

Navigating Justice: How German Lawyers Steer Clients Between Trial and Alternative Dispute Resolution

Navigating Justice: How German Lawyers Steer Clients Between Trial and Alternative Dispute Resolution

An explorative empirical study about lawyers' procedural recommendations between trial and Alternative Dispute Resolution (ADR).

Beatrice Roesler

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Declaration

I declare that the work in this thesis was carried out in accordance with the regulations of the University of Gloucestershire and is original except where indicated by specific reference in the text. The thesis has not been submitted as part of any other academic award. The thesis has not been presented to any other educational institution in the United Kingdom or overseas. Any views expressed in the thesis are those of the author and in no way represent those of the University.

Signed: [REDACTED] Date: November 03, 2024

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The last six years have been a long journey, one that has taken me in and out of my comfort zone. As a seasoned collaborator with an economics background in the legal community, I thought I had a good understanding of what drives the daily business of legal practitioners. Being curious to learn to apply scientific research tools to find out how to underpin my assumptions with honestly gathered evidence, I felt honoured to be allowed to join a truly fantastic team of scientists at Gloucestershire's Business School. The first discovery that surprised me was how the different philosophical positions a researcher can take influence what can be done and how it can be done. Reflecting on my beliefs about existence and what is and should be, I took many readings to arrive at a critical realist's position. The second discovery that surprised me was that my sense of what drives legal practitioners' daily business and what theory suggests was, in critical aspects, wrong. It took me a while to come to terms with the evidence I had gathered. Yet now, I feel I can better stand my ground in discussions with the legal and ADR community because I can argue evidence-based, engage in balanced positions, and contribute to hopefully fruitful developments within the legal and ADR community.

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Abstract

This thesis investigates how German lawyers decide on advising clients regarding procedural options between trial and Alternative Dispute Resolution (ADR) methods. Despite legislative measures aimed at promoting ADR in Germany—such as the 2012 Mediation Law and the 2016 Consumer Dispute Resolution Act—adoption rates remain relatively low. Based on a critical realist perspective, this research introduces the ADR-No recommendation-Trial (ANT) Recommendation Model and outlines a lawyer’s procedural recommendation process in seven stages. The model facilitates the analysis of complex interactions between factors that influence lawyers’ procedural advice and clients’ decision-making processes.

Drawing on a comprehensive review of relevant literature and empirical data collected from semi-structured interviews with highly experienced German lawyers, the study examines how various influences—such as the density of laws' regulation, economic incentives, trust, and expert intuition—shape lawyers’ procedural recommendations. Findings reveal that, although ADR provides clear advantages in terms of cost efficiency and time savings, clients more often than lawyers prefer trial due to entrenched expectations and uncertainty about ADR outcomes.

This study makes a significant contribution to the existing body of knowledge on procedural justice and legal decision-making by addressing a gap in understanding the underlying drivers of procedural choices. It offers practical implications for policymakers seeking to increase ADR uptake, emphasising the need for reforms in the German legal education programme to develop and teach best practice diagnostics, communication skills, risk management tools, and the appropriate use of Artificial Intelligence applications. Ultimately, this research advocates for changes in Germany’s judicial system to promote digitalisation and modifications to the Procedural Code of Conduct (ZPO).

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Keywords

Alternative Dispute Resolution (ADR), Trial, Lawyer-client relationship, Lawyer decision-making, Client procedural preference, Trust in legal advice, Critical realism, (ADR-No recommendation-trial) ANT Recommendation Model, Legal intuition, Legal risk management, Legal Education, Procedural justice, German civil law, Mediation, ADR adoption

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Abbreviations

ADR	Alternative Dispute Resolution
ANT	ADR-No recommendation-Trial (model)
ArbSchutzG	Arbeitsschutzgesetz – Act on the Implementation of Measures on the Occupational Safety and Health to Encourage Improvements in the Safety and Health Protection of Workers at Work
BGB	Bürgerliches Gesetzbuch – German Civil Code
BORA	Berufsordnung für Rechtsanwälte – Professional Code for Lawyers
BRÄK	National Bar Association
BRAO	Bundesrechtsanwaltsordnung – Federal Code for Lawyers
DIS	Deutsche Institution für Schiedsgerichtsbarkeit e.V. – German Arbitration Institution
EU	European Union
GG	Grundgesetz – Basic Law for the Federal Republic of Germany
GVG	Gerichtsverfassungsgesetz – Courts Constitution Act
ICC	International Chamber of Commerce
InsO	Insolvenzordnung – Insolvency Code
JAS	Judge-Advisor-System (model)
L/C-PC	Lawyer/Client – Procedural Choice (model)
MedG	Mediationsgesetz – Mediation Act
MiLoG	Mindestlohnengesetz – Act on Regulating a General Minimum Wage
MuSchutzG	Mutterschutzgesetz – Maternity Protection Act
RVG	Rechtsanwaltsvergütungsgesetz – Act on the Remuneration of Lawyers
VSBG	Verbraucherstreitbeilegungsgesetz – Act on Alternative Dispute Resolution in Consumer Matters
ZPO	Zivilprozessordnung – Code of Civil Procedure

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1 Introduction

Basic Law for the Federal Republic of Germany

Article 20

[Constitutional principles – Right of resistance]

*(2) All state authority is derived from the people. The people shall exercise it through elections, other votes, and specific legislative, executive, and **judicial bodies**.*

Article 103

[Fair Trial]

(1) In court, every person shall be entitled to a hearing by the law.

1.1 About the justice system

Equal access to justice is a fundamental right in rule-of-law-based democracies (Art. 3 GG). To guarantee this right, governments must design an appropriate judicial system, be mindful of spending taxpayer money, and react to required changes in the judicial system on time. The German laws have changed profoundly because of EU legislation. Since 2011, EU member states have had to offer their citizens regulated “alternative dispute resolution” (ADR) options in addition to established trial procedures to provide equal access to justice matters (EU-Parliament, 2008). Despite various public and private promotional efforts to integrate interest-based, consensual dispute-resolution procedures into the German justice system, adopting these ADR procedures remains sluggish. Section 1.1.2 describes how the slow uptake has been investigated and what is missing.

The following section provides an overview of German ADR legislation, comparing ADR with trial procedures.

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1.1.1 Alternative dispute resolution (ADR) procedures vs trials

The EU promotes “alternative dispute resolution” (ADR) procedures as an alternative to traditional lawsuits. People or organisations can choose alternative dispute resolution procedures to settle a dispute instead of going directly to a trial procedure. The umbrella term ADR encompasses different conflict resolution procedures, such as mediation, arbitration, and negotiation, or combinations of the three. Facilitation is another term used to describe negotiations by a facilitator who organises the communication process. Laws and by-laws regulate mediation and Arbitration procedures. In addition, ADR associations agreed on rules for conducting the procedures. However, mixed forms are not firmly regulated.

§ 1 MedG - Mediation act - determines what mediation is according to German laws. It says, “Mediation is a confidential and structured procedure in which the parties voluntarily and on their own responsibility aim to amicably settle their conflict with the support of one or more mediators. A mediator is an independent neutral without decision-making power who leads the parties through the mediation process.” To start a mediation, parties agree to meet with a mutually selected impartial mediator who assists the parties in negotiating their differences. Since participation is voluntary, parties can end the mediation at any point. The content of the mediation is confidential. Mediators cannot be subpoenaed as witnesses.

Arbitration is a procedure in which the parties agree to submit their dispute to an arbitrator or a panel of arbitrators, who decide on the dispute. Arbitrators’ decisions are legally binding and enforceable in courts unless the parties stipulate that the arbitration process and decision are not binding. Arbitration is often used in commercial disputes and international commercial transactions (Bezant, 2022). Arbitration procedures are regulated country by country.

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In Germany, the two most frequently used arbitration centres are run by the International Chamber of Commerce (ICC), a worldwide non-profit membership association based in Paris, and the German arbitral institution (DIS), Deutsche Institution für Schiedsgerichtsbarkeit e.V., Bonn.

Two key differences exist between a trial at court and an ADR procedure. Firstly, a disputing party can be forced into a trial procedure, whereas participation in ADR procedures is voluntary. Secondly, the level of control that conflict parties have over the procedure and the outcome is different. The trial's conduct is tightly regulated regarding timelines, venues, and causes that can be prosecuted. In contrast, in ADR procedures, the control over timelines, venues, and the content of the case is in the hands of the dispute parties. ADR procedures can include broader issues that are not enforceable through litigation. More importantly, parties commonly control the outcome since no third party has decision power equal to a judge's discretion within a conventional trial unless parties opt for strict arbitration procedures. Strict arbitration procedures are an exception in terms of arbitrators' decision-making power.

Following EU regulation, Germany introduced a new mediation law (MedG) in 2012. Since then, mediation has become more widely known and accepted in society and the legal community. Four years later, in 2016, the German government introduced another special law about an alternative dispute resolution procedure for consumers based on arbitration. It is called Verbraucherstreitbeilegungsgesetz (VSBG) or the Consumer Dispute Resolution Act (08.10.2023). Germany has 28 formally registered arbitration boards (§ 24 VSBG). Arbitrators promote practical solutions, while judges guide parties less (Lohr, 2021, p. 114 ff.). Consumers can initiate the procedure online and free of charge.

Five years after the inception of the mediation law, Ziekow et al. (2017) conducted a survey within the mediation community on behalf of the federal Ministry of Justice to evaluate its effectiveness.

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One central finding of the study suggests that the number of mediation and other ADR procedures has been sustained at around 10.000 cases yearly since 2014. The ADR numbers are negligibly low compared to more than one million newly filed civil law cases yearly (Justiz, 2023).

It is generally accepted that ADR procedures are faster and less costly than trial procedures. It would save taxpayers money when dispute parties use ADR procedures instead of trial.

Yet, a report compiled by Ekert et al. (2023, p. 357) confirmed the findings by Ziekow et al. (2017) that the introduction of new ADR legislation in Germany in the form of the mediation law (MedG) and the Consumer Dispute Resolution Act (VSBG) didn't lead to a significant uptake of ADR procedures. The ADR community's expectations that conflict parties would be more inclined to use ADR procedures, namely mediation, once it was firmly regulated by laws, were severely disappointed. The following section looks at what is currently known about the reasons for the slow uptake of ADR procedures.

1.1.2 What are the reasons for the slow uptake of ADR procedures?

Firstly, there is a measuring problem. While there are reliable official statistics about the number of new lawsuits filed per year, there is no such reliable statistic about the total number of ADR procedures conducted annually in Germany. The first official count was determined in 2017 (Ziekow et al., 2017). Either the determined low number of ADR procedures underestimates the actual number because of flawed counting, or the number is that low due to yet-uncovered factors. Solving the problems around statistics remains to be resolved. However, that task is out of scope for this project.

Secondly, research suggests changing German conflict resolution behaviour and pronounced conflict avoidance. As the number of civil lawsuits filed each year is decreasing steadily, the Federal Ministry of Justice commissioned a group of scientists to investigate the phenomenon. The final report was published in April 2023 (Ekert et al.).

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The authors confirm that the court system registered about 1.8 million new lawsuits in 2005. By 2019, the number had decreased on average by 1/3 or more than 600.000. Local courts lost 36.1% of cases, and regional courts lost 20.6%. Local courts handle lawsuits with litigation values up to 5.000 € (No. 923, No.1 GVG), and regional courts handle all cases with higher litigation values. The report concludes that many influencing factors contribute to the drop in incoming lawsuits. The authors determine the main influencing factor as the “change in the business world and economic realities marked by acceleration and pronounced conflict avoidance and conflict resolution behaviour.” (Ekert et al., 2023, p. 341).

According to the report, the availability of ADR plays a minor role in the decline in civil litigation, although litigants are increasingly sensitive to protracted and unpredictable litigation. The research suggests that considering the prospects of success, time, costs, and the psychological burden influences the parties' choice of procedure.

Thirdly, although the government introduced laws to promote the uptake of ADR procedures, the ADR community continues to hold the legislature accountable for the slow development and not doing enough. The ADR community, for instance, lobbies for public funding of legal aid for parties who want to engage in ADR procedures, such as legal aid options for trial procedures. Another aim is establishing a federal ADR association, like a bar association for lawyers and tax consultants, to ensure quality standards. Firmly regulated access to become a certified professional, like the standards of lawyers and tax consultants, would signal professionalism to society. The ADR community believes these measures would increase customer affordability and market transparency, thus promoting market development. In the search for another explanation for why the development of ADR is so slow, the ADR community suspects that the lawyers might hinder the faster growth of the ADR market.

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The ADR community suspects that lawyers believe they are cannibalising their own business if they recommend that their clients use arbitration or mediation. Once an arbitrator or mediator appears, clients would double their litigation costs because they would have to pay for both services simultaneously. In this situation, lawyers might fear that they could end up losing the client to the competing ADR service providers.

People and organisations with significant disputes often seek legal advice from lawyers when figuring out how to proceed to realise their potential claims. The lawyer's role within the judicial system includes offering advice and access to justice for clients with legitimate demands. According to the federal code for lawyers, they are an independent body within the judiciary (§ 1 BRAO). They advise clients in all legal matters, design contracts, and represent clients in court procedures (§ 3 BRAO).

However, the educational system in Germany trains students to become judges and lawyers for adversarial trial procedures.

Lawyers' main task is to present facts, contest the facts presented by the opposing party, and traverse allegations from the opposing party in court. How to conduct ADR procedures or behave as a counsel for a client in an ADR procedure is currently only taught in elective coursework. Thus, the ADR community believes that lawyers tend to recommend that clients go for trial procedures.

As statistics show, lawyers are sought-after advisors. More than half of the people with a significant conflict seek advice from a lawyer they trust to win their case. About 44% of Germans with a significant civil law dispute contact a lawyer of their choice, and about 20% contact a lawyer through their legal expense insurance company (Ekert et al., 2023, p. 98). The principle that advisors influence decision-makers' choice is well established in the literature (e.g. Gino, 2005; Harvey & Fischer, 1997; Shestowsky, 2018).

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That German lawyers are such influential experts when they decide what is in the best interest of their clients - going to trial or using an ADR procedure to solve the conflict - is supported by findings from the report. Once a lawyer recommends going to trial, clients are six times more likely to follow suit than without such a recommendation (Ekert et al., 2023, p. 105). However, lawyers' recommendation behaviour as influential experts on clients' procedural choices between trial or ADR is under-investigated.

Implementing consensual dispute-resolution processes within the German justice system could be more active despite ongoing efforts to encourage it. Lawyers wield significant influence over their clients' procedural decisions. Yet, there is a lack of comprehensive understanding of the factors shaping lawyers' recommendations for trial or alternative dispute resolution (ADR) processes. This study aims to bridge this knowledge gap by delving into lawyers' decision-making processes.

The following section will detail this project's research aim, objectives, and contributions.

1.2 Research aim, methodology, and contribution

The congruence between aim, objective, methodology, and contribution will be demonstrated throughout the study. This section starts by stating the aim, objectives, and research questions. The methodological approach and the contributions are briefly described; chapter four will discuss the methodology and methods in detail, and chapter six will put the contributions into the context of current research.

The project aims to develop a new model of how lawyers arrive at procedural recommendations between trial and ADR proceedings.

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The stages of the decision-making process and influencing factors must be uncovered to develop such a model.

Therefore, the following research questions must be answered:

- a) How do lawyers come up with procedural recommendations between trial and ADR?
- b) What are the different stages lawyers go through when recommending trial or ADR to their clients?
- c) Which policies do lawyers follow when coming up with a recommendation?
- d) What are the fundamental drivers of the decision process?

The project aims to investigate lawyers' decision-making processes when advising their clients on trial or alternative dispute resolution (ADR) procedures from a critical realist perspective. This will be conducted within a dyad consulting scenario, where one lawyer counsels one client. Bringing together a critical realist approach with a lawyer's procedural decision-making represents a novel approach to legal research. While research on decision-making is commonly undertaken in controlled experimental settings from various post-positivist viewpoints, decision-making in the legal domain primarily involves theoretical work using an interpretive approach.

This project adopts a two-stage approach. The initial stage involves theoretical work, interpreting literature from four research fields regarding lawyers' decision-making. The subsequent stage entails empirical work, conducting a field study on lawyers' practices to refine the theoretically derived interpretations. A new dataset was developed through semi-structured interviews with highly experienced German lawyers. The interview questions' design and data analysis followed a critical realist's stratified ontological approach, representing a fresh method to explore the multidimensional field of legal decision-making. In essence, critical realists contemplate what can be understood about lawyers' recommendation practices across three dimensions: observable behaviour, the policies that lawyers adhere to, and the underlying drivers of the recommendation process.

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The interview questions were structured to collect data across all three dimensions, and the analysis was organised accordingly. Chapter four provides a detailed description of the methodological approach.

To fulfil the aim, the research meets the following objectives:

1. To theoretically derive a model of a lawyer's decision process on procedural choices between trial and ADR from current findings in the literature.
2. To create and analyse a new body of data to be collected from highly experienced German lawyers to refine the theoretically derived model.
3. To derive theoretical and practical implications from the refined model to make further research and practice recommendations.

The researcher's contribution is a procedural model that distils the best practices of how experienced German lawyers counsel clients on procedural choices. Firstly, a seven-stage model describes lawyers' different stages when making procedural recommendations to their clients. The consulting process model applies in principle to other advisory settings as well, thus supporting its external validity. Applying the systematic ontological approach of critical realism revealed that the data do not support the researcher's suspicion that lawyers would follow a policy of maximising their revenue. Secondly, the schematic **ANT (ADR-No Recommendation-Trial)-Recommendation Model** depicts the drivers of the decision process in an IPO model (input-process-output model). Linking back to findings from procedural preference research and findings about expert intuition grounds the ANT-Recommendation model in the literature. Thirdly, the main implication is that a lawyer's decision process is more intricate than the theory suggests. These findings have significant practical consequences for the legal profession. Chapter seven details the conclusions of this project.

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1.3 Structure of this thesis

Following the objectives in section 1.2, the thesis is organised into six main chapters.

Chapter two encompasses a comprehensive literature review of four main research fields about decision-making. The review investigates what is known about how lawyers decide what is in the best interest of their clients: to solve a conflict through trial or ADR procedures. Subsection 2.1 reviews and discusses current research findings on decision-making in hierarchical teams. In particular, the Judge-Advisor-System (JAS) model developed by Sniezek and Buckley (1995), which serves as the theoretical basis for this study, is discussed. The JAS model represents a decision-maker -called a judge- who had been advised by a third party -called an advisor- before deciding on a given problem. This study involves a decision problem in a setting with a legal expert advising a client. In terms of the Judge-Advisor-System, the lawyer is the advisor and the client the “judge”. This terminology is a bit confusing in a legal context. The client, as a “judge”, is not to be confused with a judge in a court setting. The term “judge” in this model only indicates that this person is the ultimate decision-maker.

Considering the findings in general advisor settings, the following section narrows the focus to the legal field. Subsection 2.2 reviews and discusses contemporary research findings about procedural preference research in the legal field. By narrowing the review to studies in the legal field, this section focuses specifically on the choice between trial and ADR recommendations as procedural choices. It is noteworthy that almost all studies investigate the choice behaviour of clients. Literature pays only a little attention to the decision behaviour of lawyers. Since lawyers usually acquire a broad and deep knowledge of the formal and informal inner workings of the justice system over time, they develop a pool of information that is intuitively accessible. This leads to the next section of literature that is relevant for this study.

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Subsection 2.3 reviews and discusses current findings about intuitive decision-making in general and expert intuition research specifically as a potentially influencing factor on procedural choices. Recurring themes in intuitive decision-making, as well as in procedural preference research, are trust and confidence. These topics guide the inquiry into the following sections of literature to be reviewed.

Subsection 2.4 reviews and discusses findings about trust concepts and how these models relate to concepts of cooperation, confidence, and predictability. The discussion concentrates on how these concepts relate to other potentially influencing factors on procedural choices. The last subsection, 2.5, summarises the discussion and leads to the posed research questions.

Following the literature review, Chapter Three integrates the findings from Chapter Two. Integration leads to a preliminary model of how lawyers develop procedural recommendations. The theoretically derived model is called the “Lawyer-Client Procedural Choice (L/C-PC) model”. It emphasises the interaction between lawyer and client and assumes that trust is a central influencing factor of procedural choices. Chapter three describes in detail, in two subsections, how the first objective, as stated in section 1.2, has been achieved. Subsection 3.1 describes how the model of a lawyer’s decision process on procedural choices between trial and ADR has been theoretically developed. Subsection 3.2 explains the processes and parts of the model. A detailed description is important for comprehending and retracing the initial coding structure, which is laid out in chapter four, section 4.4.3.

Moving forward, the methodology and methods chapter four includes two subsections. Subsection 4.1 elucidates critical realism as the philosophical grounding of this research. Critical realists’ idea to organise the world into three ontological dimensions – the empirical, the actual, and the real - of what can be known has subsequently driven the analytical process. This order of analysis is reflected in the results of Chapter Five.

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The sequence of presenting the results begins in Section 5.2.1, with the empirical dimension, which depicts the structure of a lawyer's seven-stage decision process. Section 5.2.2 presents the actual dimension through four central policies lawyers follow.

Section 5.5.3 describes the real dimension as the underlying drivers of the decision process, embedded in a schematic new **ANT (ADR-no recommendation-Trial) Recommendation Model**. However, the discussion in chapter six will take a different perspective. It discusses how the real decision process might drive policies lawyers follow and how adhering to policies might shape the observable structure of the decision process. Section 4.2 details how the critical realists' approach shapes the design of the research strategy. It elaborates on the theoretical foundation of sampling and practical considerations for subject selection. It further illustrates how data saturation has been reached using semi-structured interview protocols to collect data. It further describes the analytical plan with the development of a specific spreadsheet/NVivo approach to conducting thematic analysis. Transcriptions and coding processes are laid out in detail.

Subsequently, the result chapter five presents the findings in three subsections as indicated in the methodology chapter four. Subsection 5.1 summarises the findings in numerical terms. Subsection 5.2 presents the findings according to the analytical process. Section 5.3 summarises the results.

The discussion in Chapter Six puts the results into the context of the current literature discussion. It briefly introduces how and why the debate is structured this way and includes four sub-sections. Subsection 6.1 investigates the implications of the new ANT Recommendation model in theoretical and practical terms. Subsection 6.2 discusses the impact of the four central policies lawyers follow. Subsection 6.3 showcases how current literature has been challenged by the empirical findings in the form of a synopsis between the theoretically derived L/C-PC model and the ANT Recommendation model.

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The last subsection, 6.4, summarises the discussion in the form of three claims, highlighting where these claims will lead the field.

The final chapter seven comprises three subsections. Subsection 7.1 demonstrates how the aim and objectives of this study have been fulfilled and how the research questions have been answered. The contribution to theory and practice is showcased based on the degree of fulfilment.

It shows specifically how the new ANT Recommendation model starts to fill a gap in the literature about lawyers' procedural decision-making. Subsection 7.2 suggests recommendations on how the judicial system and lawyers' educational programs should incorporate this study's findings into their development. Subsection 7.3 acknowledges the limitations of this study and the need for further research.

While this study has been conducted rigorously and honestly, adhering to international standards in qualitative research, particularly those of the University of Gloucestershire's academic research requirements, some constraints have been encountered during the research process, namely constraints related to bilingual research and limitations in terms of scope and funding for this project. However, the study's overall comprehensiveness, breadth, and depth provide robust implications stemming from the analysis of lawyers' decision processes on procedural recommendations. The limitations in terms of scope point to areas that need further investigation. One suggestion for the field of procedural preference research is to test the ANT Recommendation model in a quantitative approach. Another suggestion is to investigate the expert intuition of lawyers and its application to develop the research field.

This study contributes to existing theory by beginning to fill a gap in the literature with a model of procedural decision-making by highly experienced German lawyers. The results provide further insight into decision-making factors and their impact on legal practice.

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As far as the researcher knows, there is no research to date in civil law jurisdictions that deals with lawyers' decision-making on procedural choices and their recommendation process. Identifying fundamental drivers will lead to a better-informed discussion in the ADR community about ways to promote the acceptance of ADR procedures.

It is, therefore, expected that this study will contribute to the research literature and the development of legal practice.

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2 Literature review

This project is about how lawyers decide what is in the best interests of their clients, resolving a dispute through a trial or an alternative dispute resolution (ADR) procedure. The review synthesises theoretical elements from four research areas in conjunction with a lawyer's procedural decision-making. Firstly, drawing on Decision Theory in organisational research, because hierarchical teams are common there. Secondly, narrowing the view on juridical settings, investigating research on procedural preferences in the legal field. Since intuitive decision-making and trust are recurring themes in the first two research areas, the third and fourth subsections of this chapter will investigate how to define these two fuzzy terms for this project. This study examines the one-to-one interactive counselling between a lawyer and a client. Figures 1 to 5 and Figure 6 show the developmental stages of a new Lawyer/Client – Procedural choice model.

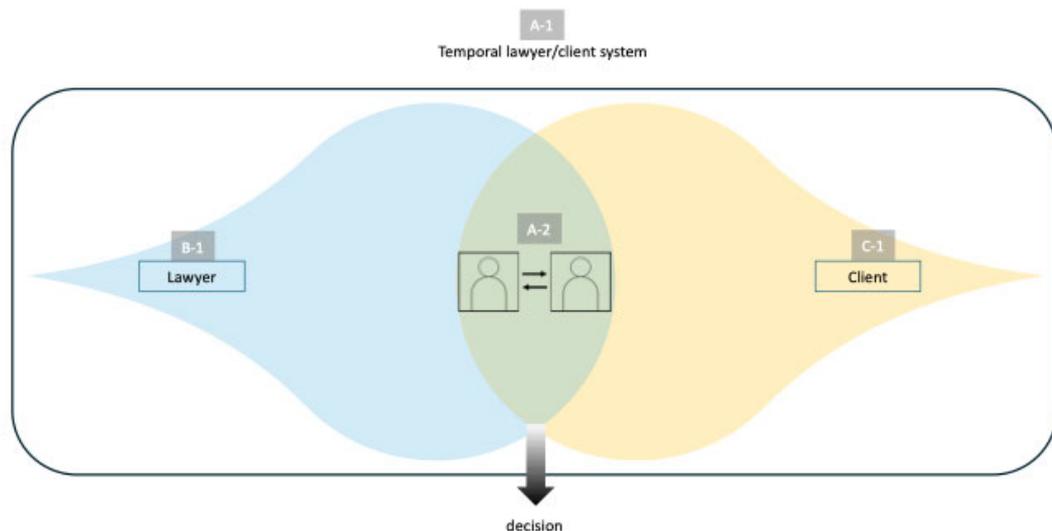


Figure 1:
Lawyer/Client Procedural Choice Model: Development stage 1

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A thorough internet search was conducted to find relevant papers. Search terms included, for example, attorney decision-making, attorney advice, attorney ADR, attorney mediation, attorney-client confidence, and attorney-client counselling. Among others, the following databases were searched: GLOS and LUH libraries, the British Library and various research portals such as Research Gate, Beck (2024), and Kunze (2024).

In addition, the legal commentaries of the BRAO (§§ 1, 3, 43), BORA, ZPO (for example, § 253 para. 3 no. 1), and the relevant case law on legal advice were searched. The keyword search was expanded because the original search did not provide sufficient results. Relevant articles were selected according to the number of citations and the rating of the journals in which the article was published. The reading order was documented in an Excel spreadsheet. To ensure that all relevant articles were included, the researcher approached contacts in the research community of ADR specialists several times at conferences and colloquia to find out about new findings on the topic of this project. The papers were analysed with a focus on the following aspects: information about the lawyer's decision-making behaviour, the lawyer's interaction with clients, and influencing factors stemming from the context of the laws/regulations/other necessities. The process was documented in mind maps and memos. Qualitative content analysis tools were used to analyse the contributions. The articles were categorised according to context and study methods. The results are aggregated according to the following categories:

- Context: Civil law or Case law
- Field study or laboratory experiment
- Cross-section or longitudinal section
- Qualitative or quantitative
- Theoretical or empirical
- information on the decision-making process of counsellors: yes or no

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Each subchapter - 2.1 Decision Theory in Hierarchical Teams, 2.2 Procedural Preference Research, 2.3 Intuitive Decision-making, and 2.4 Trust Research - ends with transferring the results to the situation between lawyer and client. The entire literature review is summarised in Section 2.5.

2.1 Decision-making in hierarchical teams: the Judge-Advisor-System

To answer the research question about the stages lawyers go through when coming up with procedural recommendations between trial and ADR, current knowledge must be investigated. Since this study aims to develop a model for a decision problem within a hierarchical setting, the literature review starts by analysing current models used in organisational research, as hierarchical structures are common in this field.

Decision-making is a complex and vital skill. Much literature on various theories and models deals with team and individual decision-making. In the literature on decision-making, the terms "decision" and "judgment" are used interchangeably, depending on the author's preference. However, Kahneman and Tversky distinguish between judgment and decision as two successive phases of a decision-making process. This paper defines a decision as a choice from a set of options. Neoclassical microeconomic theory, developed in the early 1900s, assumed a fully informed, rational decision-maker with consistent preferences who optimises outcomes by maximising utility. However, in the 1970s, behavioural economists began to develop models that considered psychological and emotional forces and emphasised the importance of heuristics and biases (Kahneman & Tversky, 1979; Leonard, 2008; Simon, 1959; Thaler & Sunstein, 2009).

Heuristics are mental shortcuts. The four most common types are affect, anchoring, availability, and representativeness- heuristics.

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As an example of an affect heuristic, imagine a lawyer getting a new case and making an impulsive decision to go to trial even though the lawyer doesn't know the details of the case. This person relies on emotions and feelings at that moment because there is a lack of time or information to reflect more deeply and come to an informed judgment. The anchoring heuristic occurs, for example, when the initial price offered for a product sets the standard for the rest of the negotiations. The availability heuristic can be observed when people fear going to trial due to a wrongful conviction. Compared to the availability heuristic, memories in the representation heuristic have more to do with stereotypes. For example, if someone is wearing a suit and tie and carrying a briefcase, it is probably a lawyer because the person looks like a stereotype of a lawyer. A bias is a tendency to view something with a preconception. Biases are systematic errors that cause the results of measurements to deviate from a true value in the same direction. Heuristics can cause systematic biases in people's judgments.

Framing is another effect that has been described in detail in the literature. The effect is that people show inconsistent preferences depending on how the same option is presented or framed. Thaler and Sunstein (2009) described the application of this effect in their highly acclaimed book "Nudge." Framing has been defined in different ways depending on the area of application. A common understanding is that framing is an active process in which the communicator selectively emphasises information and positions and neglects others. The framing elements include problem definition, attribution of cause and effect, proposed solutions, and an explicit evaluation of the option presented. Relating these findings to a lawyer's recommendations process suggests that lawyers and clients process informational artefacts and cues in a combination of deliberate and intuitive activities, balancing the contradiction between conscious and pre-conscious judgments.

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Figure 2 illustrates how the range of deliberate and intuitive decision-making is incorporated into the new model.

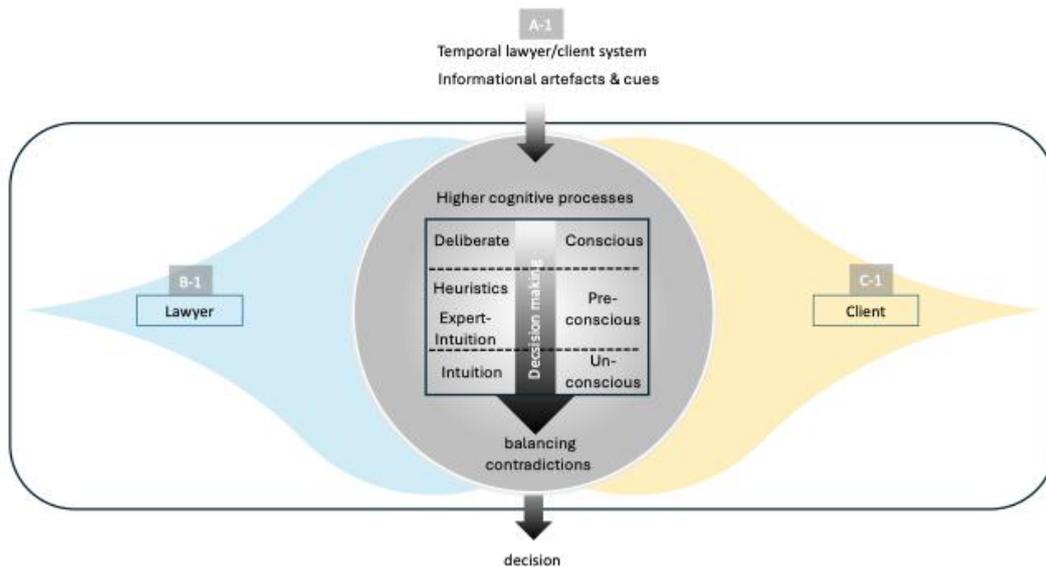


Figure 2:
Lawyer/Client Procedural Choice Model: Development stage II

As decision-making is an essential day-to-day process for individuals and organisations, it has been defined differently depending on the context. For example, Mintzberg et al. (1976) described the decision-making process as "a series of actions and dynamic factors that begin with the identification of a stimulus for action and end with a specific commitment to action." Mintzberg explicitly includes acting on the decision taken right into the concept of "decision," arguing that the concept of decision must be opened to the ambiguities surrounding the relationship between commitment and action.

In contrast, the intention-action gap has been an essential theme in management research for several decades. Simon (1987) discovered that managers tend to postpone difficult decisions. A decision is deemed difficult when a dilemma occurs in which a decision-maker must choose between options with a negative outcome, so to speak, a choice between the lesser of two evils. Simon cites uncertainty about future environmental factors as a source of "difficulty" as well as stress and time pressure to "divert the behaviour from the urgings or reason."

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Health-related research on the discrepancy between intention and action found that planning, self-efficacy, and action control serve to overcome the gap (Lufityano et al., 2016). For this project, implementing the decision involves conveying the recommendation to the client. This is part of lawyers' decision-making process because clients expect to get a recommendation, and lawyers feel obliged to fulfil this expectation. Such a broad definition of "decision" for this project begins with a client contacting a lawyer. According to Mintzberg, this contact can be interpreted as such an incentive. At the same time, the selection from a range of options (litigation, mediation, other ADR procedures) would represent the intention to act. Therefore, the L/C-PC model excludes the description of the "intention-action-gap", as indicated below by the red marker in Figure 3.

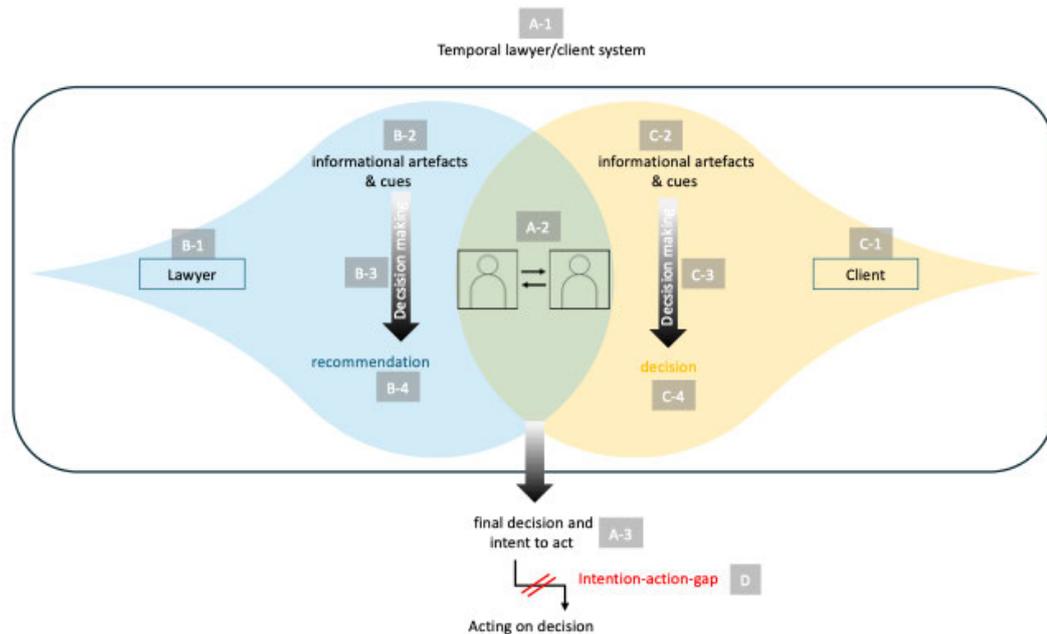


Figure 3:
Lawyer/Client Procedural Choice Model: Development stage III

Dynamic factors in the decision-making process are likely to include, for example, time pressure, costs, social relationships between lawyers and clients, the development of the facts of the case, and the changing behaviour of the other party.

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This definition encompasses the entire interaction between lawyer and client from the first contact to the point at which the lawyer decides what procedure to recommend. The interaction between lawyer and client involves two decision-making processes: the process a lawyer goes through before recommending a particular procedure and the client's decision to follow or reject the lawyer's recommendation. These two decision processes are depicted in the model using a magnifying lens (A-2), as shown in Figure 4.

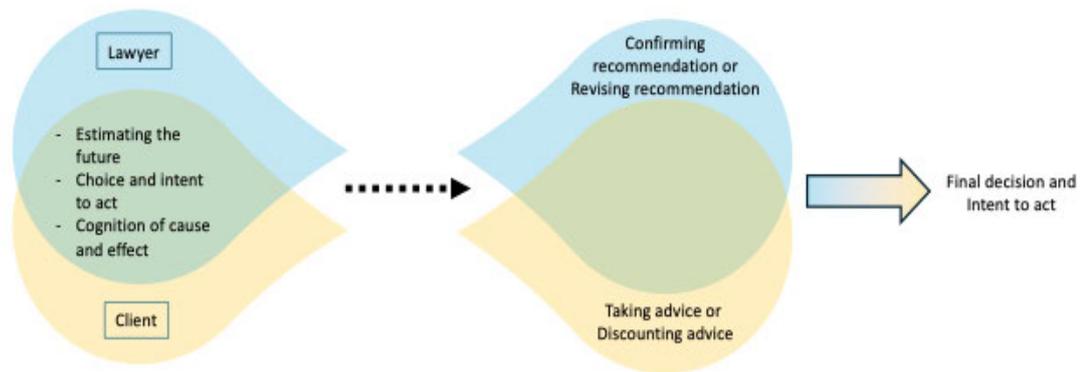


Figure 4:
Lawyer/Client Procedural Choice Model: Development stage IV

Organisational research offers several starting points for finding a suitable theoretical basis for such an environment. In organisations, decisions are usually made in groups, as a social process in which the outcomes are distributed among several group members (Sniezek & Henry, 1990). The hierarchical decision-making team (HDT) paradigm has been developed in the decision-making literature to explain how teams with one decision-maker and several advisors make decisions. The team members are all equally affected by the outcome and communicate with each other in real-time. They receive accurate, performance-based feedback on a quantitative judgment task over several trials before making a decision. The HDT paradigm is often used in organisational research.

