. For a more optimistic view, see Menkel-Meadow (1984, 830–34).

than what he or she might expect to obtain in a trial.<sup>41</sup> Although the imbalance of power theory has been extensively discussed in academic literature, this study is the first to provide empirical evidence for its validity.

At this point two caveats are in order. First, although our findings are consistent with Fiss's (1984) theoretical proposition, there may be other explanations for the gap between case outcomes in settlement conferences and in court. For example, general differences may exist between settlement conference mediators and trial judges, making the latter more generous to plaintiffs. Alternatively, plaintiffs may, for various reasons, take trials more seriously, prepare better, and act differently, while defendants may try to manage their losses by spending less resources on trials. Lastly, pushing through ADR to get to trial may give the plaintiff a "credibility bump."

Second, the practical implications of our findings are uncertain. Full trials yield a greater ratio between the sum obtained and the sum claimed than settlement conferences. However, one cannot conclude that employees are generally better off going to trial. The plaintiff employee's cost-benefit analysis reflects not only the sum obtained from the process. The legal process carries numerous additional costs, such as legal fees, in cases where the plaintiff chooses to be represented, costs of preparing for and attending hearings, and the psychological tension incurred when they are underway. The settlement conference is faster and therefore less costly and wearisome. Moreover, through the settlement conference the parties can sometimes reach a type of "reconciliation," or a nonpecuniary arrangement (such as obtaining an apology), which may have an added value from the plaintiff's point of view. Employees may also wish to avoid publicized judgments that might affect the prospects and terms of their future employment.<sup>42</sup> So although our findings may give rise to concern that settlement conferences favor defendants at plaintiffs' expense, it might be imprudent to advise all plaintiffs to pursue a court judgment.

## VI. CONCLUSION

This study has yielded a number of important findings regarding settlement conferences, two of which we wish to emphasize. First, representation increases the probability of a successful conference, contrary to our first hypothesis. The probability of a settlement where only one party was represented was higher than where neither was represented and the probability of a successful settlement conference was highest where both parties were represented. It follows that the presence of lawyers promotes settlements. This finding may ensue from the special nature of the process being examined and is expected to recur

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41. Critics also contend that the fact that most ADR providers are high-status middle-aged white males may, in informal and unreviewable processes, lead to discrimination against women and minorities (Landsman 2010, 293). ADR providers may also be biased in favor of large corporations who may be repeat clients (Varma and Stallworth 2002, 394; Landsman 2010, 294). Both criticisms are irrelevant for the purposes of this study.

42. Some forms of ADR, such as facilitative mediation, also provide better opportunities than does litigation for victims to tell their stories (Menkel-Meadow 1995, 2688–89). This is an additional benefit that ought to be taken into account. However, because limited time and resources are allocated to small claims settlement conferences, they may be inferior to court hearings in this respect.

only in similar dispute resolution processes. The low sums claimed may induce lawyers to prefer a swift conclusion to the proceedings, as the marginal fee obtained from litigating the case is not likely to be particularly high. In addition, lawyers are better able to assess the risks and expected benefits of going to court and determine which settlements will improve their clients' position. Likewise, lawyers can reduce clients' mistakes and cognitive biases, thereby facilitating settlement.

Another important finding is that the ratio between the sum obtained by the plaintiff and the sum claimed in settlement conferences is smaller than in judge-facilitated settlements and smaller still than in full trials. This is so despite the absence of any significant difference between the sums claimed in cases concluded by settlement and those decided by the court. In other words, the more formal and transparent the process and the more it is based on judicial decision making, the greater the proportion of the claim won by the plaintiff employee. This finding supports one of the central criticisms of ADR, namely, that such methods are exploited by the stronger party to avoid fulfilling its obligations to the weaker party. To the best of our knowledge, our study provides the first empirical support for Fiss's (1984) imbalance of power argument.

One policy implication deriving from our findings is that if we want to increase the success rate of small claims settlement conferences, we might need to encourage representation. For example, if the parties were offered lawyers appointed on the spot, just as mediators are offered in some tribunals, more proceedings would end in settlements. In fact, these appointed lawyers would probably develop expertise in employment law and in settlement conferences and as a result would encourage settlements even more than other lawyers. Recall, however, that our study deals with small claims settlement conferences, so our findings have no direct bearing on other types of processes or on larger claims.

A more difficult question is whether such ADR processes should be encouraged. This study shows that the sum obtained by the plaintiff in a settlement conference is significantly smaller than the sum he or she may obtain at trial. This finding strengthens the main criticism of ADR methods, as explained above. Employees, who are usually the weak party in employment disputes, are accorded significant protection by the legislature, which has recognized many inalienable rights, and by the courts, which have made it easier for employees to pursue their claims in a simple procedure. Yet employees might lose this protection in settlement conferences. It may be cautiously stated, therefore, that the findings validate the concern that settlement conferences undermine employees' rights.

Still, one cannot conclude that plaintiffs are necessarily better served by full hearings. As explained above, the monetary benefit that we have identified may be offset by the costs and tension associated with litigation. Settlement conferences are less costly and wearisome and can at times facilitate deeper reconciliation. Our study should thus be supplemented by others examining the plaintiffs' relative satisfaction with the process following settlement conferences and full trials.

Our findings and conclusions may also help parties to an employment dispute when making a decision regarding representation. *Prima facie*, the employee is better off in the absence of representation. Plaintiffs who are unrepresented tend to settle less and go to court more and when they do they actually win a larger proportion of the claim. We have also seen that in successful settlement conferences, plaintiffs receive larger

proportions of the sums claimed if they are unrepresented, even though it may be argued that this finding ensues from the fact that the sums claimed where the plaintiffs are unrepresented are smaller. To this must be added the cost of representation, which is naturally borne only by the party who has chosen to be represented and that reduces even more the net value of representation from the plaintiff's standpoint (Eisenberg 1994, 280). However, even if the monetary outcome is more favorable to unrepresented plaintiffs, plaintiffs may nonetheless decide that representation is on the whole advantageous. On the other hand, the findings clearly show that for the defendant (the employer), representation is the best path as it increases the likelihood that the settlement conference will succeed and reduces the average sum that it will be required to pay.

Throughout this research, additional questions arose for which we did not find answers. First, do the probability of settlement and the settlement ratio depend on the background of the mediator, for example, on whether the mediator was a jurist or a lay judge (appointed by employers or employees)? The mediator's legal education is presumably of some importance, particularly in cases where at least one of the parties is unrepresented. However, the mediator's name was not indicated in most of the cases we surveyed, so this type of analysis was not possible.<sup>43</sup> Second, is there a difference in the probability of a settlement and the settlement ratio between plaintiffs represented by lawyers and plaintiffs represented by labor unions? The negligible number of cases in which the employee was represented by a labor union in the sample precluded such an analysis. Future studies will help answer these questions.

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43. A related question, to which our data do not provide an answer, is whether the outcomes of settlement conferences may have been affected by mediators' incentive structure. This might happen, for example, if labor courts collect data on settlement rates per mediator and reward mediators accordingly.

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