When making important life decisions, people often seek advice from trusted people.

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Part of the value of advice is based on the implicit assumption that the counsellors would do what they recommend if they were in the same situation themselves. The judge-advisor system (JAS) is a special paradigm in the field of general hierarchical decision-making in teams. It was originally developed by Sniezek and Buckley (1995) researching organisational behaviour. The JAS model represents a decision-maker (called a judge) who has been advised by a third party (called an advisor) before deciding on a particular problem. It deals specifically with situations where only one formal decision-maker and one or more advisors contribute to the decision. The lawyer-client relationship is, therefore, a typical counselling situation targeted by the JAS concept. The model has already been used as a theoretical basis in research on clients' procedural decision-making behaviour (Gino, 2005; Jonas & Frey, 2003; Shestowsky, 2004, 2018; Shestowsky & Brett, 2008). As the term "judge" has a specific meaning in the legal context, it will be replaced by the term "client" in the following to avoid misunderstandings by adapting the JAS model to the legal context.

The 1995 study by Sniezek and Buckley was designed as an experiment in a laboratory environment. The researchers investigated the judge's decision-making process and how the advisor's confidence and conflicting advice influenced the judge's decision. They randomly assigned roles to one judge and two advisors in a team of three business students. They then gave cues to the team advisors, asked them to make a recommendation, and asked the advisors to indicate how confident they were in their judgment. The decision-maker (judge) received the recommendations and, in some cases, the confidence ratings before making their final decision. Key findings included that decision accuracy was best for independent judges, for example, judges who made their own decision before receiving a recommendation, while it was worst for dependent judges with no basis for an independent decision. Another finding showed no significant difference in the performance of judges who received their counsellors' confidence ratings and those who did not. In cases where the advisors agreed on a recommendation, the judges showed a strong tendency to follow this recommendation.

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However, in cases where the advisors disagreed, judges mostly followed the recommendation of the more confident advisor, although the level of confidence of the advisor did not show a strong correlation with the accuracy of the decision. The authors concluded that trust judgment influences hierarchical sensitivity but does not necessarily increase the accuracy of the decision. For clarity reasons, from now on, the person who receives the advice is called a client.

Two interrelated central themes emerged from these initial findings: clients' behaviour in weighing advice and their egocentric advice discounting. As described, the judge-advisor system serves as the theoretical basis for this project. The next section discusses the literature on the first related topic: clients' egocentric discounting of advice.

2.1.1 Weighing of advice and egocentric advice discounting

Yaniv (1997), building on the work of Sniezek and Buckley, attempted to clarify the process by which clients weigh the various recommendations of counsellors. The researchers used an experimental approach in a laboratory setting and conducted four studies. They compared the participants' results with the results of a normative study based on a computer simulation. For example, participants were asked to answer questions such as: "How many restaurants are there in the largest city? Person C says: 50-100, Person D says: 15-35. What is your best estimate? What is your range? He found that clients use two different heuristics to aggregate counsellors' recommendations: Weighing and Trimming. Weighing means that each recommendation is considered before averaging all recommendations, and trimming means extreme weighing, where no weight is given to a recommendation, for example, the advice is completely ignored. Yaniv's results show that aggregating different judgments generally increases decision accuracy. One of the study's key findings was that clients used trimming to eliminate inconsistencies in the data by ignoring outlier data. In situations without outliers, weighing and trimming led to comparable results.

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The author concluded that clients in hierarchical teams use more than simple averaging methods to decide.

They use a combination of weighing and trimming to reach a final decision. Yaniv notes that the weighing process is more complicated than a simple one-step process of cognitively assigning weights.

However, other research suggests that clients consciously calculate the weighting of advice before deciding on which advice to follow. For example, Wang and Ruhe (2007) developed a mathematical model based on a 37-basic-cognitive-processes modelled in a layered reference model of the brain. They argue that decision-making is one of the basic cognitive processes of human behaviour, in which a preferred option or course of action is selected from a set of alternatives based on certain criteria. Although literature takes different positions in terms of heuristic or conscious decision-making, both positions agree that aggregation involves weighing and trimming.

This project assumes that most clients are only advised by one lawyer. Nevertheless, the clients get assessments from their colleagues and their social environment, so that the aggregation results are relevant to clients' procedural decisions. This means that the perceived quality of advice plays a role. Harvey and Fischer (1997) investigated why some counsellors' recommendations were given more weight than others. The researchers used an experimental laboratory environment. They trained the participants with a task that ranged from a low to a medium to a high level. The judgments of the tasks varied in importance. They found that clients did not reject recommendations from counsellors who had less information, less training, or less expertise on the subject in question than the client himself. They concluded that people seem reluctant to completely reject the help offered to them. All clients accepted more advice from experienced counsellors, and the amount of advice accepted was related to the different levels of experience. They concluded that people try to use advice to improve their judgments. Finally, they found that experienced clients accepted about twice as much advice in the most important judgments.

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The authors concluded that people try to shift or spread responsibility when the risk associated with an error is high. The lower the client's self-confidence, the higher the probability that responsibility will be distributed.

While the findings of Yaniv, Harvey, and Fischer primarily show how and why decision-makers accept advice, the fact that people reject advice has also been extensively investigated. Several other researchers have come to the opposite conclusion, noting that clients tend to overvalue their own opinions compared to those of their counsellors (Gardner & Berry, 1995; Yaniv & Kleinberger, 2000). A robust result of this research is the effect of "egocentric discounting of advice". Yaniv and Kleinberger (2000) and Soll and Klayman (2004) have found different explanations for why clients can outweigh their own opinions and disregard advice. Both used experimental settings with university students in their studies. Yaniv and Kleinberger conducted four consecutive studies in an experimental laboratory environment. As participants, students had to answer questions that were posed to them on the computer. The answers had real consequences for them, as they received a bonus if they answered the questions correctly. In the first three studies, the advice was given free of charge, while in the last study, participants had to pay for the counsellors' assessments. Researchers found that the discounting of advice was related to differences in access to information. Yaniv and Kleinberger's explanation for the results is, on the one hand, that discounting of advice occurs because clients have access to their entire internal knowledge base and their specific rationale and justification for a decision.

In contrast, the advisor's recommendation is a mere summary of the client's entire internal knowledge base. In other words, clients are aware of their cumulative knowledge base but can never access counsellors' entire knowledge base and their rationale for a recommendation. The authors conclude that this leads to a "self-inflating opinion bias" on the client's part. On the other hand, Soll and Klayman found a correlation between overweighting and subjective intervals.

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The researchers asked participants in an experimental laboratory setting to provide higher or lower estimates of how certain they were that their answer to a question, such as "In what year did the first flight of a balloon take place?", fell within a correct interval of their choice. Participants could first answer the question by specifying a range of years. They then had to indicate how certain they were that the correct answer fell within the interval. In a second round, participants could choose the correct answer between two options. The results showed that participants were overconfident in the first round.

In contrast, participants were significantly more confident when choosing between two options. The authors attributed the leading cause of the occurrence of overconfidence to the participants' behaviour of systematically setting the subjective intervals 40% too narrow to be well calibrated, given the accuracy of the participant information. While Yaniv and Kleinberger argued that clients have a "self-inflating opinion bias" because they do not have full access to counsel's rationale for their recommendation, Soll and Klayman suggest that the leading cause of overconfidence is that clients systematically choose intervals that are about 40% too narrow to be well calibrated, given the accuracy of their information. Both access to large amounts of information and incomplete information about reasoning indicate that part of the decision problem is intuitively driven and not exclusively based on rational thinking.

Since discounting advice is a known outcome, there could be a counterbalance in the form of feedback that a decision-maker receives from their advisor during the collaboration. Consultants build a reputation through past failures and successes. As social psychological research on impression formation suggests, reputation formation is related to a negativity bias and the principle of trust asymmetry (Fiske, 1980; Skowronski & Carlston, 1989; Slovic, 1993).

For example, Poortinga and Pidgeon (2004) analysed the principle of asymmetry, whereby trust is more easily destroyed than created, concerning the role of decision-makers' prior beliefs.

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They used a questionnaire survey of the British public about genetically modified (GM) foods. The results showed that negative events had a greater impact on trust than positive events. This confirmed the principle of trust asymmetry. The results also showed that the participants were rather negative towards genetically modified foods. The researchers argued that the participants could have a negativity bias. This bias describes the fact that negative information is more informative for a decision-maker than positive information. Or it is a confirmatory bias that reflects the influence of the participants' previous attitude towards a topic.

The authors concluded that participants with clearly positive or negative attitudes exhibit confirmation bias, while participants with intermediate attitudes exhibit negativity bias. Their finding that negative information can still be more informative than positive information for undecided decision-makers is consistent with previous research.

Yaniv and Kleinberger (2000) used “reputation building for consultants” as a second theoretical concept to explain the results of their study. The authors described reputation as what a decision-maker learns about a consultant through the experience of consulting accuracy. Yaniv and Kleinberger characterise that most decision-makers follow the simple averaging of advice as a rule. A key finding of Yaniv and Kleinberger was that a good reputation is easier to lose than to gain. That risk aversion can contribute to asymmetry in reputation formation when average and bad advisors are treated almost equally. Still, good advisors are differentiated so that an average advisor can be perceived as harmful rather than helpful.

Krueger (2003) concludes that “clients favour their own opinion because they believe it is superior to the opinion of others, including counsel”.

Krueger found that clients tend to have an egocentric bias when making decisions in novel situations or receiving advice before the decision-making task. In a novel situation, clients cannot rely on their own evidence or experience.

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Clement and Krueger (2000) argue that clients do not create “anchors” as reference points in cases where they receive advice before they can make an initial decision on the task. Harvey and Harris (Harvey et al., 2000) argue that the difference between anchoring and egocentric bias is that anchoring produces a short-term, transient bias, whereas egocentric bias, or conservatism as they call it, “refers to the long-term influence of one’s opinion. This opinion exerts an influence without being disrupted by the emergence of intervening values that would displace anchoring from working memory.

Egocentrism/conservatism is a phenomenon well described in the literature. Exceptions are characterised by Gino (2005) and Schotter (2003). In detail, Jungermann and Fischer (2005) found that the advice of experts is more influential than the advice of novices. This result is unsurprising and is in line with Harvey and Fischer (1997) and Snizek et al. (2004), who found that clients with less knowledge or experience show less egocentric discounting compared to their advisors. Along the same lines, Feng and MacGeorge (2006) argue that clients are more receptive to advice from older, wiser, and better-educated people than themselves. Clients are also more receptive to advice when the decision problem is complex (Gino & Moore, 2007) and when seeking advice is costly (Gino, 2005).

As the work discussed in this section shows, decision-makers tend to overestimate the accuracy of their judgments. The literature also solidly finds that overconfident decision-makers tend to ignore advice. A common denominator of the findings discussed in this section is that they all take the decision-maker's perspective and do not examine the advisor's behaviour. However, they do describe what an influential counsellor looks like. These are well-trained and highly experienced counsellors with a good reputation who provide valuable advice on complex decision-making problems.

Research shows that a consultant's reputation is linked to how much trust a decision-maker has in the consultant's recommendation.

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Trust in the advisor's recommendations is closely related to how confident the advisor appears. The following section discusses the relevant findings on decision-makers using a confidence heuristic.

2.1.2 The confidence heuristic

In addition to the topics of weighing up and discounting advice, research has focused on trust in a decision expressed by either the client or the counsellor. The level of confidence expressed or inferred by the counsellor about a decision is an essential source of information. The idea is that clients rely on a "confidence heuristic" when using the adviser's confidence level to infer the adviser's ability, expertise, or task-related knowledge or accuracy in decision-making.

Price and Stone (2004) argue, for example, that clients rely on the "confidence heuristic" when using the counsellor's confidence rating to make the final decision. Price and Stone hypothesised that people prefer counsellors who make extremely confident judgments. In one experiment, they asked college students to evaluate two fictitious financial advisors who were asked to assess the likelihood that a series of different stocks would rise or fall in value. One was a well-calibrated moderate adviser, the other an overconfident extreme adviser. One of the findings was that the counsellor's confidence ratings influenced the client's perception of the counsellor's knowledge and the number of correct judgments. The perceptions are related to the client's preferences. The authors found that the need for cognition and right-wing authoritarianism were positively related to the preference for extreme counsellors. When Price and Stone suggest that decision-makers use a confidence heuristic as a mental shortcut, they assume that clients are not acting entirely rationally. That clients do not act entirely rationally is consistent with Harvey and Fischer's (1997) findings.

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As mentioned in the previous section, the researchers concluded in their study not only that people are not willing to altogether reject offered help but also that clients try to shift responsibility by accepting a counsellor's recommendation when they must make critical decisions. These results could be interpreted more as an emotional drive, pointing to intuitive parts of the decision-making process.

Although clients rely on counsellors' confidence assessments, the correlation between counsellors' confidence levels and accuracy varies considerably across studies, depending on several variables, such as the pairing of experienced counsellors and inexperienced clients (Van Swol & Sniezek, 2005). The authors found five factors that influence the use of advice and trust: 1. the client's general trust in the advisor, 2. the advisor's trustworthiness, 3. the accuracy of the advisor's advice, 4. the client's prior relationship with the advisor, and 5. the client's authority to determine the advisor's payment. An interesting aspect here is the prior relationship between the judge and counsellor in the context of trust. Building trust requires time, interaction, and feedback, which can be provided through appropriate communication. Research shows that the advisor's judgment that their answer to a question is correct is an important influencing factor for the decision-maker. Trusting the advisor's judgment goes hand in hand with shifting or at least sharing responsibility for the decision in a way that is not entirely rational.

As further research shows, trust in the advisor's judgment grows over time. Consultants can build a trusting relationship with clients by giving them more access to their internal deliberations through feedback and appropriate communication.

The above research findings show that much attention has been paid to client behaviour in the literature. However, in a counselling context, counsellors must decide what they want to recommend. Therefore, the next section of the literature review focuses on what is known about the counsellor's perspective.

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2.1.3 The advisors' perspective

The literature on decision-making behaviour from the perspective of advisors is very thin compared to research on the decision-making behaviour of clients. However, interesting findings exist on advisors' role awareness and information-seeking behaviour.

As a rule, clients must pay for advice from a lawyer. Gino (2005) investigated the effect of paid versus free advice from the client's perspective and as an influencing factor for rejecting advice. Gino also used the JAS model as the theoretical basis for her research design. The author conducted three experimental laboratory studies and found that participants were significantly more receptive to advice when they paid for counselling than when they received free counselling. The author links the phenomenon to the same forces that explain the sunk cost fallacy. The sunk cost fallacy describes the tendency of people who have invested time, money, and other efforts in a project to continue investing even when the costs already incurred exceed the expected benefits. The sunk cost fallacy is well documented in the literature.

However, these experiments did not investigate the impact of paid counselling compared to free counselling from the counsellor's perspective. One of the few studies to focus on the counsellor's perspective, Jonas and Frey (2003) analysed the difference between how an advisor searches for information and how they present it to the client. The researchers used an experimental design. They asked students at a Munich university to imagine a situation in a travel agency. Half of the students were put in the role of the counsellor, and the other half were placed in the role of a customer who wanted to book a trip. The authors found that the advisors would come to a different solution if the decision had to be made for themselves or for someone they were advising.

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They discovered that advisors making a personal decision appeared to search for information that confirmed their previous decision (for example, showed confirmation bias), whereas in their role as an advisor, they conducted a more balanced search for relevant information. The authors found that the effect of such a more balanced information search is mediated by the counsellors' increased motivation to be accurate.

Counsellors' concerns about accuracy are only justified to a limited extent. Research has shown that clients' decisions are more accurate even when the advice is slightly inaccurate (Brehmer & Hagafors, 1986; Gardner & Berry, 1995; Snizek et al., 2004). One argument is that expert advice reduces the complexity of decision-making tasks for the client. Although counsellors' greater concern about the accuracy of their recommendations spurs them to exert more task-related effort, counsellors tend to misinterpret each other's preferences rather than lack motivation (Kray, 2000).

Previous research suggests that counsellors use different decision-making strategies when deciding something for themselves than when giving advice (Kahn & Baron, 1995). The argument that advisors infer clients' preferences is consistent with Gonzales' (1999) findings that counsellors consider fewer characteristics of the decision object and give more weight to the dominant dimension. In addition, counsellors and clients use different frameworks to make decisions. Counsellors tend to think about what would make most people happy, whereas clients pay more attention to individual preferences. Their motivations are also different. Counsellors are liable for their recommendations, while clients consider the trade-off between accuracy and effort. Given these differences in preferences, Kray (2000) concludes that counsellors do not think less carefully about a recommendation than judges do about a decision. The authors also conclude that most of the evidence suggests that advisors do not consciously seek more balanced information before making a recommendation than when they must make a personal decision.

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Advisors are motivated to do their best and give appropriate advice, so they must have access to relevant input in the form of guidance and information. Research shows that clients are aware that the quality of advice depends, among other factors, on the counsellors' access to relevant information. In this regard, several studies have shown that the accuracy of a client's decision after deliberation depends on three variables: the amount of relevant information available to the counsellors, the accuracy of the counsellor's recommendation, and the weight the client assigns to each recommendation (Humphrey et al., 2002). Feedback has also been associated with accuracy. Harries et al. (2004) argued that clients' natural tendency to ignore dissenting opinions can be overcome under the influence of a learning paradigm in the form of feedback as opposed to one-off counselling. When judges receive consistent feedback that identifies the dissenting counsellor as correct, the default devaluation strategy can be overcome. However, the results show that reinforcing a discounting strategy is much easier than counteracting it.

As the research results presented in this section show, advisors counter their concerns about the accuracy of their recommendations with an increased motivation to search for relevant information. However, advisors generalise their clients' preferences when assuming what most clients prefer. An advisory environment that allows for feedback on a recommendation is one option to help overcome clients' default discounting strategy. The following section discusses the findings presented about lawyer-client counselling, focusing on insights into lawyers' decision-making process. As expert counsellors, how do lawyers decide what is in a client's best interest—to resolve a conflict through litigation or ADR?

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2.1.4 Discussion of literature implications for lawyers' decision process

To develop a model of a lawyer's procedural decision-making process, this section emphasises four assertions derived from the previous section's findings when applied to counselling between a lawyer and a client. The theoretically based model, as outlined in Chapter Three, relies on these assertions.

The final part of this section highlights the missing links in the literature and sets out the theoretical basis for this project.

- (1) People's decision-making is inevitably influenced by inconsistent preferences and a contradictory decision architecture, which is why this applies to clients and counsellors alike (Kahneman & Tversky, 1979).

The lawyer and the client make a procedural decision about whether to use trial or ADR procedures to settle the conflict. Both use their intuition when deciding, but in different ways. The lawyer, as a legal expert, can rely on his expert intuition, while the client falls back on his lay intuition. Section 2.3 presents and discusses the relevant literature in detail.

- (2) In counselling, both are involved in an interactive process, weighing up judgments and applying (over-)confident evaluations (Yaniv, 1997; Yaniv & Kleinberger, 2000).

Trust is linked to confidence. Section 2.4 explains and discusses how a concept of trust theoretically underpins the interactive decision-making process. Before clients seek paid legal advice, they have most likely consulted other cost-free sources in their community. Whether or not clients follow a recommendation depends on the lawyer's reputation. Reputation is also linked to trust. Therefore, lawyers must build a trusting working relationship to overcome clients' mistrustful attitudes.

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For example, Yaniv (1997) found that clients weigh different recommendations from advisors and that relatively inexperienced clients tend to overvalue their judgment and, therefore, ignore the advice (Yaniv & Kleinberger, 2000). Thus, lawyers need to build a trusting working relationship to overcome mistrustful tendencies. Although the presented study focused on the client and took the consultant's recommendation as a given input for the decision-maker, it is plausible that the consultant goes through a similar decision-making process. However, there are motivational differences.

- (3) Lawyers' motivation to build a trusting relationship is related to their desire to earn a reputation for making accurate recommendations. Therefore, lawyers look not only for relevant information to support their recommendation but also for contradictory information to support their intention to be as accurate as possible in their judgment.

For example, Jonas and Frey (2003) found that counsellors, in their role as advisors, conduct a more balanced search for relevant information than if they were making a decision themselves. The authors found that the effect of such a more balanced information search is mediated by the counsellors' increased motivation to be accurate. Further, Poortinga and Pidgeon (2004) confirmed the principle of asymmetry that trust can be destroyed more easily than it can be created. Client motivation varies. People seeking legal advice usually pursue claims involving money or monetary benefits, and they want to resolve the conflict as quickly as possible. Research suggests that clients who get advice will increase their decision accuracy (e.g. Sniezek et al., 2004). Clients seem to know or expect this fact; otherwise, they would not seek counselling in the first place. The motivation for clients to follow advice is to take responsibility. Another reason for following the advice is that clients may fall for the sunk cost fallacy.

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- (4) When lawyers are confronted with their clients' conflicting preferences regarding time and money, they engage in a multi-stage feedback process in which they exchange their case assessments with the client. Such feedback loops build the client's trust in the lawyer.

Although feedback loops start to create mutual trust, research has focused only on the client's behaviour. Price and Stone (2004) argue, for example, that clients rely on "confidence heuristic" when they utilise the advisor's confidence rating to make the final decision. However, the influence of a trusting working relationship on the lawyer's recommendation behaviour was not investigated.

The discussion summary ends now by highlighting the missing links in the literature, arguing that lawyers' decision-making and the factors that influence their decisions are under-investigated. As outlined in the previous section, most research has focused on the client's perspective, as they are ultimately responsible for the decision-making process. However, few studies have looked at the decision-making process from a counsellor's perspective. For example, when Yaniv and Kleinberger (2000) analysed the reputation building of consultants, they focused on the client's perspective but did not address the consultant's perspective. To highlight the missing link in the literature, the studies discussed can be roughly categorised according to the methods used, the focus of the study, and the jurisdictional context, where applicable.

*Table 1:
Categorisation of decision-making studies*

Author/Year	Method		Focus	
	Lab	Field	Client	Advisor
16 studies	16	0	16	0
Mintzberg, 1976	0	1	1	0

The researcher's focus on finding relevant information on lawyers as advisors biases the studies' selection. Overall, the literature includes many field studies investigating decision-making behaviour. However, to the best of the researcher's knowledge, the studies presented with a specific focus on a dyadic setting between lawyer and client reflect a lack of field studies in this area.

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The question of how lawyers develop procedural recommendations between trial and ADR is unanswered.

A lot more specific questions remain unanswered in the literature. For example, in terms of trust and reputation. How do advisors rate the reputation of decision-makers? Over time, for example, clients can acquire a reputation for “being resistant to advice” if they repeatedly reject advice and ignore recommendations. Or, clients can get a reputation for delaying fee payments. Is there a correlation between clients' reputation for discounting or paying well and what lawyers recommend? To what extent do lawyers strategically build a reputation? Another topic on which research provides mixed results is the correlation between counsellor confidence ratings and counselling accuracy (Sniezek & Buckley, 1995; Van Swol & Sniezek, 2005).

In the JAS context, overconfident clients have received much attention (Clement & Krueger, 2000). However, an examination of the role of overconfidence on the part of counsellors is lacking. Clients probably do not realise that research suggests that there is no strong correlation between confidence in their lawyers' recommendations and the accuracy of their advice. If a client assesses a lawyer's reputation not by the amount of accurate advice given but rather by personal preferences for highly confident, authoritative advisers, could this mean that specific clients intuitively gravitate towards like-minded advisers? Does this also apply to counsellors? In turn, do counsellors attract "their kind" of clients? As lawyers' trust ratings significantly impact their clients' decision-making, it is important to examine closely how advisers decide what to recommend and how they arrive at their trust ratings.

The key findings of JAS research on judges' decision-making (advice discounting and confidence heuristics) are based on experiments in laboratory situations. In real-life situations, both heuristic and conscious decision-making probably take place partially, simultaneously, or sequentially, depending on the problem and context. Laboratory experiments are the most common in research on decision-making behaviour.

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In this research environment, advisors' recommendations and confidence ratings are usually transmitted in written form, for example, to test the boundary conditions for discounting advice and deliberation strategies. The possibility of personal contact or any other form of interaction between advisor and client is, by design, commonly very limited in laboratory settings. For example, Kray and Gonzales (1999) found in an experimental study that, compared to clients, counsellors considered fewer features of a choice, gave greater weight to dominant features, and differentiated more strongly between compatible and incompatible features. An experimental follow-up study by Kray (2000) investigated the differences in the preferences of counsellors and clients. Her results suggest that counsellors sometimes incorrectly infer clients' preferences and recommend "what most people would prefer." When counsellors speculate about their clients' preferences, these speculations are based on specific values and principles they hold and follow. An examination through the epistemological and ontological lens of critical realism will clarify principles that may play a role in counsellors' decisions.

To summarise, these results undermine the underlying implicit assumption of the JAS paradigm that decision-makers make rational decisions based on valid information and accurate performance-related feedback. Most of these results come from experimental laboratory settings where decision-makers and environmental factors can be better controlled than in field studies. Manipulating the timing and quality of advice led to sometimes incoherent results. The findings that advice from experts is more likely to be followed than advice from novices, as well as advice that is expensive or difficult to obtain, appear reasonable at first glance.

Most of the literature sheds light on how the judge behaves at the end of the counselling. What is missing is a focus on the counsellors, how they prepare recommendations, and how they present their recommendations to the judge. Developing a recommendation is both an intrapersonal and an interpersonal process within the social environment of JAS.

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More research is needed to understand intuition's influence on the decision-making process. Section 2.3 presents and discusses current findings. First, the next section, 2.2, deals with research into procedural preferences in the legal field. Field studies are more common in this area.

2.2 Procedural preference research in the legal field

To focus the decision-making theory on the legal domain, literature on procedural preference research provides insights into the specific area of law. How clients decide to go for a trial or use an ADR procedure is well discussed in procedural preference research literature in the legal field. As presented in section 2.1, the advisor's influence on the advised parties' decision is well documented.

However, how lawyers decide what procedure to recommend is only marginally discussed. To answer the research question about the potential drivers of the decision process, this section examines the findings of the literature with a focus on advisors' perspectives. Specifically, the influences on lawyers' procedural preferences between trial and ADR when advising their clients. It comprises five sub-sections. The first sub-section provides a brief overview of ADR procedures.

The following three sub-sections present selected literature findings according to three themes: a) the discrepancy between clients' (changing) preferences and choices, b) lawyers' advice and cost as influential criteria, and c) procedural justice and the influence of moral/ethical considerations. The last sub-section contains a discussion of the findings of the literature.

2.2.1 Alternative Dispute Resolution Procedures (ADR) – Control - Fairness – Trust

This section starts with a brief overview of ADR procedures and their pros and cons. The last part of this section shows how early procedural preference research evolved.

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Starting with a comparison of a trial or adversarial procedure with ADR procedures, early research has mainly investigated themes of procedural control, fairness, and trust.

ADR procedures are a complex field of how conflicts can be solved outside court in the private market. Currently, about 15 different ADR procedures are described in the literature. Each procedure offers different strengths and weaknesses, depending on the individual case and conflicting parties' interests. An extensive description of what procedure might be the most appropriate for a particular case can be accessed through the interactive website <https://rechtohnestreit.de/infothek/verfahren>. The German Government promotes this platform. The most common and well-known among lawyers are negotiation, mediation, arbitration, and a combination of these three procedures. Therefore, this project refers to these procedures when ADR is mentioned. The critical difference between a trial at court and ADR procedures is the level of control that parties have over the procedure and the outcome. Trial conduct is tightly regulated regarding timelines, venues, and causes that can be litigated.

In contrast, in ADR procedures, the control over timelines, venues, and the content of the case is in the hands of the parties. ADR procedures can include broader issues that are not enforceable through litigation. More importantly, parties commonly control the outcome since there is no third party with decision-making power equal to a judge within conventional trials unless parties opt for strict arbitration procedures. There are pros and cons to ADR. Parties bear full responsibility for the outcome.

No third party is to blame for a mediocre or bad final agreement. Parties must invest personal time and effort in participating in the procedure. They cannot fully delegate the burden of articulating what they want when facing off with the opposing party.

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The ADR community blames missing public financial support for dispute parties engaging in ADR procedures, declining financial support for trial procedures from legal expense insurers, non-enforceable final mediation agreements, and the lack of a mediator association, in the style of a bar association, for the slow development of the private ADR market. However, the cost argument is just one aspect. Less costly ADR procedures wouldn't bring significant change predict Masser et al. (2018). Having analysed the Masser Report, the greater hindrance seems to be that parties must voluntarily agree to go through the process. Parties have control over whether to put their case in front of a third-party decision-maker or remain self-responsible for the outcome. Once ADR procedures became more available, control over process and content emerged as a central topic in the research community, comparing trial and ADR procedures.

Researchers began experimentally assessing procedural preferences in 1970. Since then, the popularity of ADR procedures like negotiation, mediation, arbitration, and mixed forms of different procedures has grown. Thibault and Walker (1975) were the first to investigate the influence of jurisdiction on procedural preferences. They aimed to find out if an inquisitory civil law system or an adversary case law system would serve the purpose of procedural justice better. The authors set up experiments to investigate which variables influence the disputant's perception of procedural justice. A central finding was that parties who had the chance to tell their story and present information relevant to the decision perceived the procedure as fair. Thibault and Walker later named this phenomenon the "process control effect" (Thibault & Walker, 1978). Although the degree of control over how the process unfolds fundamentally differs in trial and ADR procedures, research focused again on judicial procedures, investigating the fairness perceptions of disputants.

The topic has received much attention since fairness considerations are a central theme in procedural preference research.

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For example, Leventhal (1980) suggests that a process will be perceived as fair if: a) rules are applied consistently across persons and time, b) decision-makers are neutral, c) procedures are based on accurate information, d) appeal procedures are in place, e) all sub-groups are heard, and f) the process adheres to ethical standards. Although this study investigated the procedural preferences of disputants with a focus on social relationships, it was restricted to judicial procedures with a neutral decision-maker. If these results are fully applicable to consensual procedures, they need to be further investigated. Besides perceptions of control over the procedure and fairness perceptions, trust is a recurring theme in procedural preference research.

In 1992, Tyler investigated the psychological consequences of judicial procedures. The results suggest that if people are satisfied with a judicial procedure, it depends on whether they can participate, are treated with respect and dignity, and trust the decision-maker (Tyler, 1992). Again, this study investigated a procedure with a neutral third decision-maker. It remains to be investigated whether these findings can be applied to consensual ADR procedures, where the parties are the ultimate decision-makers. Taking psychological effects into account for disputants who went through a judicial procedure provided a new perspective. It is interesting that trust in the neutral decision-maker is important to disputants. Together with the results about lawyers' motivation to build a trustful working relationship (section 2.1.3), this might be a cue to investigate further why dispute parties' preferences and choices change over time. Regarding methods, Thibault and Walker used experiments, Leventhal theoretically developed a fairness concept, and Tyler conducted a literature review.

However, early research has found that only a limited number of empirical field studies investigate procedural preferences in the legal field. All these early studies examined how the involved party perceives the procedure as just and the decision-maker as trustworthy. Yet, all studies only look at adjudicative court procedures. Complementing research into ADR procedures is missing.

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In addition to the influencing factors of process control, fairness, and trust, the fluidity of clients' preferences and choices has been investigated more recently. The following section presents relevant findings in this area.

2.2.2 About the discrepancy between (changing) preferences and choices.

Research suggests that a person might have preferred a different dispute-resolving procedure than when the dispute ended. When lawyers want to advise their clients at their best about procedural options between trial and ADR, they must understand how clients evaluate the different options. While the early studies in the field of procedural preference research often used experimental laboratory settings, the following two studies presented are field studies with a longitudinal approach.

One study was conducted in the US (Shestowsky & Brett, 2008), and one was conducted in Germany (Kals et al., 2018b). Looking at clients' decision behaviour, Shestowsky made an important point by distinguishing between ex-ante and ex-post situations and between hypothetical and real-world situations. Ex-ante investigations focus on preferences, whereas ex-post investigations focus on choice. The critical distinction between these alternatives is that preferences ask which procedure people would find closest to the ideal, whereas choices include stronger considerations or pragmatic concerns.

Shestowsky (2008) conducted a longitudinal field study in the US following the same litigant after a complaint had been filed until the case had been closed, evaluating pre-experience preferences as well as post-experience satisfaction with the chosen procedure to study if and how procedural preferences might change. Litigants evaluated the procedure first regarding relative control for themselves or a third-party decision-maker. Second, regarding relative control over the process, and third, over relative control over the outcome, by filling in surveys.

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A key finding was that “Although the litigants indicated a desire to be present for the resolution process, they preferred third-party control to litigant control.” The authors specified that litigants wanted third parties to control the process more than the outcome. The authors concluded that “This pattern suggests that adjudication met disputants’ expectations, but non-adjudicative procedures failed to do so.” With that, the authors remarked that the evaluated sample of non-adjudicative procedures has primarily been negotiations, which tended to be conversations between lawyers without the disputing parties present. Thus, disputing parties might perceive that they are not involved enough in the procedure.

However, there is another way of interpreting the result: litigants want the third party and decision-maker to control the process more than the outcome. Having control might have proved to be more burdensome than expected for disputants. However, when Shestowsky investigated dispute parties’ preferences between different types of mediation, control was highly preferred. Shestowsky (2004) examined preferences for decision control, process control, and control over the choice of substantive rules used in the resolution process in two common types of mediation. In evaluative mediation, mediators propose solutions similar to those in arbitration. In facilitative mediation, only the parties come up with solutions. The experimental study with students as participants included the mediating factors of power distance between disputants and the role of disputants (plaintiff or defendant). Central findings are a) that participants found those options most attractive that offered them the highest level of control, and b) that substantive rules must be agreed on before the procedure starts, or rules typically used in court apply. Shestowski concluded that mediation was the most preferred procedure, and facilitative mediation was generally preferred over evaluative mediation.

Mediation gained more attraction in 2004. Different mediation styles have been developed.

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The role of mediators evolved from only facilitating the procedure, empowering clients, and giving no suggestions on how to solve the conflict, to evaluative procedures, where mediators acted more like arbitrators, giving recommendations. The result that participants preferred control over the outcome in a theoretical situation does not support the analysis that control over the outcome might be perceived as too burdensome.

However, participants might choose an ideal procedure in hypothetical ex-ante situations, as Shestowsky's later research suggests. While this interesting US-based field study from 2018 compares adjudicative procedures with ADR procedures, it comes with a caveat regarding the advisory setting of this project. Firstly, Shestowsky's study sample consisted of litigants who had already filed a claim in civil court. The litigant can then choose how to settle the claim. The litigant can opt for arbitration, court mediation, private ADR procedures, or court settlement negotiations within the court proceedings. Secondly, the paper does not describe whether or not a litigant has been advised before filing a claim, or how. Thirdly, how far the results from a case law jurisdiction are applicable to a civil law jurisdiction needs to be further investigated by a comparable study.

Whereas the US study looked at disputants who have already filed a claim, Kals et al. (2018b) conducted an online survey among 266 German participants who were not involved in a trial procedure. Participants included mediators and conflict parties who had been interviewed about a year before. The authors used questionnaires to ask participants about the chances and barriers to using mediation and about participants' experiences with positive and negative emotions during mediation procedures. They investigated how attitudes towards mediation changed with personal experience of mediation for mediators and for mediated parties. Results indicate that mediators become more critical about the procedure; mediated parties, however, are more positive or stable in their attitudes toward mediation. Kals et al. hypothesised that the ongoing discussion about a public certification of mediators in Germany might create uncertainty in the mediation market.

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If this hypothesis holds, it could be interpreted as mediators' concerns about the quality assurance of the provided mediation services. Seventeen participants collected personal experiences of being a party in mediation between the first and second interviews. The results give critical first insights. However, further research is needed to confirm the tendency.

In terms of methods, Shestowsky and Kals conducted field studies on clients' procedural preferences between trial and ADR.

These studies covered case and civil law jurisdictions. Yet, complementary research into advisors' procedure preferences is missing.

The fluidity of clients' procedural preferences demonstrates the client's partially conflicting interests of having a say and being heard in the process on the one hand and wanting to shift responsibility for control over process and outcome to a third party on the other hand. The mediator's attitude towards mediation evolves over time, as do personal ADR experiences. With time and personal ADR experience, mediators tend to develop more critical attitudes toward mediation, while disputants' attitudes towards mediation tend to change positively following their own experiences. In addition to looking at soft factors like having a voice in the process or perceived responsibility in trial and ADR procedures, criteria like cost, time, and advice have been investigated. The following section will present findings from the literature about these influential criteria.

2.2.3 Influential criteria for clients' preferences: lawyers' advice and costs

Shestowsky (2018) investigated in another longitudinal study with 413 participants what criteria civil litigants prospectively plan to consider when selecting a legal procedure. Once the trial procedure was over, litigants were contacted again via phone interviews to assess which criteria were used to make that decision. A key finding is that the most cited criteria ex-ante are lawyers' advice, cost, and time. Time refers to the expected duration of the procedure. The ex-post list of criteria was shorter and more "practical."

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Litigants who cited a lawyer's advice and reducing costs ex-ante were ex-post significantly more likely to report using procedures for those reasons. Other criteria turned out to be less stable. These results suggest that lawyers strongly influence clients' procedural choices, which underpins the need to investigate the decision-making of lawyers further.

However, in contrast to Shestowsky's finding that disputants cite minimal costs as an essential decision criterion for the choice of procedure, Kals et al. (2018b) concluded in their German longitudinal study with 266 participants that procedural costs play a lesser role in the selection of procedure.

The results suggest that participants' low trust level in mediation procedures is a bigger hindrance than the procedural costs of using mediation.

As reported in the previous section, the follow-up longitudinal study (Kals et al., 2018b) found that mediators saw mediation as more critical over time and rated the procedure less favourably. In contrast, clients who have gone through a mediation perceived the process as more favourable than the pre-experience. However, participants could give free answers in a text field besides multiple-choice answers. The answers were about the hindrances participants associated with mediation. The authors grouped the answers into the following categories: "Lack of awareness/information about the procedure," "Doubts about the impartiality of the mediator," "Doubts about finding a well-qualified mediator," "Lack of confidentiality", and "Preference for trial." All these doubts can be interpreted as a lack of trust in the procedures, respectively, in the third party involved. Mediators' concern for quality assurance mirrors clients' potential lack of faith in mediators' qualifications.

Lawyers' advice emerged as a stable criterion clients consider when making procedural choices. This finding underpins the need to investigate lawyers' decision-making process regarding what procedure to recommend. In addition, research suggests that a trusting working relationship between lawyer and client seems to be an essential condition under which procedural choices are made.

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Procedural preferences are influenced by soft factors like perceived fairness and trust, and rather hard factors like cost and advice. The overall attitude of clients towards ADR in terms of moral and ethical considerations regarding procedural preferences is another influencing factor that has been investigated. The following section presents relevant findings.

2.2.4 Influence of moral/ethical considerations on procedural preferences

Procedural justice is a well-discussed topic in the literature. To understand the findings of different studies correctly, it is essential to look at the authors' definitions. It is standard to distinguish between procedural and distributive justice with generally accepted definitions of both. Distributive justice refers to a fair outcome of the decision process and a fair distribution of resources as input to the decision process. Procedural justice refers to fairness during the procedure to reach an outcome. That means that the set of rules does not privilege either party regarding decision rights or available information. Chlaß et al. (2019) use a broad literature base (Lind, 2001; Tyler, 2004) to justify their differentiation between procedural and distributive justice, where procedural justice is observed by people's reactions to socio-emotional assets, and distributive justice to people's reactions to quasi-economic assets.

However, Cropanzano and Ambrose (2001) argue that "procedural justice and distributive justice are more similar than is generally believed.... both procedural justice perceptions and distributive justice perceptions are, in some sense, derived from individuals' expectations about outcomes." The terms of justice and fairness are often treated as synonyms by organisational scientists. Goldman and Cropanzano (2015) argue for a differentiation between justice as the adherence to morally required rules of conduct and fairness as "the individuals' moral evaluation of this conduct", citing legal scholars who view justice as a broader concept than fairness.

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It means that a decision-maker who adheres to the rule of law is just, and a person's judgment of perceived fairness is individually dependent on various factors, such as equality, moral integrity, and others.

Chlaß et al. (2019) have investigated which phenomenon could explain procedural choices beyond distributive and procedural justice. The authors conducted experiments, though not in a legal context. They focused on procedural justice and kept distributive justice as the independent variable. They conducted an experiment in which participants took part in a pair of two-player pie-splitting procedures. Participants reported their strategy in each, their belief about the opponent's choices, and which procedure they preferred over the other.

The authors compared three different procedures: a) yes-no (which distributes decision rights equally), b) ultimatum game (which proceeds transparently, granting each party complete information about the history of the game before parties take action and c) dictator game (parties don't have information about the history of the game before they make a decision). The setup was designed so that, according to existing economic preference models, each procedure would provide the same expected outcome and carry the same information on the party's intentions. A rational decision-maker would be indifferent between procedural preferences. The only differences between procedures were how they distributed decision power and information rights between players and how complex and efficient they were. Participants showed preferences in ranking procedures according to simplicity and efficiency, and, interestingly, the degree to which participants referred to the "equality of basic rights and liberties in their moral judgment." Key findings are that observed procedural choices have been ethically motivated and procedural choices do not reflect decision-making mistakes when less favourable outcomes in economic terms are preferred. The authors note that economic preference models have yet to capture an ethical dimension.

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The previous sections about changing preferences (2.2.2) and advice and costs (2.2.3) were about studies in the legal context. Chlaß looked without a specific field context for factors beyond justice as influencing factors for procedural choices. However, ethics and morals are connected to individual beliefs about what is right and wrong or just. The Cambridge Dictionary defines beliefs as “The feeling of being certain that something exists or is true.” People or societies hold several beliefs that are referred to as a belief system. It is commonly accepted that beliefs are complex constructs that are hard to operationalise. It is also generally assumed that “beliefs interact with many lower-level cognitive processes such as attention, perception, and memory” (Conners, 2022). If beliefs are rather sub-consciously held. They are probably intuitively accessed.

Lind (2001) also stresses the importance of justice judgments in organisational relations and suggests that individuals use a fairness heuristic.

He argues that (1) fairness judgments are assumed to serve as a proxy for interpersonal trust in guiding decisions about whether to behave cooperatively in social situations and (2) that individuals are assumed to use a variety of cognitive shortcuts to ensure that they have a fairness judgment available when they need to decide to engage in cooperative behaviour. Applied to an advisory situation between a lawyer and a client, the lawyer will want to propose a procedure that he considers fair. The use of a fairness heuristic indicates an intuitive decision-making process.

Ethical and moral considerations apply to both in a lawyer-client advisory setting. These considerations are related to individual belief systems that are intuitively accessed. Transferring the findings to a lawyer-client setting, intuition seems to be an influential factor when lawyers develop procedural recommendations.

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2.2.5 Transfer and discussion of literature implications on lawyers' procedural advice

This section examines the researcher's interpretation of the literature on a lawyer-client advisory setting through four claims to develop a model of a lawyer's procedural decision-making process. The theoretically derived model, as outlined in Chapter Three, is based on these claims. The last part highlights the missing links in the literature and argues for the importance of lawyers' intuitive decision-making and a trusting working relationship between lawyer and client. The literature looks at three main issues regarding clients' procedural choices: clients' changing preferences, advice and cost as influencing factors, trust in ADR procedures, and clients' beliefs.

1) Clients changing preferences

Clients have conflicting needs. They want a voice in and control over the process, but they also want to share responsibility for the outcome.

The research found that clients perceive a procedure as fair when they have the chance to actively participate and be treated with respect (e.g. Tyler, 1992), have relative control over the process and outcome (e.g. Thibault & Walker, 1975), and when rules are applied consistently across persons and time (e.g. Leventhal, 1980).

However, being involved in negotiating or arguing for a particular outcome comes with responsibility. The low uptake of ADR procedures in comparison to the number of trial procedures suggests that bearing responsibility can prove to be too burdensome sometimes. Hence, clients want to share or shift the responsibility to the neutral party, such as an arbitrator or court-appointed judge, as the final decision-maker. Alternatively, research suggests that clients shift or share the responsibility with their advisors when they use lawyers' confidence ratings about a procedural recommendation (e.g. Price & Stone, 2004).

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However, the assumption of clients' motivation to share or shift responsibility is not in line with Shestowsky's (2004) assumption that clients prefer facilitative mediation procedures over evaluative mediation procedures. Facilitative mediation gives the participants more responsibilities than evaluative procedures. The conclusions regarding justice suggest that parties perceive a procedure to be fairer when they have a voice in the process. Litigants want to be present and seen. Since they don't want to be (solely) responsible for the outcome, they rate the lawyer's advice and cost considerations persistently high both ex-ante and ex-post. Otherwise, preferences are somewhat inconsistent, which makes it difficult for advisors to navigate clients' needs.

2) Advice and cost as influencing factors

Lawyers are challenged by clients' evolving preferences, which leads them to repeatedly interact with clients, seeking feedback on preference changes.

At the beginning of a conflict, clients evaluate a procedural option according to advice, cost, and time. In hindsight, they assess the chosen procedure according to advice and the degree of cost reduction (Shestowsky, 2018). Shestowsky found these two relatively stable criteria (lawyer's advice and costs) litigants used to consider legal procedures ex-ante (the preference which was closest to ideal) and ex-post (a more pragmatic choice). Since advice is a stable criterion, it makes sense for lawyers to seek feedback about clients' preferences throughout the counselling process. The assumption that lawyers seek constant feedback is supported by Kals (Kals et al., 2018b; Kals & Ittner, 2018a).

Kals surveyed citizens from the general public about their preferences and attitudes in conflict situations. They reported that costs are slightly less of a barrier than, for example, trust in the mediation procedure itself. These findings seem to stress the importance of rather soft, socio-emotional characteristics of procedures.

However, it is noteworthy that only 110 of 902 participants have been (potentially) disputing parties in mediation. The others have been mediators.

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It would be interesting to see if the results from this relatively small sample size could be confirmed in further studies. The author's second study surveyed only 17 clients among 266 total participants, which is a tiny sample size. The authors cited the reason for the small sample was that it was hard to find people who had run through mediation as clients and were ready to complete a survey.

Yet, Thaler and Sunstein (2009) argue that true preferences might not even exist. They describe the dichotomous self and people's inconsistent preferences as a model of intrapersonal conflict with a myopic, impulsive Doer versus a farsighted, resolute planner. They suggest that it needs a libertarian paternalist to help the Planner be protected from the Doer. If Thaler and Sunstein's argument were valid, Leonard (2008) argues in his book review of Thaler and Sunstein's "Nudge" that the "consequence of dividing the self has been to undermine the very idea of true preferences. If true preferences don't exist, the libertarian paternalist cannot help people get what they truly want, only what they should want." The speculation that lawyers would give standardised recommendations is supported by Kray's finding that advisors incorrectly infer the decision-maker's preferences and therefore recommend what "most people would prefer". However, Kray's research has not been conducted in the legal field. It remains to be seen if lawyers also incorrectly infer clients' preferences.

Chlaß et al. (2019) have examined which phenomenon could explain procedural preferences, though not in a legal setting. They argue that the traditional strands of procedural preference research claim to elicit procedural and distributive justice differently, but, in essence, measure distributive justice because both forms are more or less indivisible. This finding supports the idea that the pursuit of self-interest in the form of a favourable outcome dominates the choice.

The argument that the perception of a fair process and a fair outcome are both driven by the expectation of outcome is interpreted as a more holistic approach by individuals summarising an episode of conflict in one prevalent perception of fairness (Cropanzano & Ambrose, 2001, as cited in Chlaß, 2019).

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In such a holistic approach, a decision-maker must process vast data. The tendency to simplify and use shortcuts may also hint at intuitive decision-making strategies.

Applying Chlaß et al. (2019) conclusions about procedural choices to the legal field would mean that participants rank procedures ex-ante not only according to simplicity and efficiency but also to the degree of “equality of basic rights and liberties in their moral judgment.” Suppose the client’s choices are, as suggested, ethically motivated. If so, the ethical dimensions of equality of basic rights and liberties in moral judgment hint at intuitive decision-making. Ethical decisions are probably a feeling of right and wrong, and less a cognitive comparison of different ethical concepts. Bringing the paternalist idea together with Shestowsky’s findings that lawyers’ advice is rated consistently high over time as an essential criterion clients consider, it must be investigated further how lawyers could advise clients whose preferences between process control, control over rules or outcome are changing and sell them what they should want, balancing personal business interests, professional interest and governments expectation that lawyers help to deliver justice.

3) Trust in ADR procedures

Reducing costs is a less critical factor influencing clients' procedural choices compared to trust in ADR procedures and lawyers' advice.

Kals’s findings suggest trust is an essential condition for developing procedural preferences. Lawyers offer advice on their roles as entrepreneurs and as distinct parties in the justice system. This can lead to lawyers’ different preferences for trial or ADR procedures. For example, business-driven lawyers will prefer the procedure with a higher turnover, whereas lawyers focused on sustainable solutions will prefer interest-based conflict resolution procedures. Following a recommendation is not only based on the advisor’s and client’s assessment of an option, but it also depends on reference frames (Harvey et al., 2000).

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Further investigation into the influence of lawyers' and clients' interaction on divergent preferences across reference frames and differing motivations that drive lawyers' recommendation practice is necessary.

4) Clients' beliefs

Lawyers' and clients' procedural choices are influenced by their beliefs about the nature of trial and ADR procedures. Limiting beliefs are hard to overcome, so lawyers' influence on clients' procedural choices is restrained.

That advised parties tend to discount advice when they are overconfident about their judgment is a robust finding in the literature, as presented in section 2.1.1. Confidence is related to beliefs. Clients opt for procedures they believe are fair regarding procedure and outcomes (e.g. Leventhal, 1980; Thibault & Walker, 1975). Suppose a lawyer thinks an ADR procedure would be the best way forward in a specific case. In that case, they must spend their trust capital to overcome clients' resistance to using ADR when the client believes that a trial procedure would be the better way forward. How trust influences a client's procedural choices is debatable. Research has mainly investigated how clients use confidence heuristics and advice discounting to react to an advisor's recommendations. However, trust is a reciprocal dynamic process that develops over time. How lawyers' trust in clients' judgments and clients' overall behaviour influences lawyers' procedural recommendations has received only marginal attention in the literature.

Regarding methods, it is worth noting that the studies mentioned above mainly focus on the client's perspective, as they are finally responsible for making a decision; few studies have looked at the advisor's perspective.

Shestowsky's studies (Shestowsky, 2004, 2008, 2018) are relatively rare examples of empirical field studies, both cross-sectional and longitudinal. The longitudinal approach especially brought insights into preferences' inconsistencies.

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However, a weak point is the missing perspectives of defendants and the fact that all participants, being litigants, had already made a procedural choice in favour of an adjudicative procedure. Another limitation is that there is no information from the lawyers who advised the litigants, probably before the case was filed, and their procedural preferences for the case at hand. Shestowsky's studies show by design that mediation is not a single sort of procedure like a trial or an arbitration. Since there are different forms of mediation, such as transformative, facilitative, or evaluative, it would be essential to account for the various types in future studies, the different roles of disputants, and the options to act that come with it. While all studies have been undertaken in case law settings, it would be interesting to see if a similar study in a civil law setting would produce similar results. From a client's perspective, the cost curves significantly differ in case-law and civil-law distinction. This might lead to other time windows in which ADR procedures make more sense in case law jurisdictions.

Besides the difference that Shestowsky's research was done in a case law setting and Kals' research in a civil law setting, other findings suggest that, in addition to the jurisdiction, other influencing factors play a role in changing preferences regarding procedural choices. Comparing the number of studies conducted in case law jurisdiction with the few studies in a civil law environment, it becomes clear that procedural preference research in civil law jurisdictions is still very limited.

Research provides a catalogue of criteria, including ethical considerations, that decision-makers use to make procedural decisions. What is missing is an understanding of how lawyers decide which procedure to recommend to their clients. In their interactions with their clients, lawyers fulfil different roles. On the one hand, they act as profit-oriented entrepreneurs, and on the other, they are part of the administration of justice and therefore bound by professional rules. Lawyers must process vast amounts of data to determine if a procedure and its outcomes are fairly reached. As research suggests, moral judgments and ethical decisions are rather intuitively reached.

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How lawyers arrive at recommendations acting between different roles, the fluid preferences of clients, and fairness considerations point to intuitive decision-making. Therefore, the next chapter examines the findings on the intuitive decision-making of lawyers as experts.

Figure 5 shows the implications described as two stages in the decision process when lawyers compare their judgment and reasoning for their procedural decision with the client's position, balancing contradictions when the positions don't match.

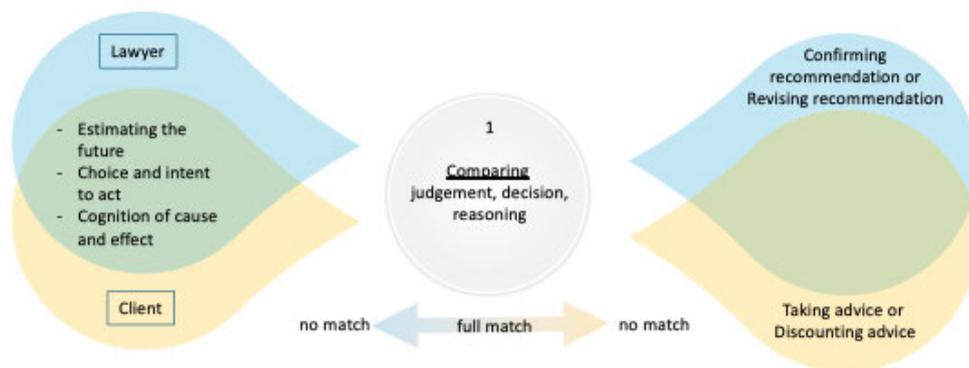


Figure 5:
Lawyer/Client Procedural Choice Model: Development stage V

2.3 Intuitive decision-making

Recognising the importance of intuitive decision-making in the previous two sections of this chapter, further insights into the relationship between rational and intuitive decision-making by lawyers are valuable for answering the research question about drivers of the decision process and for fulfilling the aim of this study, which is to develop a new model. The literature does not discuss how lawyers use intuitive decision-making to make procedural recommendations. Therefore, this chapter will apply what is generally known about intuitive decision-making in a lawyer-client setting. The section will focus on the influence of lawyers' expert intuition compared to their cognitive analytical considerations.

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The section consists of four sub-sections. It starts by defining intuition and heuristics (2.3.1) before looking at the relationship between deliberate and non-deliberate cognitive processes (2.3.2). Sub-section 2.3.3 looks at what is known about “expert intuition.” This is of interest because lawyers are experts in the legal field.

Sub-section 2.3.4 section transfers and discusses the implications of the literature on lawyers’ procedural advice.

For clarification, this project does not claim to measure or investigate lawyers' intuitive decision-making. It only claims that lawyers and clients use their intuition regularly when making procedural choices.

2.3.1 Definition of intuition and differentiation from heuristics

Literature offers a broad range of definitions for intuition. They depend on the different methodological and conceptual approaches. Intuition has, for example, been described as expertise (Burke & Miller, 1999), memory and implicit learning (Lowenstein, 2000), decision-making modes (Hammond, 1996), heuristics (Gigerenzer, 2007; Tversky & Kahneman, 1981b), and lower-level perceptual processing (Volz & von Cramon, 2006). Mintzberg et al. (1998) describe intuition from an organisational strategic management perspective as the global ability to synthesise “unconnected memory fragments into a new information structure.”

The different ways researchers define and describe intuition show that it is a rather fussy term. In addition, the meanings of heuristics and intuition are often used interchangeably.

The mathematician Georg Polya (1945) introduced the term “heuristic” as a weak problem-solving method.

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He advised his students: “If you can’t solve a problem, then there is an easier problem you can solve: find it.” or “If you cannot solve the proposed problem, try to solve some related problem first. Could you imagine a more accessible related problem?” Finding associated problems or imagining proof is intuitive; however, checking if the easier problem or proof is correct requires cognitive analysis. Polya asks his students to “imagine” a related problem before solving it. Thus, Polya proposes a sequence of intuition and cognitive thinking.

Gigerenzer (2023), however, argues that heuristics are instead the toolbox of intuitive thinking. He proposes “ecological rationality” as a theoretical framework to differentiate between intuition and heuristics.

The theoretical framework serves to “study how mental processes are adapted to their environments, based on Herbert Simon’s notion of 'bounded rationality.' Ecological rationality applies when an optimal action cannot be cognitively calculated. Decision-making under uncertainty would then rely on adaptive heuristics to create 'good' intuition. The intuitively reached decisions aren’t logical but ecologically rational. The ecosystem idea fits with the notion of expert intuition because experts live in distinct ecosystems.

Kahneman and Tversky (1972) worked on heuristics and recognised the value of heuristics in decision-making.

Kahneman (2011) later described nine different heuristics and biases people use to make decisions, yet cautioned that the results could be misleading. Literature, meanwhile, represents more than 30 partially domain-specific heuristics.

As the presented research suggests, all decision-makers use heuristics. However, the validity of judgments seems to depend on the nature of the decision problem.

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Sunstein (2006) supported the view that heuristics, as mental short-cuts, also known as the rule of thumb, work well for questions of fact, yet lead to false or absurd moral judgments when applied as a moral mental short-cut or rule of thumb under the paradigm of utilitarianism. An example is the moral heuristic “do no harm.” It is a rule against causing harm through an action, even when this action could prevent even greater harm from occurring. The resulting bias, preferring harmful omission over less harmful acts, is called “omission bias”. Except for tort law and criminal law, where negligence is typically an omission that is punishable (§ 323c (1) StGB), most jurisdictions don’t have “Bad Samaritan” laws.

As discussed in section 2.2.4, clients consider moral/ethical aspects when they make procedural choices. It can be assumed that lawyers do it as well. However, lawyers as legal experts might use their intuition in a specific way that differs from lay people, as research discusses “expert intuition”. For example, Sinclair and Ashkanasy (2005) view intuition as a dynamic process that depends on various triggers. They distinguish between heuristics as “low-effort rational strategies, where decision-makers rely only on presented data to make a conscious guess.

This may result in a biased estimate and intuition, where there is no awareness that intuition is used to produce a result. The point is that guessing is different from “direct knowing.” While the authors theoretically developed a model for using intuition, they stressed the difficulty of measuring intuition with self-report questionnaires because no robust scales are available.

Although this project uses in-depth interviews in which highly experienced lawyers self-report their decision-making, the researcher does not claim to measure the use of intuition apart from suggesting that lawyers employ their expert intuition. As research suggests, lawyers’ intuitive decision-making is a process. On the one hand, it is based on case facts; on the other hand, it is based on moods, using imagery and known patterns.

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A common understanding across the various definitions is the distinction between inputs, processes, and outcomes of intuitive thinking. Betsch (2008, p. 3) gave the following descriptive definition: “Intuition is a process of thinking. The input to this process is mostly provided by knowledge stored in long-term memory, primarily acquired via associative learning. The input is processed automatically and without conscious awareness. The output of the process is a feeling that can serve as a bias for judgments and decisions.” In this sense, intuition is defined as an IPO process that includes heuristics, memory, expertise, and implicit learning for this project.

In contrast to the one-word, two-word, or one-line definition of intuition, this descriptive definition allows for more precise determination of what part—input, process, output—of intuition is investigated at a time. As described in Chapter 2.1, the IPO (input-process-output) framework is also used to describe cognitive or deliberate decision-making. Therefore, Betsch’s description of intuition will serve the purpose of this project.

Although the nature of intuition is fussy, the literature argues that the extent to which a decision-maker uses it depends on the nature of the decision problem and environmental factors, including time pressure or available information. Therefore, the next section discusses what is known about the relationship between deliberate and non-deliberate decision-making.

2.3.2 The relationship btw. deliberate & non-deliberate cognitive processes

The literature suggests three different models to consider the relationship between deliberate and non-deliberate cognitive processes.

Simon (1987) puts intuition and rationality on a continuum, making both mutually exclusive. The portion of intuition and rationality is dependent on dispositional and contextual factors. The task itself is also a factor.

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Simons envisioned: “In more and more situations, design expert systems capable of automating the expertise, or of providing the human decision-maker with an expert consultant. Increasingly, we will see decision aids for managers that will be highly interactive, with both knowledge and intelligence being shared between the human and the automated components of the system (Simon, 1987, p. 61).

Another school of researchers views the relationship between non-conscious (intuitive), semi-conscious, and conscious (deliberate) as parallel systems (Langley et al., 1995; Mintzberg et al., 1976; Salas et al., 2009; Sinclair & Ashkanasy, 2005). For example, Sinclair and Ashkanasy (2005) view the decision-making process as encompassing bounded rationality, heuristics, insight, and intuition and decision-makers using rational analysis in conjunction with intuition. They do not distinguish between sub-, un-, and non-consciousness. They link “intuitive processing to a non-conscious, non-temporal manner to identify relevant pieces of information that are fitted into the “solution picture” in a seemingly haphazard way, like assembling a jigsaw puzzle. When the assembled pieces start making sense, the “big picture” suddenly appears, frequently accompanied by a feeling of certitude or relief. The non-conscious aspect is reflected in being unaware of any reasoning going on in our mind before the “appearance” of the solution.”

The dual-process theory has produced strong supporting evidence that the human brain uses two distinct systems to process information: conscious and deliberate, and unconscious and intuitive (Evans, 2008; Kahneman, 2011). The general framing in dual process theories is that intuitive processes are subserving deliberate thinking. In other words, the intuitive output functions as an input into the deliberate system and the deliberate system has the final say (Haidt, 2001; Haidt et al., 2008). The authors push the boundary even further by proposing an intuition-based model of moral judgment with a distinction between deliberate and intuitive processes.

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The model describes that moral judgments are made intuitively, and the following deliberations function primarily to generate post-hoc rationalisations for why the intuitive judgment is valid, while rarely changing the initial decisions.

Like the various definitions of intuition, the dual processes theories have been described with a broad range of terms, depending on the concepts and research perspectives. (for example, automatic versus controlled, experimental versus rational, holistic versus analytical, associative versus rules-based, conscious versus unconscious) Evans (2008) clustered the theories according to four commonly used attributes: Consciousness (accessible deliberate system and largely unconscious system), evolutionary development (the deliberate system being younger than the unconscious one), terms of function (functioning in an abstract, sequential, rule-based manner and functioning domain-specific, contextualised, using associative parallel processing), individual differences (slight between-person variation because the system works independently from working memory and general intelligence and more between-person variation because of different capacities and abilities).

Glöckner and Betsch (2008) proposed a “universal information integration strategy” expanding on dual-process theory, looking at the process itself. The authors question the validity of findings from experiments that show how decision-makers use heuristics to simplify the decision process by reducing the amount of information considered and mental efforts employed.

Yet, Gigerenzer (2023) challenges the dual theory generally. He argues that intuition and cognitive reasoning “go hand in hand”. There is no “dualistic opposition of intuition and reason.” Gigerenzer’s position is supported by Kruglanski and Gigerenzer (2011). They argue that deliberate and intuitive judgments are based on shared principles. Their unified theory of judgments emphasises the “individual and situational differences in motivation and cognitive resources as these interact with judgmental task demands.”

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Keren and Schul (2009) are also criticising the dual-system approach in general, arguing for a unified theory of judgment. They scrutinised the underlying implicit assumptions of dual-system theories. The dimensions that are assumed to distinguish between deliberate and intuitive, like judgmental speed or ease, are continuous dimensions rather than dichotomous. The authors argue that although the dual system approach is widely used, more stringent criteria for testing empirical evidence that supports the two-system theories are needed.

A more complicated approach stems from Wang et al. (2006). The team developed a layered reference model of the brain (LRMB) viewing input on the first, basic sensation layer as sensory input into the natural intelligence operating system of a person who passes three more subconscious layers (memory, perception, and action) before transiting into three further conscious life functions (two meta-cognitive functions and one higher cognitive function). Short and long-term memory, as well as so-called sensory buffer memory and action buffer memory, are part of a complex input-process-output model, providing space for intuitive parts on the higher cognitive layer, where decision-making and problem-solving are contextualised. Wang's model is the most complicated. However, Mintzberg has already described twelve elements of strategic decision-making in the organisation.

The literature's range of different approaches to capturing how non-deliberate decision-making occurs shows that there is no commonly agreed-upon way of operationalising intuition apart from the fact that it occurs at all in an IPO process. Besides different approaches to deliberate and non-deliberate decision-making, the literature discusses influencing factors favouring one form of decision-making over the other.

Salas et al. (2009) group the factors that influence the use and effectiveness of intuition by looking at three levels: decision-maker, decision task and decision environment.

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Expertise influences the decision-maker's meaning-making: "Extensive experience within a domain that can produce automaticity and a large and well-organised knowledge base, affording intuitive pattern recognition capacities." (Dane & Pratt, 2007; Klein, 2003). Processing styles and task structure are influencing factors on the level of decision task, meaning "People are predisposed to rely more on either intuition or deliberation. Intuition is more likely effective in judgmental tasks with large sets of cues to integrate" (Dane & Pratt, 2007; Hammond, 1996).

In addition, the availability of feedback is categorised as an influencing factor on the level of decision task, meaning "both implicit and explicit memory development is facilitated by feedback"(Hogarth, 2001). Finally, time pressure is the influencing factor on the level of decision environment, meaning "increasing levels of time pressure are associated with more reliance on intuition as deliberative processing is a more time-consuming mode of cognition" (Lipshitz et al., 2001).

Being an expert in a particular field is considered another influencing factor. For example, Simon (1987) points to a distinction between "non-rational" decisions of experts, which are derived from expert intuition and judgment and "irrational" decisions of emotion-driven managers acting under stress and time pressure, "diverting behaviour from urgings of reason." The former is described as productive and goal-oriented, the latter as unproductive. Simon's argument that dispositional and contextual factors play an essential role in the occurrence of intuition is supported by Wang et al. (2006).

However, how to measure the extent of intuition that goes into one decision is contentiously discussed in the literature. Since the underlying cognitive process of decision-making cannot be directly observed, researchers have developed various methods to measure observable parameters and cues.

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Standard methods include evaluating choice patterns, confidence judgments, information search parameters, decision times, and introspection with think-aloud protocols in various forms and combinations.

For example, Pratkanis (1989) developed a socio-cognitive model of the representation of attitudes. He argued that the predictivity of attitudes is warranted and suggests that different types of heuristics are used in different situations, yet the impulse to use a heuristic occurs when one of five conditions is met: 1. The decision-maker is faced with too much information, 2. The decision-maker is under time pressure, 3. The decision to take is not important, 4. The decision-maker has only access to very little information, and 5. An appropriate heuristic happens to come to mind at the same moment. They systematically selected decision tasks to classify decision strategies. The tasks were based on cue information in different patterns, so the strategy used, in this case, the lexicographic rule, take-the-best rule, equal weighing rule, and weighted additive rule, predicted different outcomes for substantial subsets of the task. Since it is impossible to distinguish between deliberate and automated processes when calculating weighted additive results solely based on the predicted outcome, the authors also analysed decision time patterns, assuming that time constraints would indicate an automatic process rather than a deliberate one. Finally, they analysed confidence judgments to support the findings from the first two experiments.

Key findings show, among other things, that because properties of the decision task influence the decision-making process, it is crucial to distinguish tasks in which information is readily available from settings in which information must be accessed serially. If the depth of an information search is limited, for example, due to time pressure, decision-makers tend to use non-compensatory strategies more often. Although several studies report strategy shifts from compensatory to non-compensatory concepts when decisions need to be made under time pressure, the authors suggest that the cognitive capacity of humans to integrate information is higher than usually estimated.

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Furthermore, decision-making strategies that rely on the automatic processing of information need to be investigated further using non-obtrusive methods of process tracing, such as eye tracking and multiple measurements to establish correlations.

Glöckner and Betsch (2008) tested the well-accepted findings that individual decision-makers under time constraints predominantly use non-compensatory rather than complex compensatory strategies. The authors argue this is due to restricted information search rather than cognitive computing limitations. They criticise that the research methods and design of experiments have encouraged participants to deliberate and cognitively evaluate situations, preventing the activation of automatic decision processes. To better support the activation of automatic decision-making, they used a staged experimental setting instead, attempting to verify that “automated processes driven by the “intuitive system” (Kahneman & Frederick, 2002) enable individuals to quickly integrate multiple reasons in their decisions in a compensatory way.” Results show that restricted information searches in experimental settings are the limiting factor, not cognitive computing limitations. The authors argue that their findings challenge the fundamentals of bounded rationality.

While most of the research is focused on decision-makers' perception of intuition or feeling, Lufityano et al. (2016) provided some evidence that intuition is a testable mechanism and that “non-conscious emotions can bias concurrent non-emotional behaviour.

The researchers used a lab experiment for measurements, as most of the research into intuitive decision-making is done via experimental settings.

This project, however, is set up as a field study. It will rely on decision-makers' perceived use of intuition instead of trying to measure it. Research shows that there needs to be a clearer understanding of operationalising deliberate and non-deliberate considerations that go into judgment calls.

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The consensus is that, besides other influencing factors, emotions, interaction with the environment, and past experiences play a role, and that these elements are part of nearly every decision made. Experts have a lot of past experience in their field. The role of expert intuition as an influencing factor will be discussed in the next section.

2.3.3 Expert intuition

To answer the research questions about the drivers of lawyers' decision-making, the influence of expert intuition as a potential driver must be investigated. The field of intuitive decision-making by experts developed in the 1990s. It examines the influence of extensive and in-depth knowledge bases and experience on decision-making quality. To define the term expert intuition, two elements must be described. Section 2.3.1 reviewed the literature about definitions of intuition in general. Although the definition of expert knowledge is intensely debated in the literature (Döringer, 2021), certified lawyers are accepted as experts under even narrow definitions.

Salas et al. (2009) combined definitions of intuition and expertise. They argue that the overlap of both areas defines expert intuition by "rapid generation of single decision options rooted in extensive domain-specific knowledge, pattern recognition and automaticity." It is commonly accepted that expert intuition can be acquired through extensive practice and experience (e.g. Klein, 2003).

In addition to the difficulties associated with measuring the extent of intuition employed, the literature discusses the value of intuitively or analytically reached results. Matzler et al. (2007) argue based on anecdotal evidence from management practice that "Analytics can never trump the intuition of a thoughtful executive, wrought by years of experience and accumulated knowledge, tempered by emotional intelligence."

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They define intuition as “a highly complex and highly developed form of reasoning that is based on years of experience and learning, and on facts, patterns, concepts, procedures and abstractions stored in one’s head.”

Simon (1987) points to intuition in management roles and argues that expert intuition driven by contextual factors must be distinguished from intuition driven by emotions. He argues that dispositional factors outweigh contextual factors.

Oktar and Lombrozo (2022) tested the role of authenticity in intuitive decision-making in an experimental setting. They based their experiment on folk decision theory. The theory holds that an individual decision-maker's plan is constructed in response to a desire. Desires establish decision-makers' goals.

The plans are further constructed based on decision-makers’ beliefs about the relation between actions and outcomes. Foreseeable undesired side effects further constrain the planning. Folk decision theory gives a unique role to authenticity. The authors found that the choice between using deliberate or intuitive decision strategies is influenced by authenticity. They argue that authenticity extends the list of known influencing factors like computational costs, presumed reliability, objectivity, complexity, and expertise. Since authenticity is related to intuition and trust, section 2.4 will discuss the relevance of trust concepts for a lawyer’s procedural choices.

The discussion around expert intuition shows that the individual decision-maker is in focus. In section 2.3.2, the emphasised level, like decision tasks or contextual factors, plays a lesser role. The impact of expert intuition in an advisory setting is of specific interest for this project. However, this study focuses solely on the lawyer as the decision-maker. Investigating the impact of the advice on the client side is out of scope for this study due to time constraints and methodological limitations.

The following section will discuss the implications of lawyers’ intuitive decision-making based on their legal expertise.

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2.3.4 Transfer & discussion of literature implications on lawyers' procedural advice

To create a model of a lawyer's procedural decision-making process, this section discusses the researcher's interpretations of the literature on a lawyer's intuitive decision-making in three claims. The theoretically derived model, as described in Chapter Three, is based on these claims.

a) Intuition is a fuzzy term.

Yet, lawyers and clients regularly use it, depending on the nature of the decision problem and environmental factors. How lawyers use their intuition is only thinly discussed in the literature. One example is (Wistrich & Rachlinski, 2013). The authors investigated for years how intuition influences the judges' rulings in court. They used the same survey method of presenting students with cases to solve, varying one factor at a time.

Their findings suggest that lawyers postpone settlements because they fall for at least three "cognitive illusions": Framing effects, confirmation biases, sunk-cost fallacies, and "non-consequentialist reasoning," which describes the urge to collect information irrelevant to reaching a judgment. However, there is much anecdotal evidence in the legal community's discussion that lawyers use their expert intuition regularly (Alarie, 2024; Baker, 2022; Shutt, 2017).

b) The relationship between deliberate and non-deliberate decision-making is complicated.

Since both are closely intertwined, intuition is hard to measure, especially in an advisory setting with feedback loops between lawyer and client. There is a general understanding that decision-making can be analysed by looking at three perspectives: the decision-maker, the task, and the environment (Mintzberg & Westley, 2001; Salas et al., 2009).

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It is also a common understanding that there is an intuitive, non-deliberate process in addition to the rational, deliberate cognitive way individuals make decisions. However, there are substantially different ideas about how the relationship between intuitive and rational can be best described and explained.

Simon (1987) argues that both processes are mutually exclusive, creating a zero-sum game. That allows for defining precise proportions of each “ingredient” of a decision.

On the other hand, it is a gross simplification of a rather messy process. Sinclair and Ashkanasy (2005) and Wang et al. (2006) argue that the two systems working in parallel, respectively, in the form of a layered model of different grades of deliberation, allow for investigating more dynamic processes, and with constantly varying parts of deliberation. These approaches seem better suited to help explain how the process itself finally unfolds.

Coming from a rational decision-maker model, the theme of how different cues are weighted by decision-makers and in which order cues feed into the final decision should be reconsidered in terms of how to distinguish the non-deliberate, intuitive parts.

Haidt (2001) view that the intuitive system is subserving the deliberate system, which has the final say, putting both systems in chronological order. This provides, from a modelling point of view, a clear structure, yet it is a too-strong simplification of a complex process. Haidt points to the simplification problem, presenting the finding that a moral intuitive judgment will be adapted by the deliberate system, whose role is only to produce post-hoc justifications for the ethical judgment to be the right choice.

Sinclair and Ashkanasy (2005), in contrast, view the deliberate and non-deliberate system working in “conjunction”. However, they don’t provide details about the conjunctive process.

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This more flexible perspective seems to be better suited to account for differences in terms of task and environmental influencing factors.

Finally, there is a common understanding that the decision process can be well investigated by an input, process, and output framework. What is not as clear from research is whether the implementation of the decision belongs to the decision process itself or not. There is a substantial body of literature focusing on the phenomenon of the intention-action gap and how the discrepancy between attitude and behaviour can be healed.

However, there seems to be no model that encompasses the process of intuitive/rational decision-making explicitly as a precursor of the following intention-action phase. Therefore, Langley et al. (1995) formal inclusion of implementing a decision into the concept of “decision” allows for feedback from acting on a decision into the input phase of a subsequent decision process. This approach also aligns with Langley’s and Mintzberg’s view that “the process of decision-making ... (must be) opened up to a host of dynamic linkages, so that isolated traces of single decisions come to be seen as an interwoven network of issues.” If one assumes that deliberation and non-deliberation are not a zero-sum game, it seems fair to suspect that every single procedural judgment call of a lawyer carries at least some input of intuition.

c) Ecological rationality creates two experts in a lawyer/client setting. Lawyers use their legal intuition, and clients are experts in the environment where the conflict is rooted.

Ecological rationality was introduced by Gigerenzer (2023) as a theoretical framework to study how mental processes are adapted to their environment. Gigerenzer argues that heuristics are a toolbox of intuition, and that decision-makers use the appropriate tools. Applying this framework to lawyers' procedural decision-making means that lawyers use framing techniques, satisfaction heuristics, and fluency heuristics.

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Wistrich and Rachlinski (2013) support Gigerenzer's argument, albeit suggesting that lawyers instead fall for confirmation biases, sunk-cost fallacies, and "non-consequentialist reasoning." Non-consequentialist reasoning goes with collecting too much or irrelevant information in situations of uncertainty. This finding contradicts Jonas and Frey (2003), who confirmed that advisors conduct a more thorough and balanced information search.

If it can be assumed that lawyers use specific heuristics more obviously, the question of how to observe and measure it has yet to be described in the literature.

In the fields of economics and law, research generally relies on participants' self-reports. Yet, these reports are more about confirming that heuristics are used, but not to quantify them.

The literature also discusses the difference between expert and layman intuition and how this difference affects decision accuracy. The view that experts' intuition improves decision accuracy because they have access to a deep knowledge base that non-experts don't have has gained further traction to this day. However, Mintzberg's view that laypeople can use their transferable skills to improve decision accuracy, likewise, although probably not to the same extent, seems to be an appropriate presumption.

According to Wang et al. (2006), the layered reference model of the brain (LRMB), memory is just one point on the three layers of subconscious cognitive processes.

Self-consciousness, motivation, and willingness, as well as goal setting, sense of spatiality, and motion, are among the other resources decision-makers tap into when using their intuition. These resources are the same for experts and laypeople. Transferring these findings to a lawyer/client setting means that two decision-makers look at the same case from different backgrounds. Lawyers look at the case from a legal perspective. Clients look at the history and development of the conflict in their specific environment.

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This view aligns with Kruglanski and Gigerenzer (2011), who emphasise a unified theory that individual motivations account for differences.

Simon (1987) points to another difference. He suggests that there is a material difference in decision accuracy between experts and emotionally driven managerial decision-makers. Clients are probably emotionally driven in a lawyer/client setting because they own the conflict. An emotionally driven decision might seem authentic. However, lawyers can keep a professional distance and still be genuine, as authenticity is commonly described as the coherence between emotions and one's internally justified values and beliefs. Yet, lawyers' intuitive decision-making is only marginally discussed in the literature.

Oktar and Lombrozo (2022) suggest that authenticity is another influencing factor in intuitive decision-making besides expertise or task complexity. They argue that intuition is favoured over deliberation when authenticity matters. Authenticity is, in turn, related to trust. People tend to develop stronger relationships if someone is perceived to be honest. Lawyer/client advisory setting requires trust to be workable. The legislator confirms that a lack of trust is a reason to deny legal services (§16a, Abs. 3, d BORA). The German Lawyer Association puts it positively: „A client relationship is a special relationship of trust (Jungk, 2023).

The next chapter will discuss trust concepts in relation to a lawyer/client setting.

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2.4 Trust concepts

The role of trust recurred across all previous sections in this chapter as a significant influencing factor. Trust is a fussy term, as discussed in the literature. Therefore, this section starts with a definition of trust for this project. Different types of trust, as well as boundaries to concepts of cooperation and confidence, are described. This project aims to theoretically develop a new Lawyer/Client Procedural Choice (L/C-PC) model. Lawyer/client advisory settings require a minimum of trust to be workable. How this relates to an integrative model of organisational trust by Mayer et al. (1995) will be discussed in section 2.4.2. This chapter will conclude with a discussion of the literature implications of trust for lawyers' procedural preferences.

2.4.1 Definition of trust

To answer the research question about what policies lawyers follow when developing procedural recommendations, the nature of trust must be investigated.

Trust in social interactions requires at least two individuals: A trustor and a trustee. The well-being of the trustor depends on the actions and behaviour of the trustee. While the future is inevitably uncertain to varying degrees, there is always an element of risk involved in trust.

Yet, trust as a concept is somewhat mysterious. It has been studied at a macro level, investigating how trust serves the social system, for example, by Luhmann (1988), who argues that trust serves to reduce the level of complexity in modern societies. Compounded justice systems govern societies. Lawyers help clients navigate the legal environment by focusing on each client's specific case.

Individual cases are situated at the micro level. There is plenty of research from different fields studying the function of trust between individuals. An extensive list can be found in Barrera (2008). Barrera, as a sociologist, did a literature review on the social mechanisms of trust.

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He looked at a “trust problem” referring to an “embedded” situation. A “trust problem” involves a social interaction between the two actors, a trustor and a trustee. A situation is “embedded” when the encounter between the two actors occurs more than once, and they share relations with some third parties. This means that the trustor has some information about the trustee or the specific trust problem before he decides to trust the trustee. Such a dyadic setting describes a lawyer/client setting well.

The author found robust results for two social mechanisms. 1) Dyadic control: “trust is generally placed and honoured in the first rounds of the repeated (experimental) game, then both trust and trustworthiness collapse when the last rounds approach.” 2) Dyadic learning: “actors do not place trust when it has been abused in the previous rounds.” According to Barrera’s findings, it can be assumed that a client would start by generally trusting a lawyer’s advice. Since the client had actively sought out a specific lawyer, this was not a random encounter. Most of the trust research on a micro level is done with experimental settings, including random pairing. This makes it difficult to account for previous social relationships or to include feedback as reasoning for a trustee’s decision.

However, a lawyer/client setting differs from an experimental one. It includes the lawyer’s feedback in the form of reasoning and may not be the first encounter with the client. That implies that the process of developing, stabilising, and losing trust may well be significantly different from the findings that experimental settings suggest.

Although implementing such complex relationships into experimental settings is deemed not feasible, Barrera reviewed some research on “network embeddedness”, which tries to mimic social networks by using computers to transmit information among players.

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Interpreting the results from a previous study (Barrera, Buskens, 2007 in Barrera, 2008), Barrera concluded that the more complex the interaction between the trustor and trustee gets, and the more information is available to the trustor, the more the trustor begins to use “simpler heuristics” to decide. He argues that a trustor would imitate the behaviour of other trustors who all trust a particular trustee.

As the macro and micro perspectives show, trust is a facet-rich construct. Therefore, it needs to be defined sufficiently narrowly to be operationalised in this project. In the literature, there are many different descriptions of what trust is. Commonly, they rely on observable behaviour and verbal expressions as cues to suspect an internal mental state of trust. Figure 6 shows a description of trust from philosophical, probabilistic, behavioural, and psychological viewpoints.

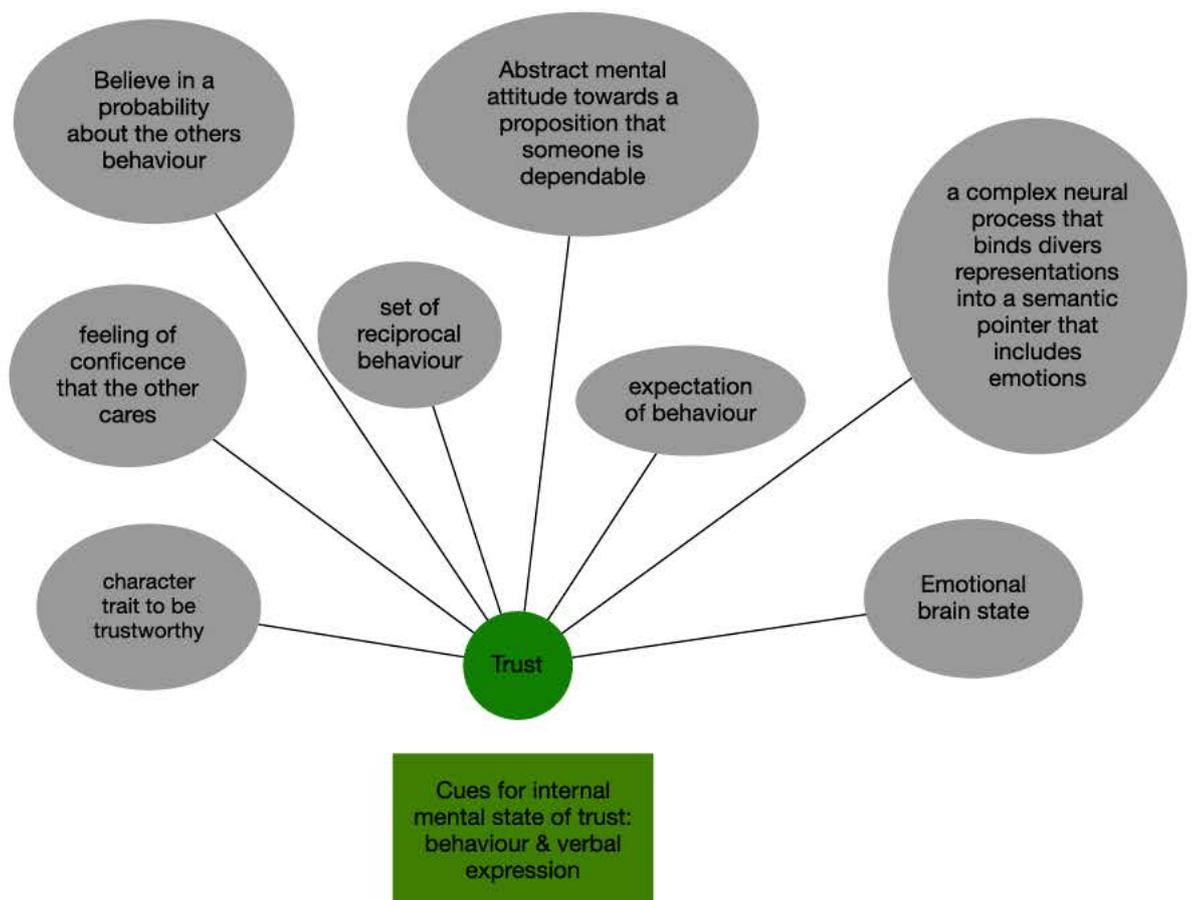


Figure 6:
Selection of trust descriptions from different fields of science

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Depending on the perspective, philosophers suggest that trust is a propositional attitude, an abstract relation between the abstract self and the abstract meaning of the sentence. For example, Aristoteles claims that humans want to flourish. Trust as a character trait is a virtue that helps people flourish or achieve “eudaimonia,” as Aristoteles coined it (Aristoteles, 1984). Character traits don’t change easily. It means a person is rather trustworthy or not. This definition seems too narrow for this project.

Probabilistic views suggest that trust is a feeling of confidence that the other cares and believes in a probability about the other's behaviour. Behavioural views define trust, for example, as an expectation about the other's behaviour and a set of reciprocal behaviour between the trustor and trustee. Or as an abstract mental attitude towards a proposition that someone is dependable.

Psychological views see trust instead as an emotional brain state or a complex neural process that binds diverse representations into a “semantic pointer”. Thagard (2019) describes a semantic pointer as a “pattern of neural firing” stemming from integrating representations about the self, the other, the situation, and emotions. He argues that “much of sociology and anthropology is taken over with postmodernist assumptions that everything is constructed on the basis of social relations such as power, with no linking that these relations are mediated by how people think about each other.” In other words, social and mental mechanisms are interconnected when people interact. This means that the social relation expressed by power distribution in lawyer-client settings is likely to be mediated by trust.

The above-mentioned descriptions include terms like expectation and probability, reflecting an element of risk. While the literature extensively discusses general risk-taking behaviour, a risk-taking relationship is defined as a specific, identifiable relationship with another party. For a trustee, trust is a function of ability, benevolence, and integrity. For the trustor, trust is about taking a risk.

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Mayer et al. define trust as “The willingness of a party to be vulnerable to the actions of another party based on the expectation that the other will perform a particular action important to the trustor, irrespective of the ability to monitor or control that other party.” (Mayer et al., 1995, p. 712). An interesting detail in this definition is that the authors did not explicitly include that a party can be vulnerable to the inaction of the other party.

This definition is often used in business and managerial studies investigating trust. Since this project investigates a risk-taking relationship between a lawyer and a client, Mayer’s proposed definition of trust serves the purpose of creating a Lawyer/client Procedural Choice model.

2.4.1.1 Types of trust

An expression in everyday life is that “trust must be earned.” To investigate this commonplace in the field of political science, Newton and Zmerli (2011) looked at the relationship between three different forms of trust: particular social trust, general social trust, and political trust. Key findings include that (a) there are strong triangular relations between the three types of trust, (b) that nearly everybody trusts somebody and (c) that particular trust, which is based on personal knowledge and contacts, doesn’t have a strong association with gender, age or education.

Newton and Zmerli’s distinction between types of trust in groups or individuals is relevant to this project in two ways. Lawyers and clients have social trust in the justice system (e.g. Gebhard & Sommer, 2022, p. 10). Yet, trust between individuals is of particular interest for this project.

Uslaner (2000-2001) refers to two theoretically different types of trust between individual parties: (a) “strategic trust”, which is based on experience and knowledge and (b) “moralistic trust”, which “transcends personal experience” in the sense that we trust people whom we don’t know and who are different from us yet share the same values as we do.

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In professional relationships between a lawyer and client, one could commonly expect mutual strategic trust. Uslaner argues further that “Trust doesn’t come from our social interactions. We learn it in early life from our parents, who impart to us a sense of optimism and a belief that we are masters of our own fate.” This challenges the everyday expression that trust must be earned, which implies that there are feedback loops in multiple interactions of placing trust. Yet the term “to learn” points to trial-and-error behaviour with necessary feedback loops. An exemption could be the instant trust a baby places in its mother. Uslaner’s notion that trustors and mistrusters are raised (Uslaner, 2000-2001, p. 571) is in line with Mayer et al. (1995), who state that people have a relatively stable general propensity to trust. The distinction between types of trust earned or given in connection with a lawyer/ client setting is further discussed in section 2.4.3.

Another frequently discussed distinction in organisational research of different trust forms is between affective and cognitive trust (*e.g. McAllister, 1995*). The notion is that relationships start with perceived cognitive trust, which may then transform into experiencing affective trust. Interpersonal trust between colleagues as a prerequisite of cooperation develops presumably differently than in temporal professional relationships that lawyer/client settings often are. These shorter relationships may stay within the dimension of cognitive trust.

Literature often discusses trust in connection with concepts of confidence and cooperation. Since the nature of trust is not clearly defined, the following section investigates how trust can be differentiated from confidence and cooperation for this project.

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2.4.1.2 Differentiation btw. concepts of trust, cooperation, and confidence

Advisors' confidence ratings play an essential role when decision-makers decide to follow or reject a recommendation, as discussed in section 2.1.1, weighing of advice and egocentric advice discounting (e.g. Soll & Klayman, 2004; Yaniv & Kleinberger, 2000). Following or rejecting a recommendation is about trusting the advice.

The idea of treating confidence and trust as two different concepts instead of two dimensions of the same event has been suggested, for example, by Adams (2005). She defines trust as "one uniform concept". This allows a differentiation from the concept of confidence, which, according to Adams, is influenced by prior probabilities and base rates, which are anchored in cognitive thinking. In contrast, trust requires intuition, consideration of broader patterns of behaviour and sense-making after the fact. Adams suggests that confidence can lead to trust.

The differentiation of preferences between occurring prior to and after the event has been investigated in procedural preference research as presented in section 2.2.3 (e.g. Kals et al., 2018b; Shestowsky, 2018). In Adam's view, preferences are related to confidence when it comes to procedural choices.

Research in procedural preferences shows confidence levels that a particular choice is the "right" one can change from before and after the event experience. However, in procedural preference research, the terms trust and confidence are used interchangeably.

Mayer et al. (1995) follow Luhmann (1988) in differentiating trust from confidence. Trusting someone requires recognising that a risk exists to become disappointed. After identifying the risk, assume it willfully. Being confident also refers to an expectation that may lead to disappointment. However, it does not require assuming a risk when no alternatives are considered.

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For example, if one is confident that he will reach the shore swimming, he will not consider renting a boat. Mayer et al. use this differentiation in their integrative model of organisational trust, which is presented in the following section 2.4.2.

Referring to the integrative model of organisational trust, Mayer et al. distinguish between trust and cooperation, looking at risk elements. They argue that risk-taking is not a prerequisite for cooperative behaviour because “cooperation does not necessarily put a party at risk.” However, they place their model in an organisational context where control mechanisms are usually in place to prevent trustees from behaving deceitfully. Schoorman et al. (2007) clarify in an update to the integrative model of trust that trust is an aspect of a relationship more than a trait-like disposition. They conclude that trust leads to risk-taking in a relationship.

The following section will present the main aspects of the integrative model of organisational trust as additional theoretical background for a new L/C-PC (Lawyer/Client Procedural Choice) model.

2.4.2 An integrative model of organisational trust

At the time, Mayer et al. (1995) identified a need for trust in developing self-directed teams in organisations. They argued that “trust must take the place of supervision because direct observation of employees becomes impractical”. They proposed an *Integrative Model of Organisational Trust*, which is well-received in the literature.

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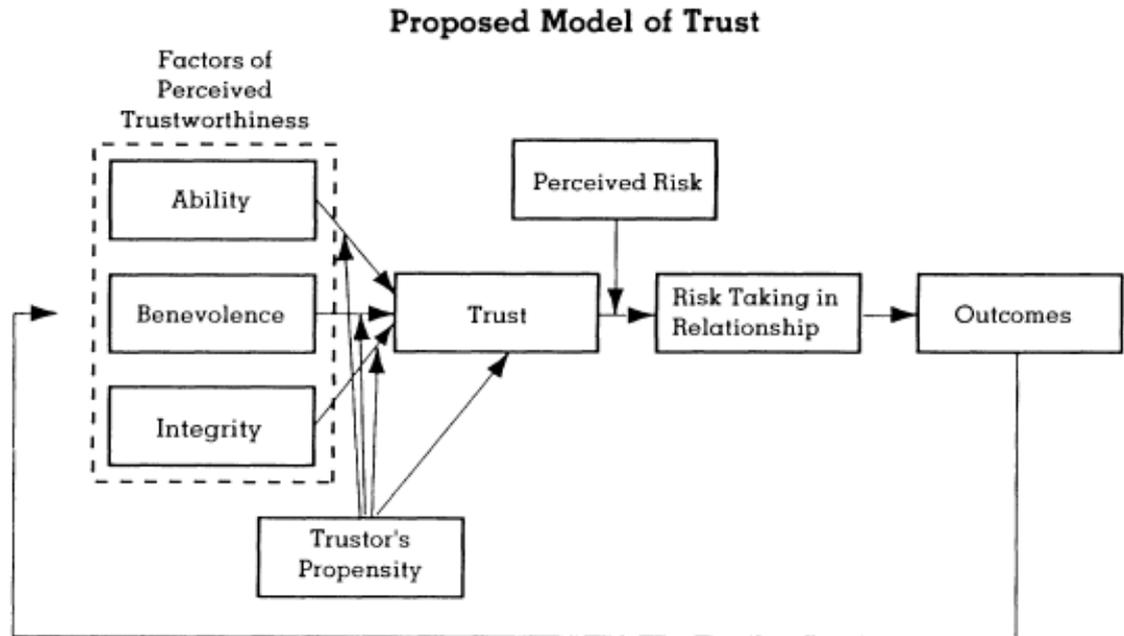


Figure 7:
An Integrative Model of Organisational Trust (Mayer et al., 1995)

The model is framed in an IPO process, differentiating factors contributing to trust, trust itself, and trust outcomes. The model accounts for the trustor's propensity to trust and defines three factors that contribute to a trustee's perceived trustworthiness: ability, benevolence, and integrity.

The authors define ability for the concept of trustworthiness as a group of domain-specific skills, competencies, and characteristics; benevolence as the extent to which a trustee's behaviour wants to do good to the trustor aside from an egocentric profit motive; and integrity as the adherence to a set of principles that the trustor finds acceptable.

Benevolence is defined as "the extent to which a trustee is believed to want to do good to the trustor, aside from an egocentric profit motive." Integrity is defined as "the trustor's perception that the trustee adheres to a set of principles that the trustor finds acceptable." Trustors' propensity to trust is an aspect of the relationship between trustor and trustee which captures the dispositional dimension of trust.

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The definition of trust has been developed in section 2.4.1 as “The willingness of a party to be vulnerable to the actions of another party based on the expectation that the other will perform a particular action important to the trustor, irrespective of the ability to monitor or control that other party.” (Mayer et al., 1995, p. 712).

Since there is no specific trust model for dyadic advisory settings between a lawyer and a client, Mayer et al.’s model comes as close as it gets to developing a new Lawyer/Client Procedural Choice model. The following section will transfer the literature implications of trust in a lawyer’s procedural advice.

2.4.3 Transfer and discussion of literature implications on lawyers’ procedural advice

To create a model of a lawyer’s procedural decision-making process, this section explores the researcher’s interpretations of the literature on trust between lawyers and clients within two claims. The model described in Chapter Three is based on these claims.

1) Lawyers have social trust in the justice system, primarily strategically and cognitively anchored.

They expect their clients to trust them because lawyers are partisan representatives. Lawyers have chosen to trust and become part of the justice system, probably for an individual mix of different reasons.

One motivation might be to be part of delivering justice; another might be to earn well, enjoy a reputation, or yield (expert) power. According to Conte et al. (2014), it could be a social norm that you must trust your advisor. Conte et al. developed EMIL – Emergence In the Loop as a “social-cognitive framework to analyse and simulate how norms emerge, exert their influence and change with their adoption.” It is out of scope for this project to apply EMIL to explore whether “trust your lawyer” is a norm under Conte’s definition.

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Lawyers' expert power is the base of social relations in a lawyer-client setting. However, Thagard (2019) argues that social relations are mediated by how people think about each other. This is in line with Fricker (2008), who raised the issue of epistemic injustice. She argues that the power and ethics of knowing need to be considered in dyadic settings.

She describes a distinctively epistemic type of injustice, in which someone is wronged specifically in their capacity as a knower. She describes practised testimonial injustice when a speaker, as the knower and sender of a message, receives a deflated degree of credibility from a hearer, as the inquirer and receiver, because the hearer held a prejudice against the knower. For example, a policeman doesn't believe a black person's statement as much as a white person's statement because of prejudice regarding their skin colour. Fricker suggests testimonial sensibility at the point of the inquirer as a cure.

Applying this idea to lawyers and their clients could, for example, mean that a lawyer doesn't believe a less-educated person's statement as much as a well-educated person's. The prejudice would be, in this case, that only "intelligent" people can understand the rules and workings of the law. On the other hand, a client might not believe a self-employed lawyer in a home office as much as a partner in a posh lawyer's office because of a prejudice that higher social status and higher fees mean better advice. Fricker used the word "believe." However, as the examples suggest, it might be interpreted as an unbalanced trust issue.

2) Feedback loops in lawyer-client interaction regarding judgments about the case matter are building blocks for a mutually trusting relationship.

For example, a client will trust the lawyer to judge the legal dimension of a tax case. However, the client might need more confidence that the lawyer can handle the accounting issues of the case. The lawyer, in turn, might trust the client to do the accounting math but might need to be more confident that the client will be a reliable witness in a cross-examination.

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During the interaction, both might raise their concerns and display benevolence explicitly or implicitly, giving verbal or non-verbal feedback. Knowing where the other party comes from makes it easier to have confidence in what can be expected to happen.

In Mayer's (1995) model, the lawyer and the client are both trustors and trustees. Both get feedback on perceived factors of trustworthiness. This can lead to trusting the other's judgment more than one's own or discounting the other's advice.

How to measure trust and trustworthiness is debated in the literature. Since trust is seen as a critical component of "social capital," it has been investigated on a macro level, using General Social Surveys (GSS) as a standard approach. These surveys pose general attitudinal questions like "In general, do you think that most people can be trusted, or do you think you have to be careful dealing with people?" Robust findings of these surveys include that people with a high social status elicit more trustworthiness in others than people without such a status (e.g. Glaeser et al., 2000). On a meso or micro level, trust is measured in experimental settings, often using money rewards. Although trust seems to be a key component in a lawyer-client setting, measuring trust and trustworthiness level is out of this project's scope, given the wide range of discussions in the literature on how to measure trust.

Although the level of trust between lawyer and client cannot be determined within this project's scope, mutual trust is assumed to generally occur.

Figure 8 shows trust as the last stage before a lawyer decides what procedure to recommend.

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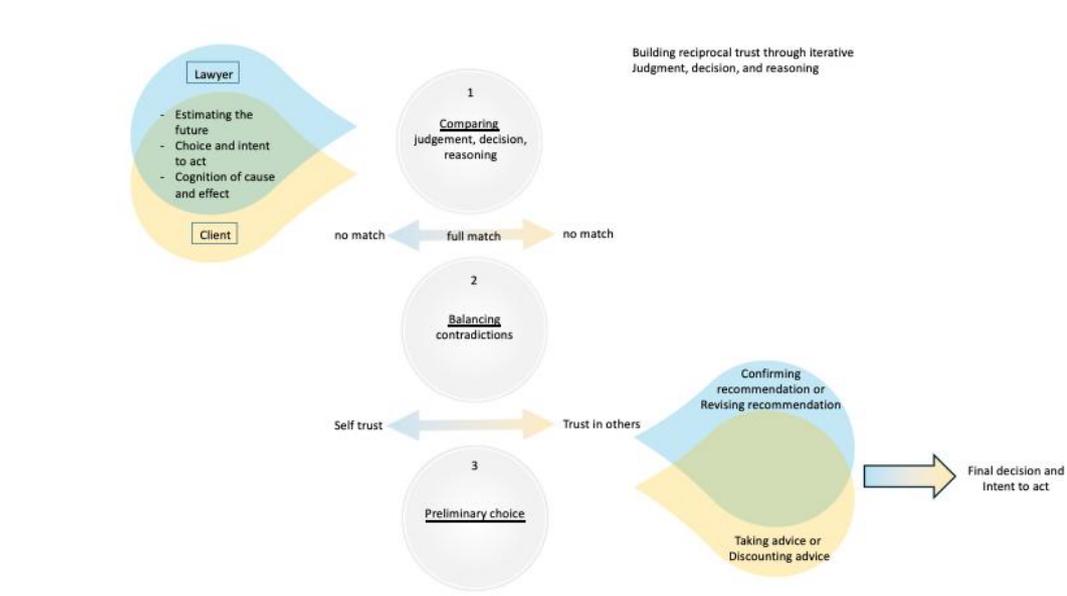


Figure 8:
Lawyer/Client Procedural Choice Model: Development stage VI

The following chapter will summarise the implications of the whole literature review for the development of a new L/C-PC model.

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2.5 Summary of literature review

This chapter summarises the discussion of relevant literature on decision-making in hierarchical teams (2.1.4), procedural preference research in the legal field (2.2.5), intuitive decision-making (2.3.4), and trust concepts (2.4.3), showing how the findings can be applied to a dyadic advisory setting between a lawyer and a client. Subsection 2.5.1 lists the relevant literature implications for developing a new Lawyer/Client – Procedural Choice (L/C-PC) model. Subsection 2.5.2 highlights the missing links in the literature.

2.5.1 Key findings

This study aims to develop a model for a decision problem within a hierarchical setting. Therefore, the research question about how lawyers develop procedural recommendations must be answered. Consequently, the literature review started by analysing current models used in organisational research, as hierarchical structures are common in this field.

Focusing on the legal domain, procedural preference research provided insights into the specific area of law. Recognising the importance of intuitive decision-making both in organisational research and in procedural preference research within the legal field, further insights into the relationship between rational and intuitive decision-making led to examining current knowledge about individuals' levels of deliberation and expert intuition.

Ultimately, the role of trust recurred across all three areas of interest as a significant influencing factor. Trust is a complex and multifaceted concept. Therefore, it is crucial to review the literature on trust to define trust narrowly enough to establish a well-founded model.

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The following synthesis of key findings from existing literature on decision theory in hierarchical teams, procedural preference research in the legal field, intuitive decision-making, and trust research offers a framework for understanding how lawyers develop procedural recommendations between trial and ADR to answer the proposed research questions about the stages lawyers go through when developing procedural recommendations. Further, what policies do lawyers follow, and what drives the decision process? Notably, the synthesis highlights gaps in the current understanding that must be addressed to answer the research questions.

Firstly, decision theory emphasises the complexity of legal decision-making within a hierarchical team structure. To investigate phenomena, researchers regularly use post-positivist or pragmatist approaches (e.g. Kray, 2000; Jonas & Frey, 2003)

Lawyers and clients alike are influenced by changing preferences and the choice architecture offered to them. Both are subject to cognitive biases, which can lead to an overestimation of the accuracy of their judgments. Whether a client accepts a lawyer's procedural advice depends on the lawyer's reputation, which is inherently connected to trust. Therefore, lawyers need to build a trusting working relationship to overcome clients' tendencies to dismiss advice. Moreover, lawyers are motivated to establish a reputation for delivering valuable advice. When lawyers face clients with conflicting preferences regarding time and money, they engage in a multi-stage feedback process. However, the existing literature provides limited insight into the lawyer's procedural decision-making process when advising clients, a crucial area for this study.

Secondly, research on procedural preferences in the legal field emphasises clients' desire to have a voice in proceedings and control over the process. At the same time, however, clients wish to avoid bearing sole responsibility for the outcome.

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Empirical research is commonly conducted under post-positivist paradigms in experimental settings as well as in field studies (e.g. Shestowsky, 2008, 2018; Kals, 2018). Lawyers play a vital role in balancing these two goals through repeated interactions with their clients, gathering feedback on changing preferences. Lawyers' influence in overcoming clients' negative attitudes, e.g., towards ADR procedures, is limited.

Thirdly, literature on intuitive decision-making offers additional nuance. The range of epistemological and ontological positions researchers take includes post-positivist, pragmatist and constructivist approaches. Mixed methods with semi-structured interviews, experiments and observations are common (e.g. Sinclair & Ashkanasy, 2005; Wang, 2006). It uncovers the blending of deliberate and intuitive reasoning, as well as the difficulties of assessing intuition in an advisory setting characterised by continuous feedback loops. Ecological rationality occurs when the lawyer is the legal expert and the client is an expert within the environment where the conflict originates. Lawyers depend on their legal intuition, while clients utilise their understanding of the specific circumstances surrounding the dispute.

Finally, findings from trust research confirm the importance of a trust-based approach. Lawyers have strategically and cognitively anchored. Mayer and Schoorman applied a post-positivist approach to conduct their mainly experimental approaches. Social trust in the justice system. And lawyers expect their clients to trust them as partisan representatives. Feedback loops between lawyer and client are vital in establishing mutual trust in each other's judgments about the case.

2.5.2 Missing links in the literature

Categorising the findings based on study methods shows that most of the discussed studies on decision theory in hierarchical teams and trust research used experimental settings. However, this study was carried out as a field study.

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In procedural preference research, most studies were conducted in case law jurisdictions. Germany, however, is governed by civil law.

Only a few studies were conducted as a field study. All the studies focused on the final decision maker, not on the advisors' perspective. A critical realist paradigm has not been used in any of the previous studies.

a) How advisors come up with a recommendation is under-investigated.

The literature review of decision-making in hierarchical teams showed that the JAS model focuses on the client as the decision-maker. The model's development is mainly based on research in laboratory settings. According to the setup of the experiments, the model implicitly assumes that the client makes rational decisions. The literature discusses only a limited number of field studies, including non-rational decision-makers. A discussion of how advisors come up with a recommendation is rare.

b) Procedural preference research in civil law jurisdiction is limited.

The literature review of procedural preference research in the legal field showed that case law and civil law jurisdiction significantly differ regarding lawyers' roles and cost curves in trial procedures. The US and UK are case law jurisdictions that provide the backbone for the body of procedural preference research in the legal field. However, there is limited literature on procedural choices between trial and ADR in civil law jurisdictions. Germany and France are two examples of civil law systems. Research shows that decision-makers display inconsistent preferences. Fairness perceptions of process and outcome are more similar than previously thought.

c) Legal expert's intuitive procedural decision-making is only marginally discussed in the literature.

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The literature review of intuitive decision-making showed that decision-making can be analysed from three perspectives: the decision-maker, the task, and the environment. It is commonly understood that each decision carries an element of intuition. There is a difference between laymen's and expert intuition. Decision accuracy is higher with experts using their field knowledge and experience intuitively. Another common understanding is that feedback from acting on a decision feeds into the subsequent decision process, which produces dynamic linkages. Notably, it is still common in this research area to use experimental settings

d) The literature hardly discusses how trust affects advisors' procedural decision-making.

The literature review of trust concepts showed that probabilistic, behavioural, and psychological views on trust differ. The probabilistic view is that trust is a feeling of confidence in the probability of the behaviour of the other. The behavioural view is that trust is an expectation of the reciprocal behaviour between the trustor and the trustee. The psychological view is that trust is rather an emotional brain state. The probabilistic and behavioural views have in common that there is an interaction between at least two parties.

The psychological view is more closely related to self-confidence. The role of trust in a lawyer/client advisory relationship has been indirectly discussed in the literature in connection with clients' procedural choices. How trust affects advisors' decision-making is hardly addressed in the literature.

The summary of the different research fields shows the theoretical foundation for a lawyer-client advisory setting. How clients decide to go to trial or use an ADR procedure is well discussed in procedural preference research literature in the legal field. However, how lawyers as legal experts decide what procedure to recommend is theoretically hardly described.

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Especially the influence of expert intuition concerning cognitive analytical considerations and trust as an influencing factor on lawyers' recommendations has received marginal theoretical attention in the literature. Therefore, the following research questions must be answered.

- a) How do lawyers come up with procedural recommendations between trial and ADR?
- b) What are the different stages lawyers go through when recommending trial or ADR to their clients?
- c) Which policies do lawyers follow when coming up with a recommendation?
- d) What are the fundamental drivers of the decision process?

The next chapter shows how the findings from the literature review have been combined to theoretically develop a model focusing on lawyers' decision-making process to make a recommendation, fulfilling the first objective.

3 Theoretically derived Lawyer-Client Procedural Choice model

This study aims to develop a model of lawyers' procedural decision-making process. The first objective is to develop a theoretical model based on the current literature.

In this chapter, the current knowledge about lawyers' and clients' decision-making on procedural choices, as described in Chapter Two, will be integrated into a theoretically derived new Lawyer/Client-Procedural Choice model (L/C-PC model).

The model integrates the findings from decision-making in hierarchical teams, procedural preference research in the legal field, findings about intuitive decision-making, and trust concepts. The identified under-investigated areas regarding how lawyers generate procedural recommendations are incorporated as much as possible.

The new L/C-PC model is based on the JAS model (Sniezek & Buckley, 1995). Section 3.1 describes what the model aims to offer. Section 3.2 explains the parts of the model and how it is supposed to work. Section 3.3 marks the model's limitations and shortcomings. Finally, section 3,4 discusses the theoretical implications.

The purpose of the theoretically derived model is to guide the following empirical work.

3.1 What the model aims to offer

Being aware that human interaction is highly complex, models will always oversimplify the real world. Accepting this premise, the L/C-PC model aims to accomplish two things: Firstly, it describes the decision process lawyers go through when they develop procedural recommendations.

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Secondly, it includes expert intuition and a trusting working relationship as influencing factors in lawyers' decision-making. The L/C-PC model attempts to show the most natural course of action when procedural choices are made.

This chapter starts with an introduction to set the scene. The following section presents the propositions under which the schematic model has been developed. Before each part of the model is explained in detail (sections 3.2.4 to 3.2.7), definitions for the terms used are given (3.2.3). After it has been explained how the model works, its limitations and shortcomings are highlighted (3.3). The final sub-section (3.4) discusses theoretical implications as well as methodological considerations for the empirical part of this project.

3.2 Parts of the L/C-PC model explained.

3.2.1 Intro

The lawyer and client system as a team **(A)** includes two equal parts or sub-systems: A lawyer **(B)** and a client **(C)**.

When a client is seeking (paid) expert advice from a lawyer to decide to go to trial or use an alternative method, the description of the situation consists of at least three parts: the client, the lawyer, and both as a team. The three parts are different. The client and lawyer have permanent characteristics, performing intra- and interpersonal thinking and communication processes. As a team, both temporarily form a system using interpersonal communication processes. This temporal team is schematically represented as two circles, which overlap. The blue circle represents the lawyer, and the yellow circle the client. The two circles overlap. The green area overlap represents the interaction between the lawyer and the client in their procedural decision process. A magnifying lens schematically represents the green part, illustrating a “match-trust” mechanism in a three-step process.

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To distinguish systems and processes theoretically, Keren and Schul (2009) used the analogy of a computer system. While the process is the software, the system includes hardware and software. Since “processes can be viewed as observers’ description of the transformations linking an input state to an output state”, the same processes can run in different systems or on different informational contents. Applying this idea to the L/C-PC model means balancing contradictions that occur in all three parts (or systems) of different informational content.

Lawyers and clients have educationally and personally different informational content and contexts as experts and laypeople on the law. The team, as a temporal entity, has more or less of a history, a present, and more or less of a future. The relationship features a certain degree of trust at various points in time. This degree of trust is the third unique informational content to balance deliberate and intuitive cues.

3.2.2 Propositions and schematic model

The L/C-PC model assumes the following propositions:

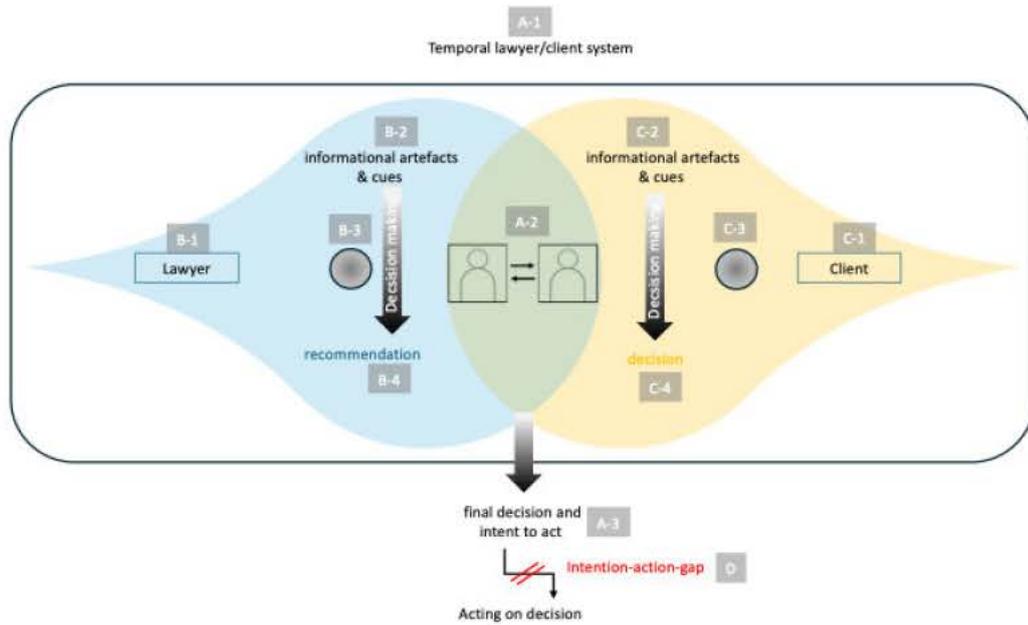
Proposition 1: The L/C-PC model assumes that trust influences JAS systems, procedural preferences, and intuitive decision-making.

Proposition 2: The process of matching judgments, decisions, and reasoning, followed by trust considerations when balancing contradictions, is universal to interactions.

Proposition 3: In most cases, balancing inter-personal contradictions occurs between a lawyer’s and a client’s judgments, decisions, and reasoning.

Figure 9 depicts the entire L/C-PC model.

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Magnifying lens of Building reciprocal trust through iterative feedback on judgment, decision, and reasoning

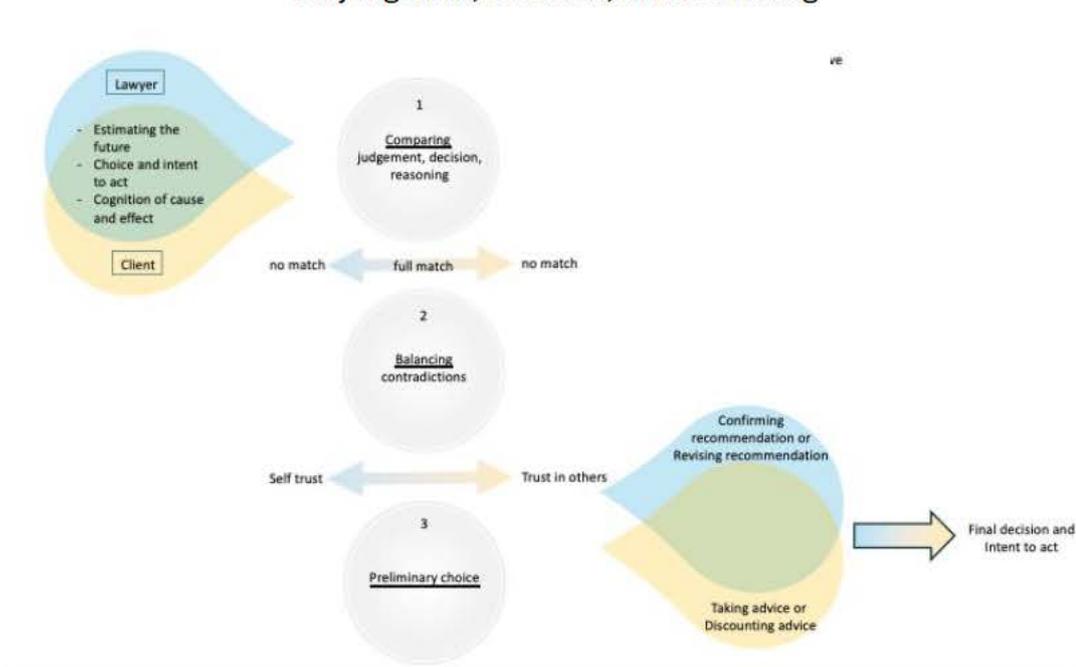


Figure 9: Lawyer/Client Procedural Choice Model

3.2.3 Definition of terms

The model includes several fuzzy terms that are used interchangeably in the literature.

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The following definitions have been chosen to clarify the model's meaning. The definitions are organised according to the flow of the literature review.

a) Judgment

The term is commonly characterised by evaluating and having an opinion about a situation or a thing. According to a literature review compiled by Blanchette and Richards (2010), judgment is “a process by which people cope with the ambiguity inherent in estimating the future.” This definition will be used for this project.

b) Decision-making

The term decision-making is often connected with having a choice between different options and the option to act or not act at all. Blanchette and Richards' review defines “Decision-making is the process of making a choice between different options and the intent to act on the decision”. As discussed in chapter 2.1, Mintzberg et al. (1976) included dynamic factors and defined decision-making as “a process as a set of actions and dynamic factors that begins with the identification of a stimulus for action and ends with a specific commitment to action.” Although the intent to act on a decision has received a lot of attention in the literature, for example, the phenomenon of an “intention-action-gap”. This project includes lawyers' recommendations in the definition of decision-making because the direct or indirect articulation of a procedural recommendation can be interpreted as acting on a decision.

c) Reasoning

The term reasoning is often characterised as justification. Blanchette and Richards' review defines “reasoning is the mental cognition of cause-and-effect relationships, either inductive or deductive” in nature. This definition will be used for this project.

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Decision-making, judgment, and reasoning are often summarised under the term problem-solving. Problem-solving strategies include, for example, trial and error, algorithms, and heuristics. All methods require judgments and decision-making as well as reasoning. Therefore, it is helpful to define judgments, decision-making, and reasoning separately while acknowledging that they are all interconnected. For the model, a possible combination of sequencing judgment, decision-making, reasoning, and parallel occurrence of the activities is assumed.

d) Conscious and pre-conscious cognitive processes

The concept of consciousness has been described in different terms with different meanings, depending on the discipline. For example, within neuroscience, different states of consciousness are associated with different brain wave patterns. Tracing brain waves shows the kind of electrical activity going on in different evolutionarily distinct brain regions. Scientists use an electroencephalograph, or EEG, to record these waves.

In this context, the states of conscious, pre-conscious and unconscious are used in the tradition of cognitive science, accepting the computational theory of mind and being cognitively unconscious when complex information processing in the brain is conducted without being aware of it.

The Oxford Dictionary defines it as “a person's awareness or perception of something. Following the contemporary idea that emotions play a crucial role in decision-making (Hassin et al., 2005; Wang et al., 2006), the L/C-PC model further works on the assumption that motivation and emotion are part of unconscious or pre-conscious cognitive thinking.

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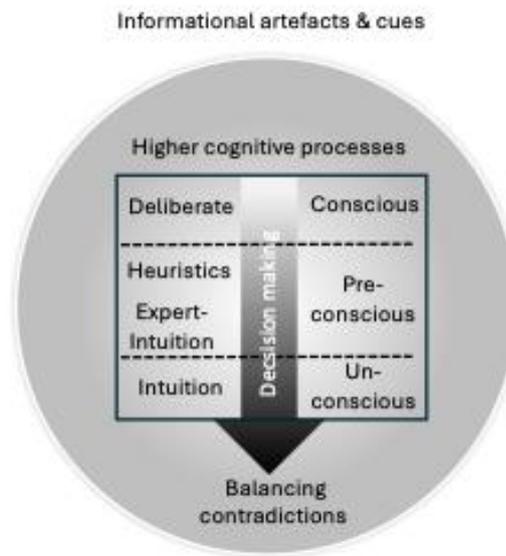


Figure 10:
Continuum of cognitive processes

The two states, from pre-conscious to unconscious, are meant to be on a continuum without a clear-cut point between them. Following the sceptics, Evans (2008) cited that “...the only firm foundation on which the various dual-process theories stand: There is one conscious working memory system and everything else.” The L/C-PC model does not describe the structure of how (many) processes are performed in which mode on the continuum from deliberate to intuitive thinking.

As discussed in section 2.3.2, for the L/C-PC model in accordance with most descriptions the dual approach is assumed in the context of an IPO process for the L/C-PC model, in accordance with most descriptions.

e) Heuristics

The terms heuristics and intuition are used interchangeably in the literature. As discussed in section 2.3.1, decision-makers use heuristics all the time (Kahneman, 2011). Heuristics are often described as mental shortcuts where decision-makers rely on presented data to make a conscious guess (Sinclair & Ashkanasy, 2005), or as a toolbox of intuition (Gigerenzer, 2023).

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Intuition for this project is defined as an IPO process that includes heuristics, memory, expertise, and implicit learning.

However, lawyers as legal experts might use their intuition in a specific way that is different from laypeople.

f) Expert intuition

As discussed in section 2.3.3, experts are knowledgeable in the sense of familiarity with factual information and theoretical concepts of a specific domain. They have competencies in the form of task-specific skills and the ability to perform these skills. The literature describes several mechanisms of how expert intuition is developed. For example, Salas et al. (2009) list eleven performance mechanisms, among them mental simulation, automaticity, feedback seeking, and situation assessment and problem representation. Findings from research about implicit learning (Evans, 2008) support the evidence that “people can acquire implicit knowledge, for example, to predict or control a complex system, without ever knowing an explicit rule that they could state.” The definition used in this project is that expert intuition is “a rapid generation of single decision options rooted in extensive domain-specific knowledge, pattern recognition and automaticity.”

The L/C-P/C model further assumes that there is transferable domain knowledge, which creates an expert-like intuition in similar domains. For example, a lawyer who is an expert in corporate law can probably transfer competencies easily to economic domains.

3.2.4 Part: (A1) The temporal lawyer/client judge-advisor-system

The rectangle **(A1)** depicts the L/C system as a temporal team. Former, current, and future lawyer-client explicit and implicit contracts govern the team. The team exists within the context of real-life situations.

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A permeable boundary allows the constant exchange of information about the issue with the social and factual environment.

The overlapping area of the two drop-shaped circles within the rectangle (**A2**) uses a magnifying lens to describe the process of iterative feedback on judgments, decisions, reasoning, and trust building.

The two grey arrows within the two drop-shaped circles depict the iterative process of incoming and outgoing information about judgments, decisions, and reasoning. The outgoing grey arrow depicts the end of the choice process. (**A3**) depicts the agreed final decision on which procedure to use (trial or ADR) and the intention to act. It is commonly known that people sometimes don't act on their decisions. The so-called intention-action gap is a well-described phenomenon in the literature. (**D**) depicts this scenario.

3.2.5 Part: (B) Sub-system lawyer (B1-B4)

The lawyer, as in one part, is represented by the blue left drop-shaped circle as an individual with a brain and five senses (**B1**). He can process informational artefacts and cues in various ways of thinking and perception, transforming inputs into judgments, reasoning, and decisions.

Informational artefacts (**B2**) are common data and the case story told by the client. Further artefacts of environmental circumstances are, for example, the jurisdiction, caseload of the appropriate court, and (changing) legal regulation. Artefacts in terms of form and timing of verbal and non-verbal communication occur inevitably in every case. As Watzlawick (1969) put it, there is no way of not communicating. The channel used (for example, personal, phone, written), the timing of contacts (chosen time for first communication, frequency, duration) and the appearance (for example, outfit, sober or under the influence of drugs, stress, or emotional influence) all send messages.

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The grey circle within the drop-shape depicts the various ways of processing input with higher cognitive abilities into judgments, decisions, and reasoning **(B3)**. The L/C-PC model adopts the idea of the school of researchers (Langley et al., 1995) who put deliberate to intuitive processes on a continuum. They take the view that deliberate intuitive processes occur in parallel. However, the L/C-PC model assumes these processes do not synchronise perfectly. The reason is that a process with a more significant amount of conscious processing is slower than a process with a more substantial amount of pre-conscious or unconscious processing.

This, in turn, leads to feedback loops among the parallel processes as an output of one process feeds as input into another. The L/C-PC model does not assume a specific dominance of either higher cognitive process regarding the activity of balancing contradiction.

The output of lawyers' decisions on what to recommend (B4), their judgment and reasoning, feeds as input into the iterative feedback area of judgments, reasoning, and decisions **(A2)**.

Following a standard approach in the literature of an input-process-output structure of a decision process (Betsch, 2008), the process part consists of two fundamentally different ways of working according to dual-system theories. The slower, deliberate step-by-step, causality-driven process of an iterative cause-effect-testing activity and the faster, intuitive, without conscious awareness, automatic pattern-matching instances.

The L/C system is shaped by the former, current, and future transformation of the incoming and outgoing information through the cognitive conscious and unconscious processes of the lawyer and the client, in particular **(A2)**, the iterative mutual feedback on judgments, reasoning, and decisions regarding the problem and the task of deciding to use either trial or ADR as a procedural choice.

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3.2.6 Part: (C) Sub-system client (C1-C4)

The (paid) advice-seeking client, as either a potential plaintiff or a defendant considering filing counterclaims, is represented by the right yellow drop-shaped circle **(C1)**. Individuals with a brain and five senses can process informational artefacts and cues in various ways of thinking and perception, transforming inputs into judgments, reasoning, and decisions.

Informational artefacts and cues **(C2)** are, for example, current data and the history of the problems that caused the conflict.

These are information about contractual relationships, cues from personal relationships with people involved in the issues, estimations of past, current, and future expected damages, information about organisations and people involved, claims, or about the solvency of the opponent and many more. Another source of informational artefacts is, for example, environmental circumstances such as the economic situation of the specific industry, (changing) labour law, or safety regulation. Other informational artefacts and cues stem from communication styles. It is impossible not to communicate, as Watzlawick (1969), Schulz von Thun and others put it. The communication channels preferred by the lawyer (personal, phone, written) and whether the lawyer runs a website or not are only two examples of non-verbal communication. A lawyer's appearance, dress, and emotional state are cues to the client.

The grey circle within the drop-shape (C3) depicts the various ways of processing all this input into judgments, decisions, and reasoning and their relationship. The L/C-PC model adopts the idea of the school of researchers (Langley et al., 1995) who put deliberate-to-intuitive processes on a continuum and believe that deliberate-to-intuitive processes occur in parallel. The L/C-PC model does not assume a specific dominance of either higher cognitive process regarding the activity of balancing contradiction.

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The output, as clients' (preliminary) decisions to go for trial or ADR (**C4**), as well as their judgment and reasoning, feeds as input into the iterative feedback area (**A2**). The feedback process stops when a final decision (**A3**) is reached.

3.2.7 Part: (A2) The magnifying lens – How the process works

The feedback area (**A2**) content is depicted in the magnifying lens.

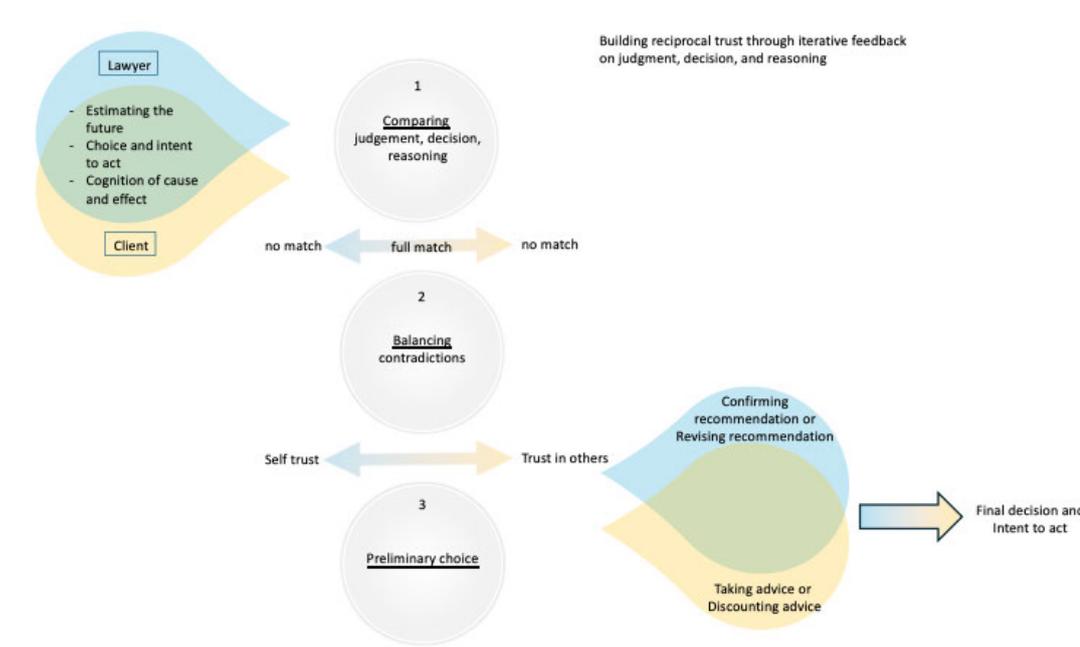


Figure 11:
L/C-PC model, magnifying lens

Lawyers and clients interact by communicating their recommendations and (preliminary) decisions, respectively. This communication is sensitive to many influencing factors.

The lawyers might use coded language and present their legal evaluation of the case as a reduction and abstraction of reality, which the client may or may not understand correctly. The coded language might also create a sense of power distance, which may, in turn, lead to a client's perception of a lawyer's greater expertise. Depending on the framing, for example, of a possible trial outcome, the lawyer might intuitively or inadvertently alter the client's preference.

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For example, the statement “No matter what the exact outcome of the trial will be, you as my client will finally see justice done according to the rule of law.” might bias a client to entirely rely on the works of the justice system and towards a trial procedure. In comparison, the statement “Although the rule of law means to produce consistent results for cases that are alike, the exact outcome of the trial will ultimately depend on the individual people involved.” might sow some doubt and bias a client’s decision against a trial procedure.

Framing effects produce predictable shifts in preferences (Tversky & Kahneman, 1981a). However, clients might discover that the perspective affects the relative attractiveness of options, which varies with the frame. This is posing another problem for the client. The susceptibility to the framing effect is complex since no one correct answer exists. The client, on the other hand, will communicate and frame his judgment, decision and reasoning more personally based on his individual preferences. For example, stressing more economic or social aspects of the case. Depending on which of the two has started to tell their judgment, decision, and reasoning, the others must reconcile the information with their judgment. The model allows for a full match, a complete contradiction, and all states in between on a continuum. In case of a full match, the choice to take or discount the advice is clear, and the process ends. All other cases create the need to balance the contradictions.

How balancing happens is a different question from if it happens. As described in section 2.1 of the literature review, there are various viewpoints on *how* contradictions are reconciled. Research considers simple averaging to be the standard psychological concept when people aggregate conflicting judgments. (Sniezek & Henry, 1989) However, in a dyad JAS setting, consolidation happens between the lawyer’s and the client’s assessment of the situation. Allowing for communication and feedback loops, the client and the lawyer get to know the reasoning for the decision and the judgments. They can both reflect and defend their position. With each additional feedback loop, both gain more insight into the other’s individual world of values, beliefs, and experiences.

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This leads to either a step-by-step convergence of the positions or, on the contrary, to a clearer distinction of positions.

Research generally accepts that the classic viewpoint of all-time rational decision-makers needs to be updated. The heuristic of simple averaging does not seem to be an appropriate method from a client's perspective. Since clients expect to bear the consequences of a bad decision, they do have a strong motivation to protect themselves from those (Josephs et al., 1992).

It is more about trust in how confident the client and the lawyer are in their judgments compared to the other's position.

Previous research has described several findings in which situations judges would be more likely to follow the advice given. A central theme is an advisor's confidence in his recommendation and how this confidence rating relates to his judgment accuracy. The L/C-PC model assumes that the confidence ratings of advisors and clients are on a continuum between being self-trusted and trusting others. For example, Price and Stone (2004) used the model of a confidence heuristic where clients use advisors' confidence ratings to decide. Clients rate cautious advisors less accurately than overconfident advisors, regardless of their accuracy. This aligns with the Harvey et al. (2000) findings that emphasised advice is more likely to be followed.

Other research includes common-sense findings, such as that trust is more important to clients than advisors and that the higher the clients' trust level in their advisors, the more likely it is that the advice will be followed. Interestingly, the following advice on trust comes with a higher confidence rating of clients in their final decision. (Sniezek & Van Swol, 2001). This could mean that once a client has decided to trust the advisor and follow his recommendation, it comes with positive feelings of relief and assurance that responsibility has partly been shifted.

Research suggests different processes through which clients might decide to trust their advisors.

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For example, when a client lacks previous knowledge, confidence and expertise, or the client rates the advisor high on trustworthiness. However, clients are less likely to follow the advice when they have made up their minds before receiving it (Sniezek & Buckley, 1995; Sniezek & Van Swol, 2001). It is a fair assumption that people who have unsuccessfully tried to resolve a conflict by themselves, for example, through negotiation, contact a lawyer with a mindset or pre-judgment that the next step is a court procedure. They seek legal advice to gauge the chance of winning a trial. Yet, there are instances where a client only seeks to understand their legal position to use this knowledge in further negotiations.

Lee and Dry (2006) show that people are sensitive to the accuracy and frequency of information when assessing the quality of their decisions.

They assume that in real-world scenarios, people trade the frequency of information (prescriptive advice is always given but could be more accurate) against the accuracy of information (prescriptive advice is almost never given but is almost always accurate when provided). The problem in real-world situations is often a) the length of the interval from deciding until the outcome is clear and b) the determination of what was the “right” or “wrong” decision. This is especially true when deciding between trial or using ADR. The length of both procedures is counted in months or even years. During this timeframe, people and circumstances develop, and memories distort. However, longstanding relationships between lawyers and clients are common in certain areas, for example, between organisations and law firms. Although the feedback circles are longer, the higher caseload provides a constant information flow about accuracy.

The process ends if the client or the lawyer fully trusts the accuracy of the other’s choice. It seems rather unlikely that clients entirely distrust their lawyer, or lawyers entirely distrust their client, since the client has chosen the lawyer in the first place, and the lawyer accepted the client and is getting paid.

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Nevertheless, considering the trust literature findings, the influence of developing trust through iterative feedback needs to be further investigated.

Summing up the description from the lawyer's perspective: Judging the case and coming up with a recommendation and reasoning will probably be done in part deliberately and intuitively. Comparing the recommendation, judgment, and reasoning with the client's judgment, decision, and reasoning will probably be done more deliberately. Determining the overall match between both will probably be done again deliberately and intuitively. While reflecting on the additional information that stems from clients, lawyers gain more insight into the clients' world, which helps to gauge the client's trustworthiness better.

The trade-off between the mismatch and trust in clients is a more intuitive process, with trust being a perception on a subconscious level.

3.3 Limitations of the model and its implications

The model's limitations, shortcomings, and implications are highlighted. The purpose is to show what needs to be considered when designing the empirical part of this project to refine the model.

As Keren and Schul (2009) proposed, dual-system theory researchers use different definitions of the theoretical concept, making it hard to comparatively evaluate findings. However, it has been given the utmost attention to make the L/C-PC model well-defined, thereby limiting the risk of conveying a false sense of understanding of human decision-making behaviour.

The elements of the model are considered the minimum number required to make sense and make it testable. Further details have yet to be included at this stage, accepting that oversimplification of complex inter-personal higher cognitive activities will inevitably lead to incomplete descriptions and projections and risk false interpretation of predictive power.

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Considering only dyads is a substantial simplification of real-world settings. Manifold iterative feedback loops create increasingly complex situations as more parties are involved. Strong simplifications are a starting point for a better understanding of some of the behaviour in procedural choices. The model does not work for defendants without counterclaims since there is no option for a procedural choice when the defendant must go along with the plaintiff's decision.

The L/C-PC model combines Evans' (2008) arbitrary categorisation of dual-process theories into three categories: reasoning, judgment and decision-making. Economists often investigate the concepts of judgment and decision-making, while the concepts of reasoning and social cognition have been studied in depth by psychologists and social scientists. Much literature is about how emotions influence judgment, decision-making, and reasoning.

Acknowledging that various brain structures are capable of rational and intuitive actions simultaneously, the scope of this work does not allow going deeper into psychological research to distinguish the different effects specific emotions have on judgment, decision-making and reasoning. Further, regarding the influence of pre-conscious processes that shape and contextualise deliberate reasoning and decision-making, the L/C-PC model is not concerned with the in-depth structure of how (many) processes are performed in which mode on the continuum from deliberate to intuitive thinking. More research from psychologists is necessary to better understand the different modes and structures of pre-conscious processes.

The literature describes several advice-giving factors in different settings. Feng et.al (Feng, 2009; Feng & MacGeorge, 2006) suggest that sequential moves of emotional support, problem inquiry, and analysis before giving advice will increase advice-taking. The L/C-PC model considers only estimation, cognition of cause and effect and choice before advice is given to go for trial or ADR.

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Accounting for emotional support and problem inquiry might considerably alter the view on the decision process.

Due to the limited scope of this project, the intention-action gap from a client's perspective is an important special topic that the L/C-PC model does not separately cover. The model needs a respective extension.

3.4 Discussion of theoretical implications and research questions

Aiming to develop a model of lawyers' procedural decision-making process, Chapter Two discussed findings from different research areas. A lot of research in the judgment and decision-making field is about the issues of correspondence (the judgment corresponds with empirical accuracy), coherence (the judgment is coherent with the values and beliefs of the decision-maker) and biases (systematically non-normative judgments in one direction). Gigerenzer et al. (1999) proposed: "One common argument is that, in real environments, the processes that lead to incoherence are sometimes best at achieving correspondence." In other words, what you feel is right will not get you the best utility outcome.

Researchers interpreting their findings with the judge-advisor paradigm seem to implicitly assume rational-behaving clients. However, clients' egocentric advice discounting and weighing strategies hint at intuitive decision-making, depending on the task and environmental factors. Thus, the L/C-PC model, which aims to describe a lawyer's decision-making process, accounts for intuitive decision-making.

Furthermore, research based on the JAS model as a theoretical foundation has been used to investigate the lawyer's decision-making process.

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Advisors have received comparatively little attention regarding their decision process, as discussed in section 2.1.3. Since advisors are experts in distinct environments, theoretical models should account for different settings. The L/C-PC model looks specifically at lawyers' procedural choices. While the agency model in a civil litigation context assigns the authority of procedural choices to the lawyer and substantive ones to the client, court rulings are inconsistent with this principle. For example, Siegel (1990) reports that, "As a result, courts often bind clients to settlement agreements to which they object, while relieving them of the prejudicial effects of their lawyer's procedural errors." (p.535). The author suggests that the agency model needs to be modified into a "reciprocal agency", a "joint venture" model, or an "informed consent model, "encouraging better lawyer-client communication. (p.536). Although these suggestions concern disputes between a lawyer and a client about the authority to make binding decisions during a court procedure, at least the idea of informed consent applies to the initial decision to go to trial or an ADR procedure.

However, in support of the agency model, Shestowsky (2018) found in her field studies about procedural preferences that litigants prefer third-party control over litigant control, yet want third-parties to control the process more than the outcome.

The L/C-PC model accounts for both findings, allowing the informed consent concept to match and balance decisions, judgments, and reasoning.

Research suggests that moral and ethical considerations influence procedural choices, as discussed in section 2.2.4. Yet, economic preference models have not captured this dimension. The L/C-PC model indirectly accounts for different beliefs by incorporating procedural and distributive fairness considerations through the iterative interaction process of exchanging judgments, reasoning, and decision-making.

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One contributing factor to the rational decision-maker assumption could be that most of the research has been done in laboratory experimental settings that did not allow for social interaction between advisor and client. Giving advice in the form of a procedural recommendation and making a decision to go for trial or use an ADR process is an intra-personal as well as an inter-personal process. This is true for both the client and the advisor, in which contradictions of intuitive and rational impulses need to be balanced.

Key findings from procedural justice literature underscore the need to investigate social interaction between lawyers and clients further regarding procedural choices. The discrepancy between (changing) preferences and choice is well documented in common law jurisdictions, as discussed in section 2.2.2. Further, as suggested in section 2.4, the interactive process of judging, deciding, and reasoning between lawyer and client in a temporal relationship requires trust. Explicitly accounting for trust as an influencing factor within the L/C-PC model offers a new perspective to explain procedural choices.

Besides experimental studies in laboratory settings, field studies with actual plaintiffs have produced evidence that lawyers' advice and procedural costs are the most stable criteria litigants use ex-ante and ex-post to evaluate procedures, as discussed in section 2.2.3.

Since cost curves and lawyers' responsibilities are fundamentally different in case law and civil law jurisdictions, investigating procedural choices in civil law jurisdictions would complete the picture of today's overwhelming investigation in common law jurisdictions. Thus, the theoretically developed L/C-PC model will be refined according to empirical research among German lawyers in a civil jurisdiction environment.

The focus of this study is to explore the interactive procedural decision process in lawyer-client dyads from a lawyer's perspective. The presented Lawyer/Client Procedural Choice model describes what theory suggests about how lawyers make procedural recommendations.

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Empirical testing is necessary to refine the model. The next chapter details the methodology and methods that have been employed to answer the research question of how lawyers decide what is in the best interest of their clients—going to trial or using the ADR procedure.

4 Methodology and Methods

In Chapter Three, the decision process by which lawyers develop procedural recommendations is described in the form of a theoretically derived L/C-PC model, thus fulfilling the first objective of this study to reach the aim of creating a new model of lawyers' procedural decision-making process. The model includes trust, confidence ratings, estimation of future outcomes, and intuitive decision-making as influencing factors on procedural choices.

One way to refine and support a theoretical concept is to validate it with empirical data. This chapter outlines the methodology and methods that have been applied to create a new body of data. The focus is on how lawyers decide what is in the best interests of their clients—going to trial or using an ADR procedure.

In line with chapters two and three, this chapter will introduce critical realism as the underlying philosophy in the first sub-section 4.1. Critical realism has been chosen to provide a new perspective on legal decision-making. The judicial system consists of laws, rules, codification, institutions and agents. In a civil law jurisdiction, lawyers use a rational approach to subsume real-life situations under existing laws and regulations. They don't think of what is, from a critical realist perspective. The very nuanced and specific way to analyse data allows a researcher to look detached from events into the broader context of law, examining how the environment, e.g. a client's mandate or the settings of the case, influences policies and observable events. A limitation of this approach is that the results do not provide an objective account of a lawyer's procedural decision-making, unlike Eisenberg and Lanvers (2009) in their post-positivist approach.

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A constructivist or interpretivist approach might provide deeper insights into lawyers' procedural decision-making by constructing narratives about cases and clients shaped by a lawyer's professional identity and values (Blake 1012). However, a critical realist approach offers new fine-grained insights into lawyers' narratives and decision-making processes, which justifies accepting the limitations.

Section 4.2 will describe the methods applied to follow an exploratory, inductive approach, performing qualitative analysis. The research and sampling strategy will be outlined, as well as how a semi-structured interview schedule has been developed. A description of the analytical plan and how thematic analysis techniques have been applied concludes this chapter.

4.1 Methodology: Critical Realism

A critical realism approach is uncommon in social-legal research, yet it is relatively popular in other social science disciplines like sociology and education. Legal scholars who used the ideas of critical realism in analysing legal decision making did not use its philosophical commitments to uncover unseen structures and generative mechanisms to shape decisions (e.g. Lazarev, V.V. (2018), Frydrych, D. (2023), Funnell, R. (2008))

The philosophy of natural science traditionally follows a positivistic approach with clear ontological positions. Natural science is based on the idea of objectivity and neutrality through the use of scientific methods. Researchers pursue establishing general laws through value-free empirical work. Research objects, things and forces are often described in mathematical terms.

Positivist paradigms rely on recording and measuring data. The records contain data derived from our five senses that can be observed directly, as well as indirectly observed data from people's self-reported perceptions of phenomena.

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The key element of measurement requires clearly determined variables as part of a concept or theory, as a scale to measure against. Since there are currently no established variables or concepts for lawyers' procedural decision-making to measure a phenomenon against, a strict positivist paradigm is not appropriate for this study.

However, the social realm is more heterogeneous than natural science. The social world includes social behaviour, institutions, culture, economics, beliefs, practices, and the like. In the literature, the regularly discussed dimensions of research philosophy are about the role of language and symbols, the nature of observations and explanations, micro versus macro and quantitative versus qualitative approaches. As opposed to positivist philosophies, the widely used philosophy of social constructivism in social research has an epistemological and methodological focus, emphasising language and culture.

Constructivist paradigms are at the opposite side of philosophical positions. The basic assumption that every individual constructs his or her own world in every moment of time produces infinite worlds in which this phenomenon occurs. Each of these worlds requires individual interpretation. However, aiming to develop a normative model requires analytical or statistical generalisation. A primarily descriptive account and a "fluid" interpretation of an individual's perception about a single phenomenon do not allow for generalising findings for a group of people. Therefore, a strict constructivist paradigm is not appropriate for this study either.

Critical realism takes the middle ground between positivist and constructivist approaches. The essential thesis of this philosophy is that the truth or the real world can never be fully known. However, ongoing "dialectical exchange between theory, observation, and experimental practice" provides a "standard by which truth claims can be assessed." The standard of what is true or real can be categorised into two modalities. Things can either be possibly true or real, or necessarily true or real.

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The contingent category of truth suggests that something is true in my world and worlds similar to mine, yet it might be otherwise in worlds substantially different from mine. The transworldly category of necessarily true or real applies, for example, to areas of logic and math. The results presented in Chapter Five about the drivers of a lawyer's decision process clearly belong in the first category. Since theorising on both epistemological and ontological positions, critical realists claim that social science is more than empirical work; it is fundamentally theoretical. As this project is about theorising to develop a model of lawyers' procedural decision-making, critical realism is a suitable philosophical position to take.

A central idea of critical realism is to distinguish between the knower, referring to epistemology, and the knowledge that can be acquired, referring to ontology. While this differentiation is well established in literature, the question of what and how knowledge can be acquired is a matter of debate among scholars of different philosophical schools. Each philosophy makes assumptions about reality or "what is" and how we can know about it. This project is about theorising how lawyers reach a procedural recommendation and what drives this decision process. As there is not much known about the process, one first needs to gain empirical knowledge through observation to learn how lawyers experience the consulting process. Next, one must understand how mechanisms in the form of policies lawyers follow are reflected in their actions and decision-making. Finally, one must judge what drivers cause lawyers to adopt these policies and fundamentally drive the decision process. Therefore, a multi-layered approach, as displayed in critical realists' ontological dimensions, is needed. The different layers are described in the next section 4.1.1.

The philosophy of critical realism is closely associated with the work of British philosopher Roy Bhaskar, who died in 2014. His key work, "A Realist Theory of Science" (Bhaskar, 1975), is based on the philosophy of natural science. In his work, Bhaskar proposed "transcendental realism" to be employed in social science.

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The core notion of realism in all forms holds that knowledgeable “things” like, for example, attitudes or perceptions, are relatively or absolutely independent from us knowing about them. The transcendental dimension means that knowledge can be inferred. In his following important work, “Possibility of Naturalism” (Bhaskar, 1979), he combined “transcendental realism” and “critical naturalism” into “critical realism”.

In transcendental realism, knowledge arises from human activities in scientific experiments and applications. Critical naturalism incorporates human intentionality through the mind and agency as sources for developing derivatives. The term "critical" refers to explanatory critique, which involves transcendental and dialectical arguments. Critical arguments can be presented in two dimensions: the intransitive dimension criticises the process itself, while the transitive dimension aims to express the process in thought. The process of acquiring knowledge about the fundamental drivers behind a lawyer’s procedural recommendations and decision-making is detailed in sections 4.2, 4.3, and 4.4.

A second, generally accepted critique of social science inquiry is the absence of decisive test situations. This critique is accepted for this project as well. Human discourse and a person’s reflexivity ask for a distinction between real reasons, which are more or less unconscious motivations like wants and beliefs, and reasons that are ideologically constructed or reasons that are rationalisations. The L/C-PC model and the revised version called ANT Recommendation model, which is presented in chapter 5, account for the aspect of conscious and intuitive reasoning, however, only in a general sense. The inquiry situation of this project has been unique. Even if the same participants were interviewed again, the test results would be different in detail. However, the ANT model (see chapter 5.2.3) that has been developed is ready to be tested and refined as needed through, for example, quantitative or experimental approaches with better-controlled test situations.

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In his later work, Bhaskar took a “dialectical turn” (Bhaskar, 1993), reflecting on Marxism, focusing on the next phase of practical social research and finally on Far Eastern philosophies, the “Philosophy of Meta Reality” (Bhaskar, 2012). Although Bhaskar added a new dimension to knowledge in his work on Meta Reality, this project sticks to the three initially proposed ontological levels. Other key authors of critical realism are Andrew Sayer and Margret Archer. Sayer (2004) worked in the field of geography on the term “space”, and Archer (1996), as a sociologist, worked on topics of structure, agency, and culture. More nuanced versions are available as the field of critical realism research is evolving.

However, all the value-based methodology of critical realism draws criticism from other scholars, arguing that it is damaging to scientific empirical research, because the results are dependent on the individual belief and value system of the human knowers. Results are not reproducible, delivering the same results in a narrow sense, since people and environments evolve constantly. Another point of critique is that critical realism claims to be a post-positivist science philosophy. Thus, claiming to declare the nature and structure of scientific knowledge instead of knowledge about the scientific objects of inquiry. This includes the claim that no one can possess direct knowledge of “the real”. The critique can be refuted by problematizing the ontological presentation. For example, it is a matter of discussion whether the self-constraint of a lawyer to stick to a field of expertise is a policy and therefore knowledge on an actual level or knowledge on a real level if the behaviour is seen as a representation of capitalism at work.

In summary, social science wants to understand what things exist and how these things behave in the social world. Therefore, it is important to explain the epistemological and ontological position the researcher has taken in designing the research methods to clarify prejudices and biases.

As described in section 4.1.1 in more detail, Bhaskar argues that knowledge can be acquired on three partially overlapping dimensions.

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The empirical, the actual and the real. However, other researchers suggest that a more fine-grained differentiation is needed. For example, Brunson et al. (2023) argue that an ecological approach in critical realism sees the world and what can be known about it as more than three-dimensional. The ecological approach suggests that social environments consist of interconnected parts, where people and events must be considered in context. Under this approach, the “intentional and meaning-based nature of human action and social relationships” links entities within “complex, dynamic and cyclical interrelationships”. Yet, the description of the different dimensions in this approach is general, broad, and overlapping. The overlap is true for Bhaskar’s three dimensions as well.

For example, policies lawyers follow when making a decision can be assigned to an empirical level in case lawyers mention that they are “sticking to their field of expertise” explicitly when accepting a client’s case. Or the policy “Sticking to fields of expertise” can be found as a consistent pattern when different participants describe their considerations to accept a client. However, in both scenarios, a policy is an abstraction of actual behaviour. Thus, for this project, policies are assigned to the actual level in Bhaskar’s stratification model.

The phenomenon of interest in this study is “a lawyer’s decision to recommend trial or ADR to a client”. As mentioned before, the lawyer’s decision-making is a mental activity which, for social scientists, is accessible through self-reporting. The data collection must come from lawyers’ self-reporting their perceptions. The clearly defined phenomenon occurs frequently, thus allowing for analytical generalisation. However, the self-reporting of individually constructed perceived decision processes requires room for a range of interpretations. Critical realism covers both requirements – allowing for analytical generalisation and acknowledging “fluid” interpretations. The following two sub-sections are based on Bhaskar’s early work.

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4.1.1 The ontological position

How to stratify knowledge and how to define actual knowledge are controversially discussed in literature. As developed by Bhaskar (1975), both positivist empirical realism and constructivist transcendental idealism are criticised. Critical realists argue that what can be known needs to be derived from combining objective and subjective accounts of phenomena, rather than relying solely on one or both positions. This “realistic” philosophy accepts, on the one hand, the objective side of knowledge about what can be known and, on the other hand, the subjective side of knowledge, hence allowing for individually constructed perceptions of a phenomenon.

Two ontological assumptions built the core of critical realism. Firstly, things exist apart from experience and the knowledge of these experiences. Secondly, there is a structured and differentiated account of reality.

According to Bhaskar, reality exists in three overlapping levels: firstly, the empirical with observed and experienced events, secondly, the actual with unobserved and observed non-events, and thirdly, the real as mechanisms which are structures with enduring properties. Since data have different characteristics depending on their source, these characteristics are used to assign data points to one of the three levels. However, the categorisation of data points is debatable. The overlap between levels includes the idea of data progressing from the inner to the outer circle and vice versa.

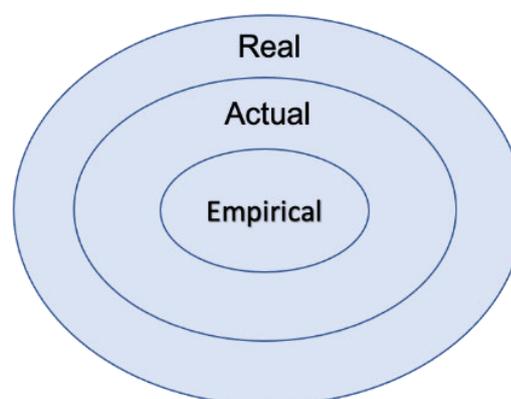


Figure 12:
Stratification model of ontological dimensions (Bhaskar, 1975)

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In this study, lawyers are the “social objects”. The empirical data collected consists of what the lawyers know and understand when they construct the world from their individual perspectives and experiences. The source is the lawyer as the “knower”. The characteristics of this data are, for example, individual perceptions, retrieved memories, oral or written accounts. Oral data stems from interviews, written accounts, for example, from client briefs written by the lawyer or other documents from lawyers’ files or other office files. While written accounts are a stable source, lawyers reflect during the discourse in an interview situation. A lawyer might perceive how he/she decided which procedure to recommend to his/her client differently at the beginning of the interview compared to the end due to reflection about the issue while being asked about the decision process in detail.

Data on the actual level is derived from the researchers’ observation and interpretation of empirical data. Characteristics of data are readings between the lines, inferred principles, inferred belief- and value systems of the lawyer. For example, a lawyers’ principle to consider revenue options first or believing in continuous learning and customer loyalty.

An example for a non-events, which literally is an anticipated event that does not occur, is the principle of legal subsumption. It is a specific principle lawyers are trained to use to determine the merits of a case from a legal perspective. It means in civil law jurisdictions that a lawyer tries to subsume a case under specific legal norms. The empirical data might hold this principle explicitly expressed by the lawyer. It might need the interpretation of the researcher, identifying the single steps required to subsume a client’s claim expressed by the lawyer, to observe the principle.

Analyzing and interpreting the data from the previous two levels allows the researcher to identify mechanisms and enduring components of lawyer’s decision-making. These underlying drivers of the decision-process constitute the real in Bhaskar’s stratification model.

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This real data consists of enduring relationships between concepts and principles. The source is the researcher, relating cross-case patterns of identified principles and concepts from the actual level to one another. Real data consists of stable relationships between variables rooted in empirical data in conjunction with identified principles and concepts from the actual level. Characteristics include cause and effect chains and processes like in a lawyer's decision model for procedural recommendations.

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Table 2:
Summary of data description on three levels of reality

Level/Data	Data scope	Data characteristics	Source of data "Knower"	Examples
Empirical	Experiences and observations	Retrieved memories, individual perceptions of the phenomenon, oral or written accounts, transitory accounts	The lawyer	Description of interaction with a client, client briefs, description of decision process
Actual	Events and regularities	Explicitly expressed and/or inferred principles and concepts	Empirical data and researcher as interpreter	Policies lawyers follow, applying legal techniques
Real	Mechanisms and structure	Cross-case patterns of principles and concepts, cause-effect chains, processes	The researcher as interpreter	Lawyer's procedural recommendation decision model

A critical realists' approach in this study leads to analytical generalizations about **what** can be known by determining the mechanisms and properties of lawyer's decision-making. A critical realist's conclusion is that unobservable structures cause observable events. One starting point to find out about these structures is to investigate observable events. The next section will address **how** we can achieve this insight.

4.1.2 The epistemological position

Critical realism assumes that reality functions without people being aware of or knowing it. The notion is that observable events materialize because of and according to unobservable real, fluid, internal mechanism and drivers.

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Bhaskar (2014) calls this “reduction of reality to our knowledge of reality” an epistemic fallacy. If we cannot imagine the unknown real world, the knower must rely on assumptions inferred from empirical and actual knowledge.

This study is about “a lawyers’ decision to recommend trial or ADR to a client”. Thus, the lawyer is the “knower” because he/she is experiencing the decision process in a real-world setting. The knowledge about the decision process needs to come from lawyers’ self-reporting. Lawyers’ reports of real-world experiences about how they interacted with their clients and perceived the decision process are the source of empirical data. When lawyers talk about, for example, client’s attitudes towards ADR procedures he/she infers that value as long as the client doesn’t mention it explicitly.

Once a lawyer has shared his/her experiences with the researcher, the researcher can analyse and interpret what the lawyer said. How the data collection, analysis and interpretation process has been designed according to a critical realist’s position, is laid out in section 4.3 in detail. Written accounts, for example, client’s briefs etc. have not been available in this study due to lawyer’s concerns regarding German data-protection regulation. In addition to the interview data, researcher’s field notes can be analysed and interpreted as well. When the researcher creates field notes that are linked to lawyers’ accounts, it is important to document the reflection process to show how these field notes and lawyers’ accounts relate to the analysis results. The analysis and interpretation of empirical data create data on the actual level.

Collecting empirical data from several lawyers allows to search for patterns of principles and concepts that occur across cases. Generalizing these findings in a theory building process creates data on a real level. However, allowing the researcher to create real data by interpreting patterns of principles and concepts, makes the real data dependent on the researcher as the “knower” and his/her knowledge of the real. Thus, the same critique about reflexivity, prejudice and biases apply to the researcher as well.

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4.2 Methods

This section starts presenting the research strategy and how this strategy fits with a critical realist's position. The following subsection 4.2.2 elaborates on the theoretical foundation of the chosen sampling strategy and practical considerations.

Section 4.3 presents the reasoning for the chosen interview schedule before section 4.4 describes the analytical plan.

4.2.1 Research strategy

The proposed research questions are the starting point to design a coherent framework for collecting and analyzing data. Asking **how** lawyers act and decide in the context of procedural recommendations for trial or ADR indicates that deep insight into complex and dynamic processes is needed. Observing the decision process through lawyer's self-reporting produces empirical data as a baseline to look for patterns on policies on a higher abstraction level.

As described in chapter two, procedural preference research in JAS (Judge-Advisor-System) settings has so far focused on the client's perspective and their decision-making process. Since there are hardly any studies on German lawyer's procedural decision-making, it is not feasible to conduct meaningful meta-studies. Therefore, it is necessary to collect a body of new data. A non-experimental explorative field study design has been chosen in contrary to the common experimental settings to study lawyer's real life decision behavior. As described in section 4.1, a critical realist's position is well accepted in the literature to investigate complex social settings which a lawyer's counseling process represents. However, investigating a decision process through a critical realist's lens is rather uncommon. Therefore, section 4.3 (data collection) and section 4.4 (Analytical plan) will demonstrate specifically how the methods relate to a critical realist's position. Owing to time constraints, the data collection is performed in a cross-sectional approach.

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To decide if this project is best to be placed on a micro or macro level, the lawyer as the “knower” needs to be clearly defined. There are at least two ways to understand what a lawyer within a society represents. Firstly, a lawyer is an individual citizen taking on a specific professional role. Secondly, a lawyer is a concept or institution within the judicial system. The pivotal difference between the two definitions of a lawyer is about regulating or understanding behavior.

Law aims to regulate human behavior by studying the relationship between the world of law and the world law tries to govern. Whereas behavioral science aims to better understand human behavior and the driving forces behind it. This project is about better understanding individual human behavior.

Investigating groups of individual lawyers would place this study on a meso level. In Germany there are federal professional associations of lawyers like the National Bar Federation of Lawyers (BRAK, Bundesrechtsanwaltskammer), or regional bar association (Rechtsanwaltskammern der Länder und Bezirke) which could be investigated. Besides geographically organized association there are groups of lawyers according to specific fields of law, for example, criminal defense attorneys, or white-collar crime defense attorneys. An interesting partially organized group of lawyers for this project, are those lawyers who are certified mediators. Investigating lawyers as a group requires exploring group decision-making. Group decision-making is a very interesting but separate research field from individual decision-making. This project is about developing a normative model about the individual decision process of a lawyer regarding procedural choices. And therefore, investigating group decision-making is out of the scope of this study. Thus, this study is based on a micro level.

4.2.2 Sampling

Theoretical and practical aspects have been considered to decide how to choose the right participants to provide the data needed to answer the proposed research questions.

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The following two sub-sections explain the theoretical foundation of sampling strategies and the practicalities of implementing theoretical considerations.

4.2.2.1 Theoretical foundation

This study aims to create a new theoretical model. Therefore, selecting participants who predict contrasting results for theoretical reasons is necessary to argue for the validity of a new model (Strauss & Corbin, 1998).

Contrasting results are framed as a choice from the set of “trial” or “ADR” as a procedural recommendation. The working assumption is that lawyers who are mediators are more likely to discuss ADR as procedural options with their clients than those lawyers who are not trained in ADR procedure. ADR trained lawyers are maybe more comfortable to consult their clients during ADR procedures.

Aiming to purposively select participants for their revelatory power will provide rich and relevant data to develop a new model. Yet, purposive sampling, as opposed to probability sampling, always comes with selection bias. Being transparent as far as possible about selection criteria helps make the results more reliable in a certain biased group of participants.

The strategy to use purposive snowball sampling served the theoretical purpose. The initial participants have been asked to refer to people who meet the sampling criteria. Although this strategy is subject to network biases, it increases the relevance of the sample.

The sampling criteria in this project have been:

- a) Mandatory: German licensed lawyers with at least 15 years of professional practice,

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- b) Mandatory: Lawyers specialising in one or more of the five following fields of law:
 - a. Inheritance law
 - b. Family law
 - c. Labour law
 - d. Insolvency law
 - e. Commercial/contract law
- c) Optional: Lawyers who are additionally licensed as ADR / mediator professionals.

The reasoning for the chosen criteria:

- a) Highly experienced lawyers had the chance to develop expert intuition regarding their procedural choices. The role of conscious and intuitive decision-making in lawyers' procedural choices is one focus in this study.
- b) Within the ADR community, these five fields of law are said to be generally more ADR prone than, for example, tax law or traffic law. To find data with revelatory power, cases which are not clear-cut trials or ADR decisions are of special interest.
- c) A working assumption in this study is that lawyers in ADR prone fields are likely to engage with their clients in discussions about different procedural options. Comparing two sub-sets of results will give first insights about the differences in the decision process to reach procedural recommendations between ADR trained and not-ADR trained lawyers.

Yet despite having specific fields of law on their letterheads, lawyers usually take all kinds of clients. And on the other hand, lawyers without such a certified specialisation also serve clients in ADR prone fields. This means it is hard to predict from a lawyer's website or letterhead if he/she is likely to discuss procedural options with their clients or not meaningfully.

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Besides specialisations in particular areas of law, being a certified mediator is another criterion that could be used to determine if a lawyer is likely to discuss procedural options with a client openly. However, a majority of lawyers with the additional qualification of being a mediator have never been active in this field or consider it flatlined (Ziekow et al., 2017, p. 124).

Yet they have at least a theoretical knowledge of different ADR procedures and what those options include, enabling them to discuss procedural options with their clients.

Identifying lawyers who will report about cases that have revelatory power about the decision process to come up with a procedural recommendation is not as straightforward as it seems. Two strategies to find sufficient cases that provide relevant data are compared: Firstly, selecting participants who are personally known to discuss procedural options with their clients is one approach. Secondly, selecting participants from official online registers of mediators is another method. This approach assumes that mediators who pay for being registered and actively advertise their services are likely to discuss procedural options with their clients.

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4.2.2.2 Practical considerations

Generally, all lawyers perform, cognitively and/or intuitively, a decision process to come up with a procedural recommendation. They have first-hand knowledge of the phenomenon under investigation - a procedural recommendation after evaluating the case matter and options to go for trial or use ADR procedures.

The advantage of the first strategy is the easy access to participants and their willingness to engage in the study. Starting with personally known lawyers and continuing with snowball sampling introduced more biases. Interviewed participants provided several new leads. Only those that met the selection criteria and were likely to add breadth and depth to the data were considered and contacted.

All participants recruited are based in the wider Hannover area. This will introduce a geographical bias. Further, all participants are white women and men without a foreign cultural background. All have been educated in Germany. Most participants work in small and mid-sized law firms as partners, and some are in private practice. They overwhelmingly serve German clients without cross-border conflicts. The homogeneity of the group of participants will highlight the decision behaviour for this segment of lawyers. It remains to be seen to what extent the results are applicable to a more heterogeneous group of lawyers.

The selected potential participants received an invitation letter and an information sheet. Follow-up phone calls provided more context and answered additional questions. Informing participants included clarification that the interviewer is not a co-legal expert.

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Table 3:
Sequence of snowballing sampling

No.	Participant Alias	Interview Date	File No.	Audio length in min.	Field of law specialisation	Certified mediator	Years of experience	Status of employment
1	Adam	17.01.22	54	00:21:43	insolvency, building, notary	yes	senior	partner in small law firm
2	Bees	25.01.22	56	00:27:31	family	yes	senior	employed & private practice
3	Carl	27.01.22	57	00:47:24	insolvency	no	senior	partner in small law firm
4	Doug	02.02.22	58	00:28:42	contract law	yes	senior	partner in small law firm
5	Ella	08.02.22	59	00:38:58	family	yes	senior	private practice
6	Fred	11.02.22	60	00:45:38	labor	yes	senior	partner in small law firm
7	Gert	15.02.22	61	00:42:44	family	yes	senior	partner in small law firm
8	Henk	23.02.22	62	00:59:20	family, labor	yes	senior	partner in small law firm
9	Inga	01.03.22	67	00:31:39	family, travel/hospitality	no	senior	employed & private practice
10	Jana	02.03.22	68	00:43:00	contract law	yes	senior	partner in small law firm
11	Kurt	24.03.22	68	00:51:21	contract law	no	senior	partner in small law firm
12	Lina	25.03.22	69	00:44:42	inheritance	no	senior	partner in small law firm
13	Olaf	28.03.22	70	00:37:26	contract law	no	senior	partner in small law firm
14	Miro	21.04.22	72	00:34:49	labor	no	senior	partner in small law firm
15	Nele	04.04.22	71	01:01:19	inheritance	no	senior	employed
16	Rosa	22.04.22	74	01:13:18	inheritance	no	senior	partner in small law firm
17	Quila	21.04.22	73	00:31:05	insolvency	no	senior	partner in small law firm
18	Sven	23.04.22	75	01:42:25	labor	no	senior	employed

Total
Avg. 19:44:52
00:45:48

senior >20 years
small law firms < 10 partners

The interview procedure is described in detail in the next section.

4.3 Data collection

Following the sample selection based on theoretical and practical considerations, the first sub-section describes how the interview schedule has been designed, and a new body of data has been created by conducting 18 semi-structured interviews with highly experienced German lawyers. In relation to a critical realist's position, the initial data collection aims mainly to produce empirical data through documentation of observable behaviour. Thus, the interview questions must relate to the different abstraction levels of empirical and actual data points.

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According to the theoretical concept of purposive sampling described in section 4.2.2.1, it is important to determine the point of saturation. Sub-section 4.3.2 will explain when the point of saturation has been reached.

4.3.1 Semi-structured interviews

In comparison to unstructured narrative interviews, a semi-structured interview approach allows for keeping the focus on topics of interest. Eliciting relevant data through subjective responses from a person, a guiding structure potentially reduces the number of participants that need to be interviewed until saturation is reached.

The semi-structured interview schedule for this project has been developed following the techniques proposed by Galletta and Cross (2013). These techniques have been applied from a critical realist's position, asking first about factual circumstances and observations, before "How" questions led to collecting data about causal explanations.

Asking only six questions during the interview can restrict the data collection. Maintaining such a narrow focus might have resulted in missing relevant topics that could have enhanced understanding of a lawyer's decision-making process. However, open-ended questions allow participants to freely introduce new topics that seem relevant to them.

Participants have been prompted to reflect on their decision process, influencing factors and their interaction with clients during the interview. This approach has been chosen in contrast to Brönnimann (2021), who suggests that a "critical realist inquiry framework" is composed of two consecutive interviews to explore change in processes through interaction and conditioning. However, this project aims to attain ontological knowledge about a decision process that is currently missing.

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While lawyers self-report about their decision process, how they come up with recommendations, and about their discussion of procedural options with their clients, they are free to respond to open-ended questions. The role of the researcher includes keeping the focus broadly on the recommendation process to answer the research questions. The combination of lawyers introducing new topics and the researcher's role to keep the focus on the areas of interest constitutes the semi-structured aspect of the method. Bartholomew et al. (2000) argue that this unique technique "... allows us to go beyond the participants' words and thoughts and capture the psychological process that might be at work." The psychological processes in this study are, for example, that lawyers underpin the recommendation process with principles and policies to fulfil expectations, for example, through adherence to professional norms.

The development of the questions is based on common knowledge about the lawyer's recommendation process to a client. This knowledge provides the framework and structure of the schedule.

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Table 4:
Interview questions & respective ontological level of knowledge

No.	structure	topic	question	data level
0	intro/ warm up	housekeeping Can you please confirm with a “yes” your consent to the recording?	
1	main body	demographics	What types of clients do you serve?	empirical, factual
2	main body	attitude	What are your views on trial versus ADR?	empirical, opinion
3	main body	decision-making	To make sure that I understand the process correctly, can you think about a case in which you discussed procedural options with your client? Thinking now of the situation when you decided what to recommend, tell me about your actions starting at the beginning till the end.	mainly empirical, factual
4	main body	influencing factors	What are the factors you consider before making a recommendation?	mainly empirical, factual
5	main body	principles/policies	What principles or policies led you to this approach?	rather actual, opinion
6	closure	debrief	Is there anything you would like to add?	empirical/ actual

To create flow, the **first question** is about the type of clients the lawyer typically advises. The answers produce empirical data about lawyers' interaction with their clients.

The **second question** asks about participants' attitudes towards ADR procedures in general. The question was meant to prepare participants' thinking for the next question.

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The **third question** digs deeper into the advice-giving situation. Attempting to slow down and focus on the participant to recall a specific situation, inviting the participant to tell a story about how he/she has come up with a recommendation.

The **fourth question** asks the lawyer to reflect on internal information processing and influencing factors. The answers produce actual data explicitly; otherwise, they are more empirical data that the researcher interprets into actual data later during the analysis.

The **fifth question** digs deeper and looks for awareness of policies and principles that underpinned the decision to recommend trial or ADR. The answers again produce actual data explicitly; otherwise, more empirical data was interpreted by the researcher into actual data later during the analysis. The difference between the third and fourth questions is that the fourth question asks for data on an even higher level of abstraction in the form of policies or principles applied when deciding what procedure to recommend.

Since we are not all used to dissecting our behaviour and decision-making in everyday life to such a deep level, it might be difficult to remember fully and accurately what was driving the decision. This might strain the participants or leave them slightly frustrated. To debrief the interview situation and cool down to reflect on the state of mind, a common **last question**, “Is there something you would like to add?” will close the conversation.

Two pilot interviews have been used to refine the interview structure and questions as needed. The initial interview schedule included nine questions and sub-questions. Sub Questions included “Tell me about your personal experiences with ADR procedures. How and when do you discuss procedural options with your clients? How do you deal with clients who don’t follow your advice?”.

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It turned out that participants answered the sub-questions without being explicitly asked. To safeguard a comprehensive interview process, keeping participants' busy schedules in mind, redundant questions should be avoided. The content of the questions could be summarised in the final six questions.

Before the interview, participants received an email explaining the nature and purpose of the study, along with a consent form concerning data protection, voluntary participation, and contact details of the supervisory team. Since only adult professionals were interviewed, discussing anonymous clients, no special ethical issues arose.

The interviews took place in participants' offices during their opening hours. Some interviews had been interrupted by phone calls or urgent requests from staff. Restarting the interviews had been smooth and easy since the participants were able to refocus quickly on the topic. All interviews could be finished, posing all the questions. In two instances, the participants kept on talking after the microphone had been switched off. The content of the aftermath was later summarised in a protocol and sent to the participants to confirm the content of the protocol. All participants received a preliminary summary of the empirical results with the seven-stage process diagram. Some participants provided feedback, confirming that they can identify with the seven stages they go through. No opposing accounts occurred.

The opening and closing questions were always right at the beginning and end of the interview. The sequence of questions varied somewhat when participants answered, for example, question four, "What are the factors you consider before making a recommendation?" before answering question three about their actions when developing a recommendation. The questions were then asked according to the flow of the interview, to avoid disturbing the participants' recall. The lack of consistency in asking the questions in the same sequence compromises the data quality.

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However, maintaining a smooth flow in semi-structured interviews is essential to gather rich, often spontaneous data. This helps mitigate the impact of inconsistencies in the interview sequence of questions.

The interviews were scheduled for about an hour. Lawyers charge hourly rates or official fixed fees for trial procedures. Considering busy legal experts' schedules, asking for an hour of interview time proved appropriate. However, even shorter interviews due to unexpected circumstances regarding the lawyers' schedule provided even more focused conversations and should not be seen as a drawback. Although shorter interviews and ones that did not proceed exactly as intended, all interviews were roughly in line with the intended schedule. Some lawyers drifted into a narrative style. To keep the structured style, it was essential to always keep the planned questions in mind to lead the interviewee back on track, even if the questions had been asked in a different sequence.

Potential prejudice of the researcher posed another pitfall. Thinking of the lawyer as the "knower", the researcher as inquirer needs to be open to "hear" what the "knower" tells. For example, the lawyer might feel treated unjustly by the researcher when the researcher deflates his or her credibility during an interview because of prejudice. Fricker (2008) calls such a behaviour testimonial injustice. She suggests testimonial sensitivity as a cure. For example, the way interview questions are framed reflects a sensitive approach. Avoiding leading questions and allowing the interviewee uninterrupted time to answer a question is a first step. Active listening by a respectful and open-minded interviewer is another step. The review of questions asked across all interviews made sure to identify potentially leading questions and the use of active listening techniques by the researcher.

The role of the researcher is to make sense through analysis of the data collected from the "knower". In this regard, the researcher is the "knower" of the sense-making process. Which in turn can be treated as data.

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To be available for further analysis, the process of sense-making has been documented in analytical memos and transparent documentation of data handling of interview transcripts and audios. An example of an interview transcript is in the appendix.

Besides the collected data through the interview itself, gathering, documenting, and analysing background information, and metadata like the timing, the setting, etc., have been part of meaningful interview preparation.

Given the requirements to ensure strict client-advisor confidentiality, privacy rights have been observed by anonymising identifying information in data sets. This has been done without distorting data after transcription and coding as suggested in the literature (Rock, 2001). Since only non-vulnerable, professional lawyers have been interviewed who, in turn, report about their clients' disputes in an anonymised format, no ethical challenges occurred.

The next section details how the saturation point has been determined.

4.3.2 Data Saturation

Saturation means that sufficient data has been collected to draw a well-supported conclusion and that more data will not provide new relevant insights.

The participants in this study built a homogenous group, and the objectives of this project are narrowly defined, looking at procedural choices between trial and ADR. In such a setting, saturation is commonly reached between 9 and 17 interviews (Hennink & Kaiser, 2022).

A first interim analysis of the transcription of the two pilot interviews confirmed that relevant data had been collected. The initial plan included 20 participants. However, saturation was reached with the 15th interview.

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The last three interviews repeated data from the fields of inheritance, insolvency, and labour law, which was evident in the coding process, which did not produce new codes.

4.4 Analytical plan

To fulfil the aim of developing a new model about lawyers' procedural recommendation process, the second objective of empirical refinement of the theoretically derived model, as described in Chapter Three, must be accomplished. Therefore, an a priori analysis plan has been developed prior to conducting interviews against the background of the L/C-PC model. This section describes the ex-ante plan for how to analyse the collected interview data.

Since a large trove of data was expected, digital tools were used to search for patterns and present them visually. However, creating mind maps and manually sorting through the data and codes to map patterns was expected to do the main job.

The analytic plan included the following seven steps:

1. Transcribe the audio recordings with transcription software.
2. Hear the recordings.
3. Edit transcriptions.
4. First round coding, analogue, deductive, with head codes in coding matrix.
5. Second round coding, digital, explorative with NVivo.
6. Organise codes into themes, digitally with NVivo.
7. Search for patterns in themes, digitally with NVivo and analogously in figures.

The next four sub-sections (4.4.1 - 4.4.4) characterise key elements of the plan as well as deviations from the plan during the analysis process.

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The first sub-section provides information about the digital and analogue tools used. The following section details the transcription process.

After the data had been written down, the next step was to code the data. The third sub-section explains how the coding process unfolded. The last sub-section elucidates the chosen thematic analysis approach.

4.4.1 Analysis tools

To conduct the analysis, four distinct tools have been used. Transcription and translation software have been used to process data. The coding matrix and coding software have been used to organise and interpret data. Translation software has been used to translate codes and quotes.

a) Transcription software

This tool was chosen because of its compatibility with NVivo Qualitative Analysis. All interviews have been conducted in German, as this is the native language of all participants. The audio content was then imported into NVivo transcription software (Lumivero, 2024a) to generate written German transcripts. NVivo Transcription claims a 90% accuracy rate, depending on the quality of the audio file and the way speakers articulate themselves. The original quality of this study's first version was insufficient (perceived appr. 80% accuracy).

To further improve transcript quality, all written content was checked line by line in person by the researcher to match the audio up to about 90%.

b) Coding matrix

The researcher developed the matrix.

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Table 5: Coding matrix

Participant:
Date of fill in:

	Interaction with clients	Discussing procedural options	Decision process				
			Judging	reasoning	deciding	confirming	reviving
			estimating the future	cognition of cause & effect	choice & intent to recommend	recommen- dation	recommen- dation
Influencing factors							
Principles and policies							

Head codes have been derived from the content of the L/C-PC model. These head codes have been arranged in a coding matrix. The order on the x-axis follows the decision process: “interaction with clients”, “discussing procedural options”, and “decision-making”, broken down into “judging”, “reasoning”, and “deciding”. Head codes on the y-axis map influencing factors and policies. The y-axis head codes have been added to organise and interpret data on a secondary level.

c) NVivo Qualitative Data Analysis

This tool is widely used among qualitative researchers and is available through Gloucestershire University. The tool allows importing and storing data, organising, and analysing it. A protocol system allows for keeping track of all changes over time, which provides transparency about the actions taken by the researcher. Query and visualisation functions help to explore the data in an efficient manner.

However, it is still the researcher’s responsibility to create meaningful queries, identify relevant themes and draw conclusions.

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d) DeepL Pro Translation software

This tool (Deepl, 2024) is a translation software that provides high security and privacy standards. It's a German-based company. The software works with algorithms and is AI-based.

The initial plan was to do all coding in English from the beginning until the end. This requires translating from German to English in parallel to the coding process. It turned out that this approach did not work. While in the flow of the first round of coding, the researcher captured themes from the German transcripts, staying close to the wording of the participants in German. Immediate translation started to disrupt the essence-capturing process. Therefore, the translation process was partially delayed until the first round of coding was completed.

Afterwards, codes and quotes have been translated first by the researcher from German to English. The English text has then been translated back into German through the tool. The German version has been compared with the initial German quote. The English translation has then been edited as necessary. The English translation has then been translated into German again through the tool to make sure the same meaning is captured in both languages (Tyupa, 2011).

4.4.2 Transcription

From the semi-structured interview approach with a sample size of planned 20 in-depth interviews, it was clear that about 20 hours of audio recordings could be expected. To streamline the writing, NVivo Transcription Software (Lumivero, 2024b) was used to do the time-consuming work of creating a first text version. Section 4.4.1 a provides a description of the tool and why it has been chosen.

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Although the researcher conducted all interviews personally, hearing the recordings while editing the raw transcripts was expected to familiarise the researcher with the data again in a different setting. The editing time per transcript was about two hours each. Utterances, fill words and parts of audio that were impossible to understand because of overlay or background noise have been left out. The edited version of transcripts was then imported into NVivo Qualitative Data Analysis for digital, explorative coding. Printed versions were used to further allow for analogue analysis.

4.4.3 Coding

In qualitative analysis, a code is a name or symbol for a word or a short phrase. A code is an attribute which intends to summarise the meaning and capture the essence of the data presented.

Two rounds of coding are commonly suggested in the literature (e.g. Saldaña, 2021). Codes in the first cycle can encompass whole paragraphs of text. In this study, the two rounds vary in their strategy. The first round of analysis in the form of hypothesis coding (Saldana 2021, p. 219) has been done paper-based, filling in the coding matrix described in section 4.4.1 b, by hand. The predetermined head codes came from the initial theoretically derived L/C-PC model. This form of deductive coding is especially appropriate for searching for rules and causal explanations by taking things apart. The purpose was to identify the main content, search for previously defined head codes and get a first impression of how the data would reflect these codes derived from the theory.

Since the head codes in the coding matrix are in English, identified content that fits the head codes has been mapped for the most part in English, too. However, larger parts of the interview's content could not be matched to the head codes of the coding matrix. Notes for this content have largely been mapped on the sidelines of the matrix and, for the most part, in German. This language mix is a deviation from the initial plan to keep all coding in English from beginning to end.

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The previously defined head codes did not fit well with the content of the interviews. Therefore, an inductive approach was applied in the second round of coding to look for the most frequent or significant codes to properly describe the themes occurring in the data (Charmaz, 2014; Saldaña, 2021, p. 302).

To check the reliability of the coding process, two transcripts have been coded twice by the researcher, weeks apart. The head codes one to seven have been compared. The consensus is about 80%. Since two transcripts have been coded twice, the number of files/participants in NVivo statistics is 20 instead of 18.

The comparison between the initial and the final code book in section 5.1. b shows the development from a deductive to an inductive approach.

4.4.4 Thematic analysis

Thematic analysis is a widely used approach to analyse qualitative data. In this approach, a theme or a storyline captures evidence-based what is claimed to be written or said between the lines in the participants' expressions. Themes are interpretations beyond manifest content. The themes in this project have been developed as latent content according to Vaismoradi and Snelgrove (2019). The analysis generally consists of three subsequent steps: coding transcripts "line-by-line", identifying surface-level codes, developing "descriptive themes" by combining codes based on shared similarities, and finally, generating "analytical themes". This step involves interpretation and making sense of relationships between descriptive themes.

It is important to keep in mind this stepwise analysis of the data when considering the outcome of this research. All three levels of analysis contain human bias due to subjective decisions made while defining codes, descriptive themes, and analytic themes.

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As this process is inherently subjective, it is important that readers can evaluate the correspondence between the data and findings to evaluate the trustworthiness of the analysis (Anfara et al., 2002).

To clarify the meaning of the codes and to help the reader evaluate whether the codes reflect the voices of the participants, section 5.1 provides a sample quote for each code.

The themes based on commonalities of codes answer the research questions about the stages lawyers go through when they come up with procedural recommendations and what policies they follow. The combination of themes through interpretation provides for the next level of abstraction to answer the question of what drives lawyers' procedural recommendations. Table 8 in section 5.1 shows which themes relate to answering the research questions.

5 Results

This chapter presents the results obtained from analysing the newly collected interview data. It is structured into three parts. The first part, 5.1, describes the results in numerical terms to give an overview and a guideline for organising the examples of evidence.

The second part, 5.2, presents the results according to the analytical process in three sub-sections according to the epistemological sequence of empirical, actual, and real from a critical realist's position. The sequence has been chosen because empirical data builds the foundation for analysing the following two levels.

The third part, 5.3, summarises key results. It highlights the differences and commonalities between the initial and revised models and compares how the findings challenge the current literature.

5.1 Presentation of results in numerical terms

a) Translation validity

Codes and quotes have been translated back and forth between German and English as described in section 4.4.1.

Temple and Young (2004) argue that „Language constitutes our sense of self as well as enabling us to communicate the ways in which we are similar to and different from others. The lack of a one-to-one relationship between language and meaning does not absolve the researcher from investigating the role of language in cross-language research.” (pg. 14).

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Back-and-forth “correct” translation requires reflection on epistemological and ontological post-positivist positions. The analytical process is then about examining words and registering findings.

However, applying a critical realist approach as a qualitative reflective position, the individual position of the researcher and translator in their respective social worlds and how they see it, matters. In this study, the researcher and translator are identical. This deprives the translation of a second viewpoint and keeps the translator closely involved in the analytical process. In any setting, the aim of bilingual research and translation is that the final result is representative of the source. The reflective researcher/translator engages in a discourse between texts to subjectively create meaning. Therefore, machine translation has been used additionally to provide a second “objective” viewpoint on translations to enhance the “correctness” of the results.

b) Code books

The analysis was based on a deductive approach with nine head codes in the first-round coding.

The first result is that the deductive approach shows a major mismatch between deductively defined head codes and the content of the interviews. Therefore, a fresh start with the second round of coding with an inductive approach was now applied to describe and analyse the content of the interviews properly.

With the switch to an inductive approach, the analysis has been done digitally with NVivo Qualitative Analysis software. The deductive coding approach created 95 initial codes. The codebook includes 19 head codes with their respective subcodes.

The following statistics refer to the coding as documented in NVivo.

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To confirm inter-reader reliability, the interviews of Adam and Bess were coded again about three weeks after the first analysis. Since two transcripts were coded twice, the number of files/participants in NVivo statistics is 20 instead of 18.

c) Quotes

Table 6 shows one example quote for each head code and the number of participants that contributed. Quotes, numbered 1-109, are used throughout this section to illustrate the results.

The main themes, numbered one to seven, outline the seven stages lawyers experience when developing procedural recommendations. Themes eight to eleven detail the policies lawyers adhere to throughout these stages. Themes 12 to 19 have evolved from the researcher's interpretation of the interview data, highlighting the driving forces behind the decision-making process. Note, the percentages given in brackets include excerpts that are assigned to more than one (sub) code. Assigning excerpts to more than one code is standard practice. The percentages indicate how prominent the theme occurred in the data.

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Table 6:
Head codes with sample quotes

Theme / head code	Total files	Sample quote
Deciding to accept a client	19	Fred, Ref. 1
<i>When I realise that he is an asshole, I can't stand being around him. If he or she is so unendearing to me, then it becomes challenging, I think.</i>		
Clarifying the client's interests and mandate	20	Svea, Ref. 2
<i>If you have a works council, you must find your way to them, and of course, you must try to meet their psychological needs. Of course, they always want to know everything immediately and already know things that you don't yet know yourself. Then there are the very difficult works councils, the troublemakers who don't really care about anything and just demand, demand, and say, "Oh well, it's forbidden by law, I don't care, make it happen." And, of course, there are also the sensible works councils, which are perhaps also advised by sensible consultants who also have a certain amount of insolvency law expertise and practical experience, who then put a stop to the works council, demanding impossible things.</i>		
Evaluating legal position	20	Olaf, Ref. 3
<i>You can choose between various legal options. These are the rights you have. I can demand compensation, I can withdraw. There are various ways in which I can exercise my rights. And you must look carefully at where you can be most successful.</i>		
Explaining litigation/ADR options	20	Kurt, Ref. 4
<i>After more than 20 years as a lawyer, I can say that you won't get justice in court or for a long time. They usually get a judgment. If you're lucky, it's well-founded; if it's not, you can have it reviewed by the next instance. Many clients or litigants are usually given stones instead of bread.</i>		

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Theme / head code	Total files	Sample quote
Reasoning about possible outcomes	18	Fred, Ref. 5
<p><i>Of course, I'm highlighting where the journey can go. There is, for example, the possibility to file for dismissal protection proceedings will be aimed at achieving continued employment. There is only an application to establish that the dismissal is invalid, and that the plaintiff must continue to employ the claimant in the company. It is always aimed at continued employment. If the employee sits here after the dismissal and says: "I don't really want to go back there under these conditions. That's entirely out of the question for me. I actually just want to get out." You file a lawsuit that is aimed at continued employment. I must tell the client that, if the employer doesn't want to agree with you, he can take back the dismissal if he realises he's in a very bad position, and we can maintain the impression that you go back to work because you have to. Or the employer pulls out and lets it go to judgment. If you win, the stupidest thing that can happen to you is that you still have your job, which you no longer want.</i></p>		
Recommending a procedure	20	Bess, Ref. 6
<p><i>I don't know what is best for the client. He must decide for himself. I can only show him what legal options he has. And then he is an adult and, in my opinion, able to decide for himself. It's not my job to decide what's best for the client.</i></p>		
Client's choice, btw. Litigation & ADR	18	Ella, Ref. 7
<p><i>So, I'll say this about the less educated classes: They need a judge; otherwise, they won't do anything anyway. But it's the same with people who are a bit more educated. They prefer that a judge tell them what the result is.</i></p>		
Sticking to fields of expertise	16	Carl, Ref. 8
<p><i>For my part, I always say when clients get in touch and say they want a consultation, and it turns out in the first meeting that it's commercial and corporate law or something completely different, I say, "Stop, I'm out. I don't do this. There's a lawyer back there who specialises in commercial and corporate law, and you must ask him."</i></p>		

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Observing professional rules of conduct	3	Nele, Ref. 9
<i>If I say I must tell the client where to go now, I'm deciding her business. And that's not what I'm allowed to do. I find that a very difficult position.</i>		
Theme / head code	Total files	Sample quote
Managing clients' expectations	1	Doug, Ref. 10
<i>That means my client gets that adrenaline shock every time. Then I must deal with it again. So, I must scrape him off the ceiling. And that's quite stressful for the client. Depending on what it's about, of course. It's not easy to paint this picture because these are all facets that clients don't want to hear; they want to be correct. And they say: "I'm with a lawyer, and you must do this and get me my rights." It's tough for the clients to understand and very difficult to imagine that this doesn't work so quickly because they're right.</i>		
Empowering clients	0	
Client's needs and mandate	18	Lina, Ref. 11
<i>So, the client wants something. And I'll tell you legally what's going on, for example, the basis of the claim and the requirements. And that's not enough for many people. Because I think it also takes time to recognise what is being demanded. But it's also not so romantic that you can have a family constellation after death and bring it to an end and have everyone happy. You must make it according to the demands.</i>		
Case matter	3	Quila, Ref. 12
<i>There is often a lot of confusion in such insolvency proceedings, depending on how big the proceedings are. And if you can quickly sort things out and find solutions first to get some money into your account, then you are, of course, more flexible again and can perhaps work on and enforce the other points still open in more detail. So, it's in the sense of weighing things up.</i>		
Regulatory density of laws & provisions	16	Kurt, Ref. 13
<i>And that makes inheritance law very different from building and architectural law. In both cases, they are civil law claims, but in inheritance law, as I have just said, the reason for a dispute is usually quite different.</i>		
Attitude towards ADR	16	Olaf, Ref. 14
<i>Then I can't change it. But these are the kinds of things where I say that make sense, where you can grasp it with your hands, and you have to do something like that (mediation). That happens. I would say that one in four or five cases could be done so.</i>		

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Theme / head code	Total files	Sample quote
Economic viability	13	Fred, Ref. 15
<p><i>Why should I talk him into bringing an action against his dismissal if he has no legal expenses insurance, for example? Yes, he's investing 1500 euros with me. And what does he get out of it? I'll have to discuss that with him, too. What can you achieve? From a business point of view, he won't get a high severance payment because he's been with the company only for a year and a half. Of course, the factual and legal situation must always be considered. What makes the employment relationship stand or fall? What chances do you have there? How quickly will you be back in the bread and butter? Do we have to worry about the blocking period? It is also worth money if I gain three months by turning a termination without notice into a termination with notice. The client then has a real financial gain. But I must count that against it. What do I have to invest in money for that? And then I always tell people: "Look, it's not about me now conducting proceedings for you and then sending you a nice bill at the end. In labour law, everyone pays themselves, and I don't care where I get my money from anyway, as long as I get it. But let's do the math if you put the numbers together. I'm not a businessman, I'm just a lawyer, but it's a loss-maker for you."</i></p>		
Risk management	7	Rosa, Ref. 16
<p>There are cases in which you need court proceedings for that. Often, however, it is not so, and that also applies to the person who says, "I want to get the last out of it for myself." Of course, you must consider the risk of litigation, cost risks, and time risks. And here, too, the question sometimes arises about how far you want to go. How far does it serve your interests?</p>		
Reputation	11	Gert, Ref. 17
<p><i>So, I always joke with my clients and say, "We can go from hard to tender." Clients then tell me that the opposing party has a colleague so-and-so who is known to be an aggressive dog or something like that. I reply, "Yes, you can have that too." Whether that will help the case is another question. I don't think so."</i></p>		
Expert intuition	7	Nele, Ref. 18
<p><i>I often have that. I look up something in the law, think about it, and also see the case law. Super, exactly as I want it, but my gut feeling tells me that won't work in real life. So, I have that quite often, and I communicate that with the client: "We can do it that way. I've read that, but I'm not sure if it will work".</i></p>		

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Table 7 shows the grouping of initial codes into themes according to the stages of the decision process, the number of participants who contributed, and the frequency of codes assigned to each stage.

*Table 7:
Grouping of initial codes to form themes*

Theme Initial codes grouped to form a theme	n of participants contributing (N=20)	n of transcript excerpts assigned (in % of total excerpts)
Theme 1: Deciding to accept a client	19	309 (13%)
Including 9 Sub Codes		
Theme 2: Clarifying client's interests and mandate.	20	301 (12,67%)
Including 4 Sub Codes		
Theme 3: Evaluating legal position.	20	517 (21,76%)
Including 6 Sub Codes		
Theme 4: Explaining litigation/ADR options.	20	104 (4,38%)
Including 1 Sub Code		
Theme 5: Reasoning possible outcomes.	18	125 (5,26%)
Including 3 Sub Codes		
Theme 6: Recommending ADR/trial/no procedure.	20	572 (24,07%)
Including 6 Sub Codes		
Theme 7: Client's choice btw. Litigation & ADR.	18	40 (1,69%)
Theme 8: Sticking to fields of expertise.	16	79 (3,33%)
Theme 9: Observing professional rules of conduct.	3	3 (0,13%)
Theme 10: Managing client's expectations.	1	1 (0,05%)
Theme 11: Empowering clients.	0	0
Theme 12: Client's needs/mandate.	18	115 (4,84%)
Theme 13: Case matter.	3	3 (0,13%)

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Theme14: Regulatory density of laws and provisions.	8	13 (0,55%)
Theme Initial codes grouped to form theme	<i>n</i> of participants contributing (N=20)	<i>n</i> of transcript excerpts assigned
Theme 15: Attitude towards ADR.	16	67 (2,82%)
Theme 16: Economic viability.	13	52 (2,19%)
Theme 17: Risk management.	7	7 (0,30%)
Theme 18: Reputation.	11	52 (2,19%)
Theme 19: Expert intuition.	7	17 (0,72%)

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Table 8 shows which themes contributed to answering the research questions.

*Table 8:
Emergent themes and research questions*

Research question:	Themes that address questions
How do lawyers come up with procedural recommendations between trial and ADR?	
a) What are the different stages lawyers go through when recommending trial or ADR to their clients?	Theme 1: Deciding to accept a client. Theme 2: Clarifying the client's interests and mandate. Theme 3: Evaluating legal position. Theme 4: Explaining litigation/ADR options. Theme 5: Reasoning about possible outcomes. Theme 6: Recommending ADR/trial/no procedure. Theme 7: Client's choice btw. Litigation & ADR
b) Which policies do lawyers follow when coming up with a recommendation?	Theme 8: Sticking to fields of expertise. Theme 9: Observing professional rules of conduct. Theme 10: Managing clients' expectations. Theme 11: Empowering clients.
c) What are the fundamental drivers of the decision process?	Theme 12: Client's needs/mandate. Theme 13: Case matter. Theme 14: Regulatory density of laws and provisions. Theme 15: Attitude towards ADR. Theme 16: Economic viability. Theme 17: Risk management. Theme 18: Reputation. Theme 19: Expert intuition.

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5.2 Presentation of results according to the analytical process

All results are based methodically on thematic analysis of the sample transcripts. This method commonly consists of two cycles (Saldaña, 2021): firstly, coding transcripts “line-by-line” and developing codes as “descriptive themes.” A code is a word or short phrase that summarises and captures the essence of a portion of text from the transcripts. A theme encapsulates a group of codes descriptively. Secondly, generating “analytical themes”. This step involves interpreting and understanding relationships between descriptive themes.

The analysis of themes is integral to creating new themes as data points. Discovering the latent overall storyline allows one to outline relationships between themes through hierarchies and input-process-output frameworks. However, the two cycles of describing manifest data in the form of themes and afterwards searching for latent contextual connections and hierarchies between these themes are rather closely intertwined. This means there is no clear borderline between a data point and an analysis of this data, as there is in natural science.

The results will now be presented in three sections. Empirical data will be given first because they build the foundation for actual data, which in turn relies on the interpretation of actual data. Therefore, results will be presented in the empirical, actual, and real epistemological sequence.

EMPIRICAL data will be presented according to the structure of the decision process. The process includes seven stages lawyers commonly follow when they decide what procedure to recommend to their clients.

ACTUAL data will be presented in the form of policies lawyers follow throughout the seven stages.

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REAL data will be presented as a consolidation of actual knowledge into fundamental drivers of lawyers' decision-making. However, it is not a one-way process from empirical to actual to real knowledge. It is also possible to view that the fundamental drivers of the real form the basis for policies, which then influence lawyers' behaviour. The discussion in chapter six will follow the perspective from real to actual to empirical.

5.2.1 The empirical structure of the decision process

This section organises the findings on the empirical level according to the structure of the decision process.

It starts with the seven stages lawyers commonly follow when they decide what procedure to recommend to their clients. The order is the most common one and is driven by an inherent logic. Three alterations of the order arise depending on the client's needs, the field of law and individual approaches by lawyers, which are described in the next section. Each stage is illustrated with the most telling quotes.

5.2.1.1 Description of seven stages

The data analysis revealed seven different stages lawyers go through when they decide to recommend to their clients either to use trial or ADR procedures.

Each phase provides a partial answer to the initial research question regarding the various stages lawyers experience while developing procedural recommendations.

The schematic model in Figure 13 shows the seven stages that occurred in each interview.

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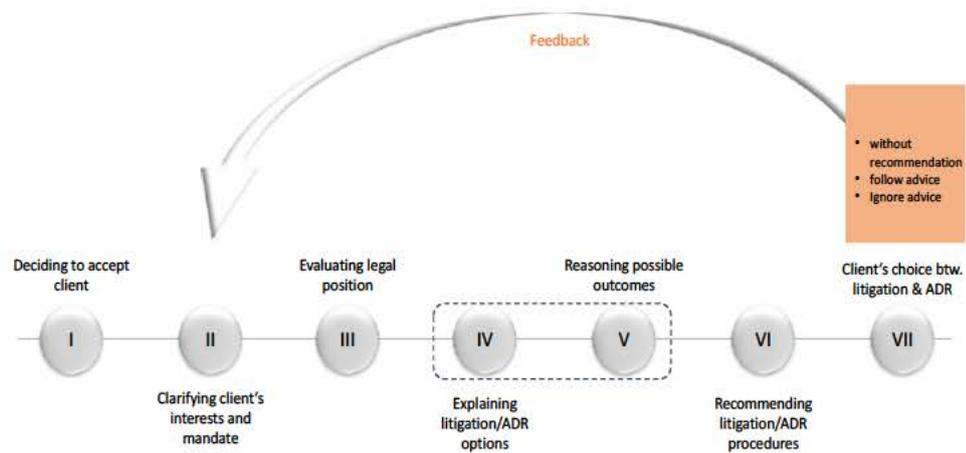


Figure 13:
Structure of the decision process

Stage I: Deciding to accept a client

First, clients and lawyers must agree to work together. Accepting a client often starts with a potential client contacting the lawyer. According to lawyers' testimony, clients usually search for lawyers with certain field expertise and appropriate fees. If clients are insured against legal expenses, they ensure their lawyer accepts the insurance coverage. Lawyers report that they usually ask potential clients why they were chosen. Clients often answer that a report from an acquaintance influenced their cost-benefit considerations. Lawyers perceive that these referrals create more customer leads than seemingly, to a lesser extent, customer ratings on lawyers' or search engine websites or social media.

Jens; File 66; Reference 19

Of course, that is also an issue where you get your clients or the people who are interested in your work. Ultimately, we only have one advertising channel through our homepage. Whether we do this with a lot of love or rather with less is an open question. Otherwise, I think we, like other colleagues in this office, really live by word of mouth and recommendations.

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However, it is a bit different when a lawyer gets appointed as an insolvency administrator. In this case, the contracting body is different from the client. From the lawyer's perspective in the insolvency court, the judges must be treated as customers. However, the group of creditors in each case are the ultimate clients, who dominate the proceedings. The insolvency administrator must represent their interests when liquidating all assets of the debtor in the best possible way to pay out a quota finally.

Quila; File 73; Reference 20

As I said, I don't advise, but I am usually appointed as an insolvency administrator. Then, the court appoints me to handle the proceedings. I don't have to do this as a representative of a client's interests, but according to Section 1 of the Insolvency Code. I must act in the interests of the creditors.

Clients looking for specific expertise are especially common in family law, labour law, and insolvency law. This is different for less specific topics, such as commerce or construction law. In both cases, conflict often arises out of complex contract issues. The clients often can't correctly judge which field of expertise is required. However, in family, labour, or insolvency law, the public is widely aware that there are specialists around. Clients get leads either through networking and recommendations or through systematic online searches.

Correspondingly, seasoned lawyers seek clients with cases mainly in their fields of expertise to work efficiently and satisfy clients' expectations.

Working efficiently in the sense of an appropriate balance between hours invested and revenue from the lawyer's point of view, and, at the same time, an appropriate cost/result ratio from a client's point of view.

Adam; File 54; Reference 21

Many of my clients are companies that would later become insolvent. A small number of people need to file for personal bankruptcy.

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Of course, I advise them, but then I send them to a debt advisor because he does it for free. And I charge for it. Some still want me to do it. I don't want to say I don't like doing it. However, I always think: "People, remember, it's your money. You don't have any money, but I must charge a few hundred euros." I always charge the minimum amount, but that's still 600-700 euros. They could save that if they went to a debt advisor.

Olaf; File 70; Reference 22

There are cases where you can already guess that it will be complicated. It requires a lot of written submissions, and the fee won't be enough. Then, I can only agree to an hourly fee. I can only tell the client: "It won't work without an hourly rate; otherwise, my work won't be paid." So, I say I turn the mandate down because of economic reasons. It is not profitable for me. That happens.

Participants report that in their first communication with a client, they take the time to hear about the matter without charging the client to decide during the interaction whether to accept the mandate or not. Personal antipathy may play a role.

Jens; File 66; Reference 23

Sometimes, there are also certain people with whom you don't necessarily click. It doesn't have to be a friendship, but there must be a certain level of sympathy and a working relationship.

And if, for example, you have someone who, in your view, is demanding beyond all reasonable limits and doesn't show you enough appreciation for what you do for them, then you will, if you can afford it, also take the liberty of saying: No, I don't want to do this anymore, and then I'll just stop.

Clients' first contact with lawyers' offices is through their front desk or assistants.

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Assistants are briefed by their bosses on what sort of cases should be refused immediately. For example, if the matter of the case does not fit the field of expertise or sometimes if it is about legal aid cases. If the client can take this first hurdle, the next appointment with the lawyer will be made under the assumption that the lawyer will accept the mandate. Only if, during the stage of clarifying the client's interests and mandate, it becomes apparent that the lawyer has reservations, will the client be advised to search for a colleague who is more appropriate for the client's intentions.

For example, administrative law is very broad. Lawyers must specialise further in specific areas of this field to be real experts in a certain area. The assistant is usually not able to judge if the case matter fits her boss's expertise. Thus, it is for the lawyer to decide at the stage of clarifying the interests mandate to reverse the initial decision to accept the mandate. Another reason for changing the initial decision to accept the mandate occurs when lawyers learn that the client's intentions or the case matter is improper. The judgment of what point grey areas are being overstepped depends on a lawyer's individual set of values. Lawyers start with the general assumption that a client is acceptable. The process is more about sorting clients out and looking for reasons why a mandate should be declined.

Reasons include:

- a) Lawyers tend to decline mandates when the case is outside their field of expertise. They want to offer a quality service that is competitively priced.

Kurt; File 68; Reference 24

I consider myself an expert in some fields, and I can offer services there with a clear conscience. This means that I exclude certain other things and say I'm not.

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Lina; File 69; Reference 25

(In inheritance law) That's not just an annoying procedure because the neighbour somehow gets in touch about the tree. It's more of a family project close to my heart. That's why I only do inheritance law; otherwise, I wouldn't necessarily like being a lawyer because of this profiling in court: he said, she said. I was so good; it's not my thing at all.

- b) Lawyers tend to decline cases with high maintenance or difficult clients.

Fred; File 60; Reference 26

Sometimes, you must discuss very private things, or people have to reveal certain things. And I'm a complete stranger to them, so I think the chemistry must be a bit right.

Jens; File 66; Reference 27

If you ask me about my guiding principles for accepting a mandate, then a few things are mandatory. I treat people respectfully and I also want to be treated respectfully. For me, this is actually something that shouldn't need to be said at all. But there are also other situations that you may experience. More honesty is also part of it. I expect the people I work with or for to be honest with me, even when it comes to unpleasant matters. It is of no use to deceive their own lawyer. If I found out that someone had done so, it would be a 100% reason for me not to accept a mandate or to terminate a mandate.

- c) Lawyers decline clients who are operating in grey or even illegal areas. Participants reported that they would reject these mandates right away. Their peace of mind is more valuable to them than additional revenue.

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Jens; File 66; Reference 28

Our colleagues in this office also have specific guidelines that we have formed for this purpose. We don't want to have serious criminals sitting here and looking after them, and we also don't want people involved in non-serious crimes.

- d) The overall chance of winning a case only plays a role in accepting a client when the client aims to achieve something that is appropriate from a legal standpoint.

Inga; File 67; Reference 29

So, I can only tell you my basic principles when taking on mandates. I will not allow myself to be used as a weapon or a means to an end against the opponent. So, I don't go along with that. I've already turned down several mandates where the client wanted me to behave in a way that wasn't quite right.

However, participants regard the issue of rejecting a mandate as a highly sensitive matter.

Carl; File 57; Reference 30

It's also tricky in terms of employment law and status law. As a lawyer, even as a lawyer, you're on skinny ice. But when in doubt, I hide behind the excuse, "I can't do it, I don't do it," and I don't know anyone who does. Period.

Bess; File 56; Reference 31

So, it failed because of the legal requirements. I clarified this and said, "So legally, you have no chance. You are not named in the letter. If you would like an informal letter, I would happily send you one. However, even an informal letter cannot provide a legal basis.

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And I assume that the property management company will not respond. I then asked the client whether he was already in talks with the property management company. Yes, the property management company had already suggested mediation. But the client didn't want that. I wrote the letter and, of course, the property management company didn't respond. The client was outraged by this and asked whether it was possible to file a criminal complaint for defamation. I replied that: I'm not a criminal lawyer, but you can, of course, go to the police and press charges. But again, I recommend that you look for another way, because you can't resolve the conflict that way. I then referred once again to arbitration proceedings and arbitrators.

Once the lawyer has decided to accept the mandate, including confirming economic viability from the lawyer's perspective as an entrepreneur, only cost efficiency considerations from a client's perspective matter from now on. Lawyers report that being cost-efficient from a client's perspective increases their reputation and their business revenue streams in the medium and long term.

Gert; File 61; Reference 32

Of course, you have to find the best way for the client because you will see each other again. And especially in family law, which I look after, it's mainly word of mouth, our cold-calling stories, or some Anwalt.de. That's what you do because that's how people find you on the Internet, so that they can click on the reviews. Not a birthday party goes by that you're not approached as a lawyer.

Lawyers need to exchange information about a potential client's case before they can act on their core service, which is evaluating the legal position. Already in the first direct contact between a potential client and a lawyer, clients start to tell their story.

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Lawyers interrupt the storytelling with questions that help them identify the legal claims, the legal base, and the client's interests and needs. This leads to stage two of the model.

Stage II: Clarifying the client's interest and mandate

Clarifying the client's interests and mandate closely connects stages I and II because it is often done within the first one or two dialogues between the lawyer and the client. Besides evaluating the matter from a legal standpoint, lawyers use the thorough information exchange with the client to clarify the scope of the mandate and the underlying interests and needs of the client. When clients start telling their story about the case, it often includes a mandate to sue the opposing party.

Inga; File 67, Reference 33

No, the mandate clarification is not the first thing. First, the clients come and say: "So, I have this and here's this. And I want you to sue or file a claim."

However, some clients who contact a lawyer who is also a mediator want to start with ADR formats.

Adam; File 54; Reference 34

But then they often want to use the aspects of the non-attack mode of the mediator to be able to ultimately enforce their claims without court proceedings.

The difference between the first and second stages is the depth and extent of the conversation and the following communication.

Lawyers curtail the conversation in the first stage to what is necessary to judge whether accepting the client is a viable business decision.

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Lawyers describe the process of finding out what the case matter is as time-consuming and not a straightforward task.

Lawyers say they normally spend between 45 minutes and two hours talking to clients to find out what the job is.

Gert; File 61, Reference 35

I start by recording the general conditions, such as how long you have been married. do you have children? And what about a house? Until you know the whole setting. I tell the clients to plan for two hours because you need to have discussed everything. So, the client describes the life situation, and then you think about how to proceed.

Gert; File 61, Reference 36

I start by recording the general conditions, such as how long you have been married, your children, and your house, until you know the whole setting. I say, plan two hours because you need to have discussed everything. So, the client describes the life situation, and then you think about how to proceed.

What motivates the client is not always apparent. Often, surrogate issues are at the forefront of conflicts. Finding out what the real issues are is not only about cognitive analysis but also about gut feeling and sensing deeper conflicts.

Nele; File 71; Reference 37

People argue about striped bath towels, but it's not about striped bath towels. And every judge knows that. And good judges have an instinct for where the case is.

Time constraints depend on the personal situation of the client and a lot on the density of the field of law's regulations. In labour law, for example, there are very tight deadlines for a dismissed employee to file a suit.

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If a suit isn't filed within 3 weeks of the dismissal or a settlement is agreed upon, the employees lose their jobs. On the other hand, inheritance laws have hardly any deadlines.

The right and the burden to inherit something do not fall under the statute of limitations. Personal time constraints are manifold and can include liquidity pressure, life-time issues, and the need for a place to live.

Gert; File 61; reference 38

You commonly have clients in such an economic position that they are in a hurry. At least, that's the case with me.

Ella; File 54; reference 39

She was left because the man had another woman. However, it's not so much about coming to terms with this relationship but really about bare survival. How can I make sure I have enough money for my children? And the man is usually not prepared to pay.

Lawyers want to answer the following questions for themselves: How is the client's economic situation? To what degree is the client open to losing the claim or money? How strong is their risk propensity?

Doug; File 54; Reference 40

Let's put it this way. My job as a lawyer and forensic expert is, first of all, to establish the escalation status and what has happened.

Then, of course, it's also about looking at what interests, what needs are affected. And in every situation, this movie is always going on in the back of your mind. How can they come together amicably? The first thing I ask is how the contact was. When you talked about it, what was the reaction? Has something already happened, and how did it develop? After all, there is usually a preliminary phase that needs to be assessed. Because of the client's assessment, I can now also see what the mood was like. I can see precisely what the readiness looks like.

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The second stage is to make sense of all additional information in the conflict story that the client tells that is not directly legally relevant. In this procedure of creating meaning, lawyers try to figure out what motivates the clients. What are their desires and needs? To help clients be open, lawyers emphasise their obligation of confidentiality.

Jens; File 66; Reference 41

Even if you realise that not everything is true, you can still build a bridge for clients by saying: “You know, this is a protected space, a protected relationship between us. No one else will see or hear what you tell me, at least no one else who doesn’t keep it confidential like I do for you.”

In addition, lawyers want to answer the question of whether the client is seeking justice, money, or closure.

Kurt; File 68; Reference 42

This is often the case at the beginning of a client relationship. The initial “I don’t want to” is important. “I want to get justice, and what he’s doing is wrong. And he cheated me.” There are all kinds of things you hear. And when you point it out, it’s like this or that. And that’s the position, that’s the legal risk. And going to court also takes at least so long.

Then, the client’s previously frequently encountered hard positions softened a little. And that also happens during proceedings. Who initially goes to court waving flags, so to speak, and then realises during the proceedings that it takes time and time again.

When people want to find closure, lawyers explain that going to trial will involve a lot of written pleadings.

Depending on the type of the opposing party’s lawyer or the way they work, the pleadings from the opposing party describe not only what has happened from their perspective but also include allegations, criticism, and counterclaims.

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This is often hard for the client to swallow because the client relives the events all over again, bringing back all the bad feelings. Lawyers report that it is very difficult to communicate a factual message to the client. Clients don't want to hear this.

Nele; File 71; Reference 43

But litigation as a tactical tool is helpful in these emotionally charged matters, such as family law and inheritance law. Every pleading that we as lawyers simply regard as factual and in the matter, however helpful or not, is a stab in the heart for the client. That is a great injury. Every sentence is dissected. So, they call and I realise that they know this pleading by heart because every sentence cuts them to the core. And of course, that's often not helpful when trying to find a solution in writing, because it's always perceived as a confrontation, even though it's not. Lawyers often take the sharpness out of the written pleadings and also shorten the emails. The emails that clients exchange with each other are less helpful. And then it's simply the case that sometimes the situation is so deadlocked.

Lina; File 68; Reference 44

Sometimes, to be honest, it's really the behaviour of the other parties, which is typically not so appreciative. So, our client says, "Actually, I wouldn't have done anything, but now I want to clarify it." And then we really just try to get down to the facts.

In addition to examining the facts of the case, lawyers consider the client's current human condition. They take a holistic approach, combining the story of the conflict with how they perceive the client's emotional state and overall human condition. This judgment is ongoing throughout the evolving teamwork on the case.

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Ella; File 54; Reference 45

If it hasn't been taken care of yet, clients are ready to sit down at the table because once you've passed the 50 mark, you don't want to spend another five years going through a divorce.

Kurt; File 68; Reference 46

Last week, I talked to a colleague who confirmed, "Architects are so sensitive. It's terrible." If you say, "You're being taken to task because you did something wrong," they get offended for a long time, and sometimes it affects the trial procedure, in which case there's no talking to them about the case.

Lawyers also want to find out if there are special confidentiality requirements. Wealthy people might not want to disclose their wealth to their opponents or the fiscus. Or people don't want their home community to know about their legal fights.

Ella; File 54; Reference 47

I have a case like that right now. And honestly, it's often the case with people who earn more money than the rest of the world.

They're more willing to do that because they don't want to reveal that much about themselves either, even though you can see balance sheets, profit and loss statements, accounts and such (in trial procedures).

Lawyers encourage their clients in follow-up conversations to discuss the circumstances of the case and the parties involved. Lawyers are also interested in how clients judge and perceive the other party's intentions and needs.

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Lawyers are building the legal conflict story around their clients' economic situation as well as their emotional state and special needs, for example, confidentiality about wealth or time constraints to produce evidence or deadlines regarding final resolutions. The purpose is to get a holistic picture of the client's situation and the human condition and gauge their risk propensity regarding their intent to fight or willingness to compromise.

Stage III: Evaluating legal position

To assess the legal position, lawyers encounter two fundamental issues in a complex and uncertain world. The first task is to figure out what happened in the past. Almost always, different people who experienced the situation of interest and those who observed it have different memories of what happened. Personal biases and deception often lead to vigorous disagreement. The second problem lawyers face is to figure out which rules to apply. How to subsume a real-world case matter under legal rules is not straightforward because rules consist of written language with ambiguous words and phrases that can be interpreted differently. To locate the right rules to apply depends on anticipating the most probable circumstances in which a rule might apply. Lawyers understand evaluating the legal position of their clients as a core service. The procedure starts right away with the first contact with the client.

Kurt; File 68; Reference 48

The first factor, and for me, the most important, is the legal examination. First, the critical examination assumes that everything the client has told me is correct. What is his position?

Performing the legal analysis of the matter itself is a creative process that lawyers perform independently. Lawyers process all information they get by selecting what is legally relevant and what is padding. However, lawyers sometimes engage with colleagues who are reflecting on the case.

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They exchange information about the analysis before discussing different views of the legal analysis.

Svea; File 75; Reference 49

I'm stumbling a bit here because these are two or three paragraphs in the Insolvency Code, and as far as I know, and from what colleagues and presenters in further training tell me, they hardly play a role in practice. I always ask colleagues because I am interested in it. After all, it sounds good on a piece of paper.

Carl; File 57; Reference 50

Well, that's how it is. That's how it is in practice with all of our colleagues we work with, and we work more closely. And then there's also maintaining contacts. These long lunches we sometimes have when we're out with colleagues are also simply a way of maintaining contact. I'd say that at most half of it is work-related, and the rest is really entertainment and fun.

During the legal analysis, the client's interests and needs all feed into the development of a legal strategy. Strategies include, for example, whether and in which order court procedures and ADR procedures should be used to reach the client's goals. Again, the strategy and the reasoning behind it are explained through an information exchange process between lawyer and client.

Fact-finding and subsumption are at the core of the creative process to find the best way to present the claim's legal basis.

Olaf; File 70; Reference 51

We first need to get the facts right. That's important.

Olaf; File 70; Reference 52

And otherwise, step on the gas. So, we're trying everything possible. Use the leeway. You must fight. You must see if you can find court rulings.

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Of course, you can do research and find out both in terms of the actual facts of the case and also legally. That's also important. And then you must see who can do it better, you or the colleague from the other party.

A resourceful and experienced lawyer can design a legal case in various ways. For example, in a contract dispute, the lawyer can ask to undo the contract or dispute the implementation of various parts of the contract. Both options lead to different legal arguments and differing strategies for achieving the client's desired outcomes. The selection of the strategy depends on the expected chance of success.

Olaf; File 70; Reference 53

The second point is that you look at the chances of success. That's my job for now.

Another way to design a strategy is to consider the salami slicing (abschichten) approach options.

Lina; File 69; Reference 54

I think for myself, what would be the best strategy to achieve the goal here? What would the following steps be? And what do I include? What do I no longer include? And maybe this preparation, too. What could be part of the intention to possibly find a pressure point at a later point in time and say, "We are now legally asserting the claim," and then reopen the subject and say, "This is just the entrée, and after that, we get the other topics covered."

When lawyers design a comprehensive strategy as a multi-step process, cost efficiency considerations from a client's perspective are paramount.

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Olaf; File 70; Reference 55

Well, that's how it is if I settle out of court. I no longer have the risk of a second instance. However, there are costs involved in the first instance, too. But the cost risk is lower because I am in control. I can settle in court, or I can leave it. So, I usually have a cost arrangement where each party bears their own costs. Then we know our costs, which are manageable, and then we can try to reach a settlement.

Lina; File 69; Reference 56

This is how I experience it: if I have inputs, I usually already think about and draft a response as a kind of concept paper with questions included in this text. Like, "Could you imagine it that way or this way?" That would have prospects of success, but this wouldn't. I try to clarify the process and not just pass the text and say that would be my suggested approach. So, with that, I'm already trying; that's my goal, to bring about a solution for the client to not artificially maintain the matter in the interest of everyone.

To minimise the risk of pursuing a suboptimal strategy, lawyers typically consult colleagues to enhance their clients' chances of winning. Since lawyers generally consider evaluating the legal position as the key distinguishing feature from competitors, they are cautious about seeking advice from colleagues outside their firm or immediate circle. The reason is that they don't want to be seen as amateurish or even incompetent.

Olaf; File 70; Reference 57

And suddenly, it is there; you have other facets of the case. That's how it is. And if you don't have that at all, it isn't easy. A colleague who is a lone fighter complained about his suffering. I can understand that, too. I can subscribe to that 100%. It's better in a shared office like this. You don't just call anyone. I don't do that.

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You don't want to make a fool of yourself. It's clear; sometimes, it's stuff you could have thought of yourself. That's why it's better to do it in a trusted circle.

Lawyers in family and inheritance law report on a second distinguishing or branding feature: the ability to convey to clients that they are well understood. It is about building a trusting relationship. By displaying authentic empathy, clients feel safe talking about very personal needs and intentions. This, in turn, helps the lawyer find the appropriate legal strategy.

Lina; File 69; Reference 58

In the legal field, it is said, you must focus on a recipient's horizon, which is very important to us.

Gert; File 61; Reference 59

And then you have to switch to a different tonality. I come from a village, and it is not difficult for me to express myself clearly. I see my role as interpreting these legal technicalities for clients.

Evaluating the legal position is closely connected to Stage I: accepting a client and Stage VI: recommending a procedure. The connection with stage I is about fact-finding and developing a gut feeling for the client. The connection with stage VI is judging the legal strength of the case. The stronger the legal case, the more likely the lawyer will recommend going to trial. The weaker the legal position is, the more likely the lawyer will recommend using ADR procedures.

Stage IV: Explaining litigation and ADR options

Lawyers provide technical knowledge about the law. They educate the client about legal and ADR procedures and explain legal terms.

Lawyers who are certified mediators explain the ADR procedures in more detail and in favourable terms.

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The extent of the education depends on the client's knowledge and previous experience with trial and ADR procedures. Lawyers will explain the most common sequence of events and the key factors that influence them. Besides the publicly available information about different procedures, lawyers will, for example, explain differences in the places of jurisdiction.

Depending on the venue, the timeframe in which court dates will be set can vary considerably. It is part of the overall strategy to decide which venues would be possible and which pros and cons relate to each venue.

Jens; File 66; Reference 60

In regular litigation proceedings, you can expect to have a first hearing date at the contentious chamber or to get a judge within a time frame between half a year and a year and a half. The difference is simply because the judiciary is overwhelmingly unrestrained. There are more and more proceedings, but fewer and fewer judges within the judiciary, also because society has become very legalistic. Five or six years ago, things were pretty bad here, especially at the Hanover Regional Court, because the Regional Court in Hanover is so understaffed. The opposite pole is this conciliation procedure, which has also been very much pushed by personnel capacities. If the other side wants to participate, you can easily get a court appointment to talk in two to three months.

Olaf; File 70; Reference 61

Especially when it comes to court proceedings, you can't always choose, but sometimes you can choose between different places of jurisdiction. You can select the place of the other party or the place of performance.

You can look and think about what is reasonable. I occasionally get a second opinion. Is a second place of jurisdiction even possible? The client can't help you with that. Then you just have to say: "This is best here."

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Since legal strategies often involve a multi-step process that combines court and ADR procedures, lawyers discuss various scenarios to explain the risks and opportunities to be expected in different successions of court and ADR steps. Participants report a high preference for court mediation. Firstly, it is easy to convince the client to go for it because it is a recommendation from the judge. Secondly, it gives the lawyer an understanding of the opposing party's position. Thirdly, it improves the party's standing because it shows the willingness to work constructively to resolve the matter. Fourthly, it helps the lawyer to get deeper into the case matter. Fifthly, it is an efficient way to resolve the conflict because the chance of resolving the case is high.

Adam; File 54; Reference 62

If it goes wrong, it's still good for me and efficient because I can then explain that we tried this and that. And I can justify it in the statement of claim, similarly to the mediation process, because I know all the positions.

Adam; File 54; Reference 63

Yes, that's exactly what I find efficient. I can't say otherwise. It may take a few hours, but the hit rate that it often ends there is relatively high. And if it's not the end of the story, then it's time well spent, firstly to increase the client's standing in court and secondly to be involved in the matter.

In contrast, lawyers report that it is challenging to sell private market mediations to their clients as an alternative to court procedures. It is different for court mediations. Clients are more willing to consider these mainly due to the mediation fees already being included in the court fees.

Ella; File 59; Reference 64

It's difficult as a mediator; I must be honest because people aren't prepared to pay a specific hourly rate for mediation. I don't know why; I can't make it clear to them. They request that if they pay so much for it, something must come out.

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So, if they pay 1,000 euros and have maybe half the house in return without paying a lawyer, they don't see that. That's when something is missing.

Stages 4 and 5 are closely intertwined. They occur in a two-way communication channel where lawyers' explanations are interrupted by clients' asking understanding questions. In addition to simply posing questions about the 'what' and 'how' a procedure was selected, 'why' questions seek to understand the reasoning behind the chosen strategy.

Stage V: Reasoning about possible outcomes

In sequence but often intertwined, lawyers give their judgment on how strong the legal case is and what possible outcomes would look like. They explain the chances and risks involved in the various steps of the strategies. The clients, in turn, consider how likely the suggested strategy would work, taking their situation into account holistically. The client is the only person who knows about the conflict and all involved parties from the beginning. The clients may add additional information at this stage if they deemed it irrelevant before. They are the ones who know about their changing interests and evolving needs first. As far as the change is relevant, the client's feedback may lead to a strategy change as well.

Lawyers perceive managing clients' expectations about getting justice, finding closure, the costs and stress involved in the different procedures and the chance of winning or risk of losing as their crucial tasks in this stage of the consulting process.

Miro; File 72; Reference 65

I usually give the clients envelopes in the consultation meetings. I usually tell them, "You can do this. You can do this; you can do that, or you can do that. It's up to them to decide.

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So, if you want to do this, this will happen, and if you do that, that can happen, or if you do that, that can happen". So, I show them alternative ways. Then I'm usually asked: "What would you do?" Then I give them my assessment. Yes, and give them a way forward.

And vice versa, we also have to somehow see how we can capture the opponent on the other side so that the clients can best implement it to achieve their goal. And I always say 30% of the time you shouldn't lose. You can't win 30% of the cases. Yes, and in between is a grey area, and this grey area is not only decided by the legal aspect, but there are certain other grey areas.

Carl; File 57; Reference 66

And that's where judges play with stoked uncertainty because you can't tell the client, "Okay, the judge is leaning towards this side or that side". Ultimately, you can't determine that. That's because many judges then turn their hearts into a lion's den and say, "It could go either way. Don't you want to settle?"

Lawyers want to prepare the client to make an informed decision about the strategy and the choice between going to trial or using an ADR procedure.

Bess; File 56; Reference 67

So, in the end, I tell the client what the legal situation is. I do this by e-mail and write to him: "So the other party has replied. Legally, I assess it like this and like this.

Clients, on the other hand, sometimes challenge lawyers' reasoning. They provide new facts they did not deem important previously and/or insights into opposing parties' intentions. This leads to a feedback loop to Stage II, followed, if needed, by an updated legal evaluation and updated strategy.

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Stage: VI Recommending litigation or ADR procedures

The goal of the lawyer is to empower the client to subsequently make an informed procedural decision. Lawyers often hold back on explicit recommendations.

They argue that only the client knows the full story of how the conflict has come about and developed. Lawyers say that they only know the bits and pieces the client told them, plus information they gathered on their client's behalf. For example, finding information in official registers or asking involved parties for testimony or files. Yet, when clients ask specifically for a recommendation, lawyers commonly give one. They perceive it as part of the deal they made with their clients, who pay them. It is about fulfilling the expectations clients implicitly have when they contact a lawyer for advice. Lawyers navigate the tension between stepping in more decisively and empowering clients by evaluating risks associated with different options.

However, in most instances, lawyers don't give explicit recommendations. To intervene, they rather use cognitive and/or involuntary framing techniques to implicitly suggest the "right" choice to clients. For example, "I have the feeling...." It is a way of framing one option implicitly positive or negative.

Fred; File 60; Reference 68

So, taking into account what I have heard beforehand, I reflect this back to the client and say: I have the feeling that perhaps this option would be the best solution for you at the moment, also taking into account the possible consequences that may result. But that's all I can do.

The right choice would be the one where the lawyer can best act to achieve the client's goals.

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Fred; File 60; Reference 69

So, for me, the only maxim is what the client wants to achieve. I am a legal representative. I don't have to provide a balance.

Balancing claims between parties is usually required in ADR procedures. A lawyer's personal attitude or judgment in a specific case is that it is not their duty to balance claims, which would probably lead to an implicit recommendation to go for a trial.

In the end, lawyers leave the responsibility up to the clients to assess the different options presented in Stages 5 and 6. Lawyers argue that only the clients know and have experienced the full story of the conflict and that they must live with the results. Lawyers only look from a bystander's perspective, clearly focusing on legal aspects of the conflict story. They perceive themselves as not able to finally judge the risks involved in different procedures.

Bess; File 56; Reference 70

I don't know what is best for him. He must decide that, and I can only show him his options and what is legally possible. I must advise him on what the risks are and what is legally possible. I also must advise him on what options he has to enforce these legal options or claims. And then he is an adult and, in my opinion, able to decide for himself. Yes, I would like to have this clarified in court. Or I would like us to proceed in such and such a way. Or I would like to try to control my conflict myself. I think that's also a task for the client.

Doug; File 58; Reference 71

Justice is also a subjective value. We do justice to some extent; I think that's very important.

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But if the parties individually see concordant justice somewhere other than where we know the law, then I have no problem with that. That's how it is. As I described at the beginning, if the clients have agreed on something, they can do that. If the solution is contrary to the contract, that's their issue, not mine.

However, when directly asked about a recommendation, lawyers use a holistic approach to the client's case and strive for the best possible outcome for the client.

Olaf; File 70; Reference 72

That's what the clients expect. They trust me and tell me all sorts of things. But then they also expect me to put my foot down and step on the gas.

Depending on the strength of the case, lawyers will either recommend going to trial or using an ADR procedure. The stronger the case, the more likely a lawyer is to recommend going to trial. However, the personal human condition of the client may influence this recommendation. Moreover, lawyers often advise clients to comply with court recommendations, such as utilising court mediation services or resolving the case with the opposing party rather than waiting for a verdict. A special situation occurs when lawyers feel compelled to protect clients from making harmful decisions. This may be because clients cannot grasp the consequences of their harmful choices or because clients tend to reject the advice because they are overconfident about their judgment of possible outcomes. Sometimes clients simply refuse to heed lawyers' advice. For instance, when lawyers explicitly suggest mediation, clients raise concerns about perceived power imbalances and costs.

And the less you say about it, the less chance the opponent has of explaining and proving anything, because otherwise, you will also provide him with information about what happened or how it is assessed.

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But then the opponent says it will be evaluated quite differently. So sometimes it's best not to say anything. And then, of course, mediation isn't helpful either. If the 90-year-old had said: Yes, let's go to mediation to discuss this, then I would certainly have said, "No, we're not going to do that now. Everything is very open there. And this is not the situation for mediation."

Ella; File 59; Reference 73

So, there are still these two problems: mediation is somehow rejected because people still see this power imbalance, or this cost factor.

If rejecting advice would lead to a substantial loss of assets for the client, lawyers are compelled to protect the client from making a harmful decision. They will insist on more discussions or simply use communication tools to guide the client towards making the "right" decision, while monitoring the client's ability to cope with prolonged stressful situations.

Henk; File 62; Reference 74

And the less you say about it, the less chance the opponent has of explaining and proving anything, because otherwise, you will also provide him with information about what happened or how it is assessed. But then the opponent says it will be evaluated quite differently. So sometimes it's best not to say anything. And then, of course, mediation isn't helpful either. If the 90-year-old had said: Yes, let's go to mediation to discuss this, then I would certainly have said, "No, we're not going to do that now. Everything is very open there. And this is not the situation for mediation."

Bess; File 56; Reference 75

You may not make the total claim; claim something, but don't exaggerate to such an extent that the other party is unprepared to settle. Always keep an eye on the clients to see how far they can take it if it's so emotional for them.

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Stage VII: Client's choice between litigation and ADR procedures

There are three different outcomes from a client's decision: the client follows the lawyer's advice, the client rejects the lawyer's advice, or the client makes a decision without an explicit recommendation. The client's decision is a one-way communication from the client to the lawyer. Commonly, lawyers accept a client's choice as given and proceed accordingly. As described in Stage VI, lawyers commonly leave their clients on their own to make a final choice once they have prepared the client to make an informed decision.

Lawyers do not perceive it as their duty to prevent clients from making unfavourable decisions. Only if a client is about to make a harmful decision that could lead to a potential liability risk for themselves would the lawyer intervene. In any case, lawyers accept clients' choices as a given. They do not challenge them.

Inga; File 67; Reference 76

Yes, the decision is the client's decision. Clients always say they don't want to discuss it; they say, "Here is the bill; sue for it." There are very few other cases, especially when it comes to debt collection. Or I'm just thinking about it: in travel law, there are always situations where items are to be claimed that are not enforceable. So, the clients I've had so far have said, "Please assert it anyway, and if it's not recognised afterwards, then that's how it is."

Bess; File 56; Reference 77

The clients then have something to think about. But everyone is different. One person doesn't care. Some fight it out and see the whole thing without emotion, and the next person says, "Yes, I want my rights here, but I can't hold out." That's different.

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Over time, clients' perceptions of the case usually change, and so do their choices. Clients feel the burden of drawn-out confrontational approaches regarding the duration of the procedure, the stress involved in having an unsolved situation, or the uncertainty of a future outcome. In addition, expenses add up over time. This includes out-of-pocket expenses and indirect expenses caused by the client's time spent providing the lawyer, for example, with evidence or explanations about the development of the conflict before contacting the lawyer. These changing perceptions lead to the major feedback loop depicted in the process model, which moves from Stage VII, "client's choice," to Stage II, "clarifying client's interests."

This section presents the findings stage by stage according to the most common structure of the decision process. The following section will describe the additional feedback loops in three possible alterations of the common order, which mainly depend on the client's needs, the lawyer's personal approach, and the field of law.

5.2.1.2 Alterations of common order

The seven stages of the lawyers' decision process have been described in the most common order. However, the order of the different stages can vary depending on the client's needs, the regulatory density of the fields of law and the lawyer's personal approach. This section describes deviations from the common process order. Three alterations occurred.

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I. Switching Stage I and II

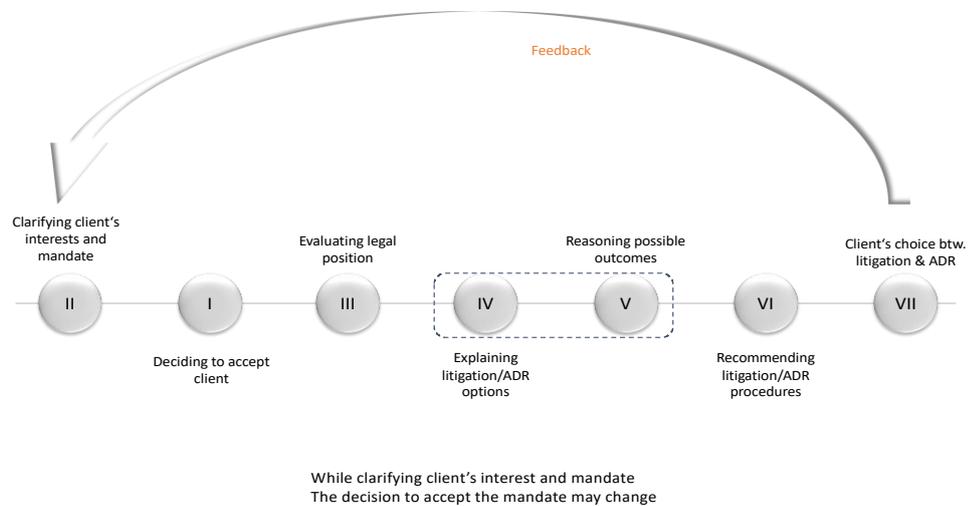


Figure 14:
Order alteration: Switching Stages I and II

Participants reported that they start with clarifying interests and mandates in a rather lengthy first meeting with the client, which they don't charge for.

Jens; File 66; Reference 78

We always have an initial consultation for every assignment, which I deliberately do without a fee, in contrast to what the scale of fees would allow, because I first want to find out what a client who chooses me wants. ...

Sometimes, that happens very quickly, and sometimes, as exhausting as it can be, you must take three-quarters of an hour and listen to people so that they can clarify what they're looking for.

Another example is about a type of client who doesn't know the facts of his own case. Specialists in inheritance law reported that clients sometimes don't know all the assets and the whereabouts of the potential inheritance. Evaluating the legal position is more uncertain (Stage III). Knowing, for example, if there are international relationships involved when a property is located abroad is one factor.

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Subsequently, the lawyer's challenge is determining how to bill the client to make a profit, based on the value involved in the case, or to charge an hourly rate. Negotiating with the client is key to the decision to accept the client (Stage I).

Lina; File 69; Reference 79

We have always decided to conclude a remuneration agreement on an hourly fee. If only because some people come and say, for example, "I'm disinherited. I know there's something there, but how much? I have no idea. And how much do your services cost?"? I say: "I have no idea what's there. How am I supposed to know and say what fee is fair? It's also good for you to understand that the work is remunerated." The approach is to communicate an hourly rate openly. We do performance overviews, and for us, it must be economically reasonable. We enter the time spent dealing with the matter or speaking to the client on the phone.

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II. Moving Stage IV into second place

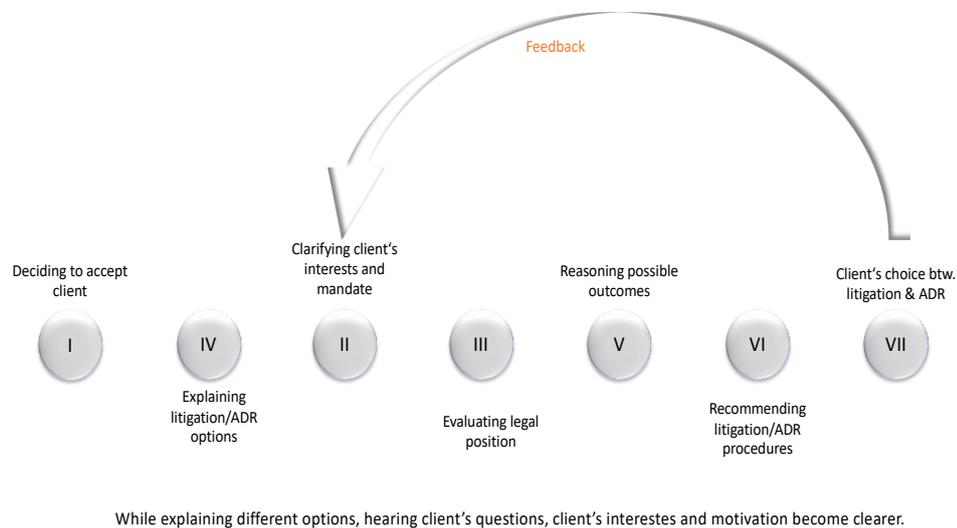


Figure 15:
Order alteration: Moving Stage IV into second place

Participants reported, for example, that clients with a labour law dispute may need an explanation of different options (Stage IV) before they can clearly state what their interests and mandates are, for instance, keeping the job or negotiating a severance package (Stage II). Participants describe a situation in which they explain various procedural options to their clients and discuss the advantages and disadvantages of each option in general when clients begin to ask questions. One category of questions is about understanding. For example, clients ask the lawyer to explain legal terms by giving specific examples. Another type of question is about the reasoning behind why a certain aspect is viewed as an advantage or disadvantage. The way the client asks provides the lawyer with more insight into what is important to the client.

Bess, File 56; Reference 80

In these cases, where you know that it's a lengthy process that may take years with expensive expert opinions if money or property is involved, I address this right at the beginning of the consultation.

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So, right at the beginning, I will point out the options for resolving the conflict or the disputes. You can first write to the lawyer or the opponent out of court.

Or that you can offer something straight away. I also often ask whether an attempt has already been made to perhaps sit down with the opposing party with the help of a third party to resolve the issue.

How the clients react to the presentation of different options gives the lawyer a better idea of what motivates the client and what their priorities are.

III. Moving Stage I into third place

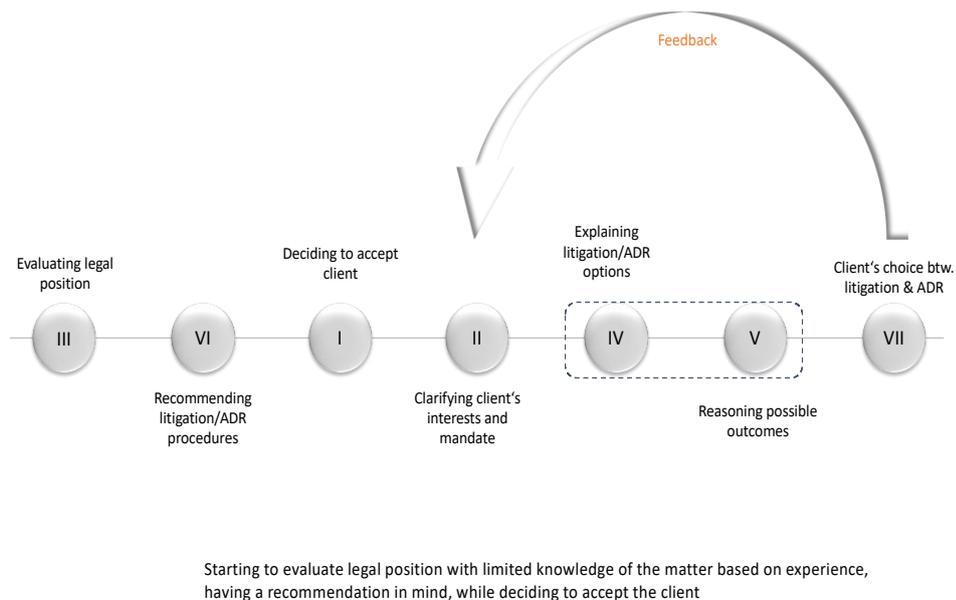


Figure 16:
Order alteration: Moving Stage I into third place

Experienced lawyers can assess a legal position with severely limited information, immediately excluding certain procedural options. Typically, the lawyer begins evaluating the legal position with only limited knowledge when a prospective client contacts a legal practice and speaks to the receptionist. The assistant notes down key information about the issue.

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For example, suppose a client opposes an administrative deed from a building authority. In that case, lawyers know that ADR procedures are not a viable option since administrative inspectors have very limited leeway to compromise, and there is a fixed deadline to file a suit. ADR procedures don't necessarily impede those deadlines. Hence, filing a lawsuit is the only option to prevent the loss of rights. A participant reported that in insolvency matters, a few key information points determine the procedural choice to use a formal court insolvency procedure without having met clients in advance and having heard about their specific needs.

Carl, File 67; Reference 81

It always depends on whether there are collateral and assets that would be lost in the event of insolvency proceedings. But quite honestly, if someone lives only on their income, lives in a rented apartment, drives a modest car and has nothing else, why should they cling to a loan over the years if they will be through in three years (with insolvency procedures in court)?

Interestingly, from a decision-making point of view, a lawyer can have a recommendation in mind without even having met the client personally. This is a standard decision rather than a tailored individual approach. In another example, the case is about a divorce between a husband earning a living and the wife taking care of the children. The wife calls to get support on how to manage to continue living in the house. The recommendation in mind could be to go for a common strategy mix of trial and ADR procedures. The early decision to accept the client is made because it fits the field of expertise, and the constellation of the matter is commonly economically viable for the lawyer. In short, it is a typical case which fits the lawyers' office structure and expertise.

Gert, File 61; Reference 82

You can estimate a lot of things.

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When I hear that one side is a managing director earning 5,000 to 10,000 euros and the other works part-time because of the children earning 2,000 euros, then it's clear that there will be an alimony amount. And it's clear that so much comes out of it that it's worth all the arithmetic and consulting, that's for sure.

But as I said, if you must invest a few hours before you have this result, you must agree with the client that this will be compensated somewhere.

Participants from the insolvency and labour law fields report that typical cases make up the overwhelming part of their revenue stream. Therefore, it is possible to start the decision process on procedural choices with a generic legal evaluation. Participants from the construction or commercial law field report a greater variety of case matters. In these areas, lawyers follow the standard order of the decision process.

IV. Feedback loops

The chosen procedure begins after the client decides to pursue litigation or an alternative dispute resolution (ADR) process in Stage VII. The client's situation is constantly influenced by their reactions and interactions with the other party and any involved third parties, such as judges and authorised experts, and the passage of time. The client's interests and instructions often change over time, which initiates the decision-making process for what to recommend all over again. This feedback loop occurs regardless of the specific order of the process.

Another regularly occurring feedback loop participants report occurs between the two stages of explaining litigation and ADR options and reasoning the possible outcomes. These stages are not as clear-cut as the schematic model suggests. Participants report discussions with their clients that include back-and-forth judging and estimating uncertain outcomes.

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These feedback loops occur iteratively because, in most cases, trial procedures and ADR procedures are used in multiple steps in sequence until the case is finally settled. Lawyers talk about escalating the conflict step-by-step by first trying to solve the conflict without court proceedings before filing a lawsuit.

Similarly, de-escalation steps include using ADR procedures in parallel to an ongoing lawsuit or following a judge's suggestion to use court mediation procedures. De-escalating the conflict becomes part of the strategy when, for example, clients get tired of a confrontational approach, or the case facts develop in a direction which makes winning a favourable verdict less likely. Finding a negotiated solution to related issues, if one general issue has been settled through a judgment or settlement in court, is another typical way to de-escalate in building law or inheritance law cases.

The description of feedback loops and alterations is most likely not exhaustive. Counter evidence might show that lawyers sometimes don't follow the stages described in the decision process, nor any alteration of it. They might rule out using ADR methods in principle. Lawyers might perceive filing lawsuits, no matter what the probability of a positive outcome for the clients is, as their job. Participants argued that some clients are contacting a lawyer to initiate a lawsuit. They don't even want to hear about other options. Otherwise, clients would go directly to an arbitrator or mediator.

Inga, File 67; Reference 83

But many clients are so stubborn that they only want to go their way and sue. You must go along with that to a certain extent.

Also, some lawyers are certified mediators who always go for ADR procedures. They made a business decision to earn a living as full-time mediators instead of representing clients in court.

The influence of client needs, the regulation density of the fields of law, and the lawyer's personal approach showed some flexibility in the common order.

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Interpreting how participants described how they form an opinion about what to recommend during their interaction with their clients will reveal what actually happens during the decision process on an abstract level of policies. The following section will explore how concepts and policies are distributed throughout the seven stages of the decision-making process.

5.2.2 The actual policies

Actual data can be obtained from empirical data in the second phase of the analytical process. The following section, 5.2.2.1, presents the four central policies that lawyers adhere to during their counselling and decision-making. Section 5.2.2.2 further examines influencing factors on lawyers' decision-making.

5.2.2.1 Policies

In the literature, there are various definitions of a policy, a concept, and a principle. In this project, a policy is defined as a protocol lawyers follow during their decision-making process. A concept is defined as a mental representation of an abstract idea. A principle is defined as a rule that serves as a chain of reasoning. It consists of at least two factors that are related to each other in a relatively stable relationship, explaining how something occurs. Although it is debatable how to define policies because of fluid boundaries, the context of this project provides a coherent framework of empirical data for the chosen definitions and categorisation. They are plausible. During the seven-stage decision process, lawyers apply four policies: a) Sticking to fields of expertise, b) Observing professional rules of conduct, 3) Managing client expectations, and d) Empowering clients.

These policies consist of various concepts.

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The well-described concepts in the literature include 1. Economic viability (profit), limiting liability (risk management), 3. Confidentiality, 4. Needs, 5. Justice, 6. Closure, 7. Empowerment. A specific concept in the domain of law is about evaluating a legal position.

It is a structured process of interpreting and subsuming a real-life situation under the rules of law and predicting a likely outcome of a court ruling. Another general concept has a specific characteristic in the domain of law. The concept of delegation encompasses the three elements of authority, responsibility, and accountability. In a judge-advisor-system setting, the authority to decide is with the client. The client is also the one who must bear the final outcome. However, the decision is a shared responsibility. The lawyer must prepare clients to make an informed decision. The clients must defend their decisions for themselves and within their circles of people involved. However, the clients will hold the lawyers to account if the predicted outcome does not materialise.

The policies have either been mentioned directly by participants or derived from the concepts they described in their own words. During the interview, lawyers started to reflect on their behaviour and decision-making, thus partially doing the work of abstraction, which commonly belongs to the researcher. However, analysing the whole body of data and looking for patterns beyond lawyers' self-reflection is still upon the researcher. The process structure allows for the identification of policies that recur in different stages and are specific to particular stages.

The following table, Policy A, shows how the content of three head codes contributes to policy formation.

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Table 9:
Policy A with a selection of corresponding codes

Sticking to fields of expertise	=	a) Economic viability for lawyers	+	b) Economic viability for clients	+	c) Limiting liability risk for lawyers
		Scope		Cost efficiency of the procedure		Strong case = Trial
		Being cost sensitive/client's solvency		Escalating step by step		Protecting client from harmful decision
						Preference of court mediation
						Follow court recommendations

That lawyers stick to their fields of expertise can be inferred from how they merge the concepts of economic viability and liability risks.

a) Economic viability for lawyers

Stage I regularly follows the policy of sticking to fields of expertise. This includes the concept of economic viability from a lawyer's perspective, which is mainly addressed in stage I.

Nele, File 71; Reference 84

These amounts in dispute bring tears to the lawyer's eyes; you don't touch the pen. The alternative for the client, which I also discussed with her, would be for us to do this for a certain hourly fee, but then the increase she gets is used up for a year if she pays me. In other words, it's completely disproportionate. In this case, the client could read the Düsseldorf table. I then told her what she had to do.

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But it was clear from the outset that I would only do the initial consultation for which we get a specific rate. I convert that into time. I know how fast I am. I'm relatively quick and know I'll be done in 20 minutes. So, it pays off. So that's what I do. But I had already made the decision beforehand when I received the email from the client telling me what it was about.

Lawyers' objective of being profitable clearly influences the decision to accept a client. However, once the client has been accepted, participants report that only economic viability considerations from the perspective of the client play a role.

Gert, File 61; Reference 85

I have to. In my view, the client is also entitled to it. I jokingly say, "I've got my eye on your wallet", which makes everyone jump. But then you tell them that we also must ensure we can find a cost-effective solution for them.

b) Economic viability for clients

From a client's perspective, economic viability occurs mainly in Stages II and IV. The idea that all further legal strategies must present an economically viable way forward for the client is one important factor lawyers consider before deciding which procedure to recommend. Escalating a conflict step-by-step is one way to keep the costs for clients at bay.

Adam; File 54; Reference 86

I say, "Watch out; we stay below the court and lawyer thresholds." I write something, or you write something. You must also change my letter a bit, so it looks like it came from you.

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Lawyers' idea of being cost-efficient when providing legal services mirrors that of cost-sensitive clients. Thus, lawyers who are sensitive to costs build a positive reputation.

c) Limiting liability for lawyers

Limiting liability risk for lawyers occurs prominently throughout all stages. The concept of risk management occurs directly in the reporting of participants when they talk about a potential liability risk if they don't advise their clients in a professionally sound way. As long as they stick to their fields of expertise, lawyers are confident that they don't make profound mistakes in their legal judgment and advice. The policy of sticking to their field of expertise is related to economic viability, building a positive reputation, and managing liability risk for lawyers.

Jens; File 66; Reference 87

And that is also self-protection. You can't work efficiently in these areas. You can somehow work as a lawyer, but perhaps not necessarily achieve the resounding success and not really be able to help a client. He won't come back, either.

The policy of sticking to fields of expertise influences the choice between recommending a trial or ADR, depending on how ADR-prone a field is in general.

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The following table, Policy B, shows how the content of three head codes contributes to policy formation.

*Table 10:
Policy B with a selection of corresponding codes*

Observing professional rules of conduct	=	a) Evaluating legal position lege artis	+	b) Serve legitimate needs for legal advice	+	c) Obligation of confidentiality
		Consult colleagues		Unpleasant working relationships		
		Being creative		Fight to reach client's goals		
		Fact finding		Being the client's armour		
		Given place of jurisdiction				
		Legal basis of claim/subsumption				
		Given time constraints of law				
		Designing a strategy				

It can be inferred that lawyers adhere to professional codes of conduct by combining the concepts of evaluating legal position lege artis, serving legitimate legal needs, and respecting lawyer-client privileges.

a) Evaluating legal position lege artis

§ 3BORA, § 43a BRAO state lawyers' professional rules of conduct.

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How lawyers evaluate the legal position *lege artis* can be observed most prominently in Stage III, as supported by the quotes in section 5.2.1.1.

b) Serve legitimate needs for legal advice

The concept of serving a client's needs by following these rules can most prominently be observed in Stages I (deciding to accept a client) and VI (recommending a procedure). For example, before accepting a client, the lawyer must ensure that he doesn't enter a conflict of interest. One participant reported that in a divorce case, the couple contacted him to discuss how to split the assets according to legal rules. The lawyer had to decide which of the two to represent early because both would have contradicting interests.

Gert, File 61; Reference 88

In divorce cases, spouses often come together, so you must say who you represent. It must also be clear that you only represent one person and not the other. It must be transparent for all sides. And I always recommend that after the three of us have tried to come to an agreement and find a solution, the person without representation should seek legal advice, too.

By accepting the mandate, the lawyer is fundamentally obliged to provide careful and ongoing information about the prospects of success of the proceedings, no matter how good or bad these ultimately turn out to be (BGB, Urteil v. 10.05.2012, IX ZR 125/10). Therefore, when recommending a procedure, the lawyer keeps the client's interests in mind. Otherwise, he might be liable for not adhering to professional codes of conduct.

Fred, File 60; Reference 89

The principle of profitability is only from the client's perspective because I'm not allowed to do anything else.

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I can't advise in such a way that I say I don't give a damn what the result is, the main thing is that I can write him the invoice. I'm not allowed to do that.

Similarly, being creative in developing the best legal strategy by subsuming case matters under the most pertinent laws and regulations is an element of building a reputation, as well as observing professional rules of conduct. The higher the level of complexity of the case matter, the more room for creative legal solutions exists. For example, participants reported applying a salami slicing (abschichten) approach to create a step-by-step strategy combining trial and ADR procedures.

c) Obligation of confidentiality

The concept of confidentiality is governed by the lawyer-client privilege (§§ 1,2 BORA). That lawyers follow this rule can be derived from the reported behaviour throughout all stages of the consulting and decision process.

The policy of observing professional rules of conduct leads lawyers to inform clients about ADR procedures available; however, lawyers don't perceive rules of conduct as a mandate to recommend ADR procedures.

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The following table, Policy C, shows how the content of three head codes contributes to policy formation.

*Table 11:
Policy C with a selection of corresponding codes*

Managing client's expectations	=	a) Client's need for justice, money, closure	+	b) Client's time constraints	+	c) Client's risk propensity
		Human condition		Economic situation		Gauging openness for ADR
		Emotional condition				Explain chances and risks involved
		Confidentiality requirements				

That lawyers manage client expectations can be derived from how lawyers combine the concepts of clients' needs, timing, and risk.

Fred, File 60; Reference 90

I try to avoid promising things that I cannot fulfil.

a) Clients' needs for justice, money, closure

How lawyers cater to clients' needs is supported by quotes in section 5.2.1.1. Participants report that they take considerable effort and time to find out what motivates the client. This behaviour can most prominently be observed in Stage II (clarifying the client's interests and mandate).

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b) Client's time constraints

How time constraints from a client's perspective can be met with court dates and deadlines in relevant rules can most prominently be observed in Stage IV, as illustrated by the quotes in section 5.2.1.1.

c) Client's risk propensity

Participants report managing the risks of winning and losing a claim for the client as well as managing their own risk of being liable for misconduct in their consulting practice.

Interestingly, participants' reports about how they gauge clients' risk propensity seem mostly to be intuitive rather than through (mental) calculation.

Bess, File 54; Reference 91

It's a higher level of escalation because the other party has already hired a lawyer. If my client says: I would like you to represent me. I then perhaps also realise that my client actually wants to reach an agreement, and I make a settlement offer in the first or second pleading. And say, for example, that they would like to bring this to an amicable end and offer this and that. I've just had that with two companies.

Lawyers often manage risks by attempting to escalate a conflict gradually.

Doug, File 58; Reference 92

And I do this in a very low-threshold way by asking the parties to name someone they can turn to. At the beginning, conflicts are also experienced one-sidedly, before they spill over and become obvious. If the other party is not confident enough to speak up or is somehow not making progress, they can approach this mediator, this third party, who will intervene and take care of it.

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The policy to manage the client's expectations influences the recommendation practice by framing trial and ADR according to the client's risk propensity.

The following table, Policy D, shows how the content of the three head codes contributes to policy formation.

*Table 12:
Policy D with a selection of corresponding codes*

Empowering clients	=	a) Meet and treat clients on equal footing	+	b) Prepare the client for an informed choice	+	c) Leave responsibility with client
		Take the client's choice as given		Client's present knowledge		Mandate to sue
				Client's previous experience		

That lawyers empower clients can be inferred from how lawyers combine the concepts of treatment on equal footing, informed choices and assigning responsibility.

Following this policy can be observed most prominently in Stage IV (explaining litigation and ADR options), as further supported by the quotes in section 5.2.1.1.

a) Meet and treat clients on equal footing

An example of how lawyers meet and treat their clients on equal footing refers to teamwork.

Lina; File 69; Reference 93

And sometimes I'm straightforward and honest and say to the client: "That's what you want is impossible."

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And then they thank me because they know that this is the wrong path. I can do that. It's not just a cuddly approach. I can be clear and precise. But I also have no problem if someone points out a mistake to me.

I say: "That's true. You're right about that." We are simply a team on the same project, which makes inheritance law so lovely because we want to achieve something together.

b) Prepare clients for informed choice

From how participants describe their teamwork with clients throughout the decision-making and counselling process, it can be derived that empowering clients to finally make an informed procedural decision is a complex and multistage process.

c) Leave responsibility with clients

It is interesting to note that lawyers generally leave the responsibility for the final procedural decision with the client. As the quotes in section 5.2.1.1 support, lawyers convey procedural recommendations often indirectly by framing procedural choices positively, as they think are appropriate or negatively for choices they think are not appropriate. This can be interpreted as a hint at a more balanced level of responsibility. Participants' testimony supports this interpretation that they give clear recommendations when a client wants to make a harmful decision.

Carl; File 57; Reference 94

It, of course, depends on what arguments the other side has. In the case I mentioned earlier, we based our claims on very thin ice. If the other party doesn't want to settle, then I would say, "Come on, let's write off the claims because they are unlikely to be enforceable."

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The policy of empowering clients to make informed procedural decisions influences the recommendation practice by introducing a third option: giving no explicit recommendation at all.

5.2.2.2 Influencing factors

Various factors influence lawyers' decisions to recommend a certain procedure explicitly or implicitly. The following section will discuss four of those: additional training as a certified mediator, laws' regulation density, lawyers' risk management, and lawyers' intuitive decision-making.

a) Certified mediators

It is commonly assumed that lawyers who are also trained mediators tend to recommend ADR procedures more often than colleagues without this additional training. Mediators have a particularly favourable attitude towards ADR procedures. This is understandable, as they have invested time and money in acquiring specific communication skills and techniques to handle highly escalated and, at times, emotional conflict situations. Lawyers are confident that they can successfully guide their clients through ADR procedures as their legal advisors.

Fred; File 60; Reference 95

Having trained as a mediator, I have an interest in or access to it, and I think it's good and right to consider such things because in court, I make a request, and then it's yes or no. Alternative proceedings, of course, always offer the opportunity to include specific things in a solution.

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Doug; File 58; Reference 96

Out of conviction, I am an absolute advocate of non-judicial disputes. I also try other methods in advance to achieve a result. Of course, this also depends on the client. It very much depends on the issue.

To address this assumption, approximately half of the participants in the sample are certified mediators.

Table 13:
Sample overview

Field	Sample:	18 SSI conducted by researcher with certified lawyers	Average duration 45 min.	Average legal experience of lawyers 24 year	SSI conducted Jan-Mar 2022 in Lower Saxony, GER
Inheritance law	Lina	Rosa	Nele		
Family law	Bess	Ella	Gert	Henk	Inga
Labour law	Fred	Miro	Svea		
Insolvency law	Adam	Carl	Quia		
Commercial/ Contract law	Doug	Jens	Kurt	Olaf	

Legend:	= Mediator	*women
		*men

Surprisingly, today, the fact that a lawyer is also a certified mediator makes a less significant difference.

Doug; File 58; Reference 97

So, it's also much easier with the lawyers. Depending on who is there. Of course, there are also lawyers who say they don't do that (mediation) as a matter of principle. They don't want to. But that has changed a lot over the years. When I became a mediator, it was all the devil's work we were doing. But now we get along quite well among colleagues. Ultimately, the clients are the ones who must make decisions. And that's where it often fails.

Fred; File 60; Reference 98

When an older colleague received an invitation to mediate the case, they hesitated because older colleagues found this role very difficult.

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In mediation, they sit in the second row and are only involved if necessary or perhaps in the interim consultation in the corridor. So, the older colleagues, who had nothing to do with it, had massive problems understanding their role. They only know themselves in their robes, as the ones talking. So that's certainly also a generational issue.

The sample included eight certified mediators and eleven lawyers without such an additional qualification. In general, lawyers were more ADR-prone than their clients. As expected, lawyers with the additional qualification as mediators explained ADR procedures in more detail to their clients than those participants without such an additional qualification. When lawyers who are also certified mediators are contacted by a potential client, one of the lawyers' first questions is whether the client wants to hire them as a lawyer or a neutral mediator. In almost all cases, clients want to hire a lawyer. Participants report that it is mainly the additional costs for mediation services that clients are not ready to pay for.

Gert; File 61; Reference 99

But the difficulty also lies in the fact that not every family can afford a more expensive procedure. And in my view, this is a flaw in the legal regulation. A person who doesn't have that much income, who is an average wage earner, can apply for legal aid for court proceedings. But if they want to go to mediation beforehand so that they don't have to go to court, they won't get any support for mediation. There is still basic legal aid, but it is not sufficient. No mediator will do this for the tariff.

However, clients seem to expect that lawyers who are also mediators use their skills to find non-confrontational ways to get their rights.

Adam; File 54; Reference 100

I tell the client: I would do it this way and that. You are welcome to send me a draft of such a letter.

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I can scribble around in it a little bit in terms of the legal aspects and perhaps also the wording so that it comes out as consensual as possible, or what can be regulated by consensus. "Okay, we've made a mistake here", and so on. I put a lot of effort into this first letter that officially comes from the client in cases suitable for mediation.

b) Law's regulation density

The attitude toward ADR procedures depended among the participants more on the specific fields of law, respectively, the field regulation density, than on the additional qualification as a mediator. The German Civil Code consists of five books. 1. General Part, 2. Law of contractual obligations, 3. Property law, 4. Family law, and 5. Inheritance law. Special laws like the Commercial Code, several labour law codes like the Occupational Safety Law (ArbSchutzG), Maternity Protection Act (MuSchutzG), Minimum Working Condition Act (MiLoG), and others regulate the Civil Code in more detail. Insolvency procedures are regulated in a provision, as is the Code of Civil Procedure. Insolvency regulation details and overrides the Civil Code or special laws in some regards. The code of civil procedure applies to every trial procedure.

Participants who are active in special law areas reported that trial procedures are regularly used, while ADR procedures are rather rarely recommended. Thus, mediators also see ADR procedures critically when there is a sense that the counterparty has no wiggle room or is not willing to compromise at all.

Bess; File 56; Reference 101

In my opinion, mediation is an excellent addition to the court process. And it is certainly helpful in some areas of disputes, like in family law, where it's about personal ties and relationships, where long-term relationships still exist.

If there are children involved, or in disputes with neighbours, long-term tenancy relationships, where you still want to work or live together.

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In these cases, it is undoubtedly a good complement to court proceedings. There are certainly also areas where, in my opinion, it cannot be used, where it is only of limited help or where you know that you are more likely to encounter resistance, for example, in traffic accidents, where it's all about money with an insurance company behind it. You know that they won't agree anyway because they have specific requirements as to how they want to settle. And there's no room for negotiation.

In contrast, participants who are active in family, property or inheritance law reported that ADR procedures are very common at some point.

Gert; File 61; Reference 102

I would say that 70 to 80 % of the people I meet have no interest in going to court. They want to settle the matter beforehand.

Rosa; File 74; Reference 103

That (the client's interest) is the overriding principle. In inheritance law, as I said, this can be achieved relatively often outside of court proceedings because the client's interests are certainly not always expressed only in euros and cents but sometimes in other areas.

c) Risk management

Lawyers' procedural recommendations to a client are influenced by risk considerations, which can be inferred from how they manage clients' expectations.

Fred, File 60; Reference 104

But that's why I always try to be relatively open about it from the beginning, saying, "Watch out when we reach that; it would be really good."

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Well-managed expectations, combined with a high success rate, help lawyers build a good reputation. Lawyers report that building a good reputation is important to them. This includes gaining a good reputation among colleagues and judges.

Carl, File 57; Reference 105

That's not proper for a lawyer. I once argued with the bar association president on the other side, and it was a delightful, collegial argument in front of each other. As colleagues, you look each other in the face and shake hands. And that was a lesson for me. That's how it should be. Time and time again, you come across colleagues who rumbled and escalated in the processes, and then you say, "There's no need for that. So why don't you behave a little more appropriately here?" I once reported another colleague to the chamber because he threatened one of my clients.

Kurt, File 68; Reference 106

One such expertise I have always had is the fee for architects, which is incredibly complicated and difficult. I would drive colleagues who have nothing to do with it crazy with my expertise. The architects, too, by the way. You notice very quickly when people don't understand it. They then write something and have no idea about it. And I don't really want to be in that situation.

Lina, File 69; Reference 107

Yes, that really is probably also a brand. We also get that when clients are recommended. That's what it is. You feel understood, accepted. You want and have the confidence to see the project through together. Yes, definitely.

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d) Intuitive decision-making

That lawyers use heuristics in their decision-making can be inferred from statements participants made when they were asked to describe their decision process.

Participants report that they sometimes override a cognitively reached assessment of a legal strategy with a gut instinct assessment.

Henk; File 62; Reference 108

Exactly, so that's a bit of a feeling thing. How do I now assess the information from the past and everything that has happened and what I have experienced myself? It's also a matter of feeling. How do I assess the other person now?

Rosa; File 74; Reference 109

Of course, the client's interest in a quick end, in pacification, or at least in calming the situation is also essential for the client. But of course, you also must feel this out and discuss it openly with the client.

It has been shown how the policies of sticking to fields of expertise, observing professional rules of conduct, managing clients' expectations, and empowering clients that lawyers follow influence their decision on what procedure to recommend to their clients. It has been further shown how the three new fundamental drivers (law's regulation density, risk management, and lawyers' expert intuition) could be identified by interpreting lawyers' behaviour throughout the counselling and decision process, as well as taking the policies lawyers follow into account.

The following section describes how policies and the three drivers of law's regulation density, risk management considerations, and intuitive decision-making relate to one another.

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The main elements of the decision process lawyers go through before making a procedural recommendation are identified. How these elements are connected through causal links and how policies drive them shows what happens.

5.2.3 The real decision-process -(ADR-None-Trial) ANT Recommendation Model

Real data relies on the interpretation of actual data. This third analytical round identifies the relationships between key elements of the lawyers' decision-making process and the fundamental drivers. The findings are presented in two subsections. Section 5.2.3.1 presents the fundamental drivers that form the policies, and Section 5.5.3.2 integrates the results into the (ADR-No recommendation-Trial) ANT Recommendation model.

5.2.3.1 Fundamental drivers of policy formation

Besides the influencing factors that drive lawyers' decisions to recommend trial or ADR described in section 5.2.2.2 (certified mediators, law's regulation density, risk management, and intuitive decision-making), additional cultural and structural fundamental drivers on a macro level form the policies lawyers follow.

The German culture of dogmatism (Rechthaberei), reflected in clients' need for justice and closure, is one stereotype of how others see Germans. Dealing with dogmatism leads lawyers to a policy of managing clients' expectations. Within the broader legal community, it is common ground that "thinking around the corner," pointing out less likely scenarios, and anticipating the other party's next legal move is good legal practice. This attitude can lead to a culture of hesitation, with lawyers answering, "It depends on ..." when asked for clear guidance. This self-perception of a good lawyer manifests in the policies to stick to fields of expertise and empower clients.

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Lawyers' decision process underlying structural drivers are the historically developed legal curriculum and the reasonably well-functioning court system. A lawyer's legal education prepares them to become judges, thus focusing only on the legal aspects of a case. In combination with a court system that provides for hearings in a reasonable timeframe and minor corruption risks, recommending the use of trial procedures reflects the policy to adhere to professional rules of conduct.

5.2.3.2 The (ADR-None-Trial) ANT Recommendation model

The data will be presented as a consolidation of actual knowledge into fundamental drivers of lawyers' decision-making. However, it is not a one-way channel from empirical to actual to real knowledge.

It is also an option to take the viewpoint that the fundamental drivers of the real drive policies, which then influence lawyers' behaviour. Therefore, the discussion in Chapter Six starts with the ANT Recommendation model. First, the key elements of the ANT Recommendation model are identified. Then, the underlying main themes, which allow for the abstraction of the decision process, are described.

The following model depicts the elements of the decision process and their relationships that have been identified across all cases.

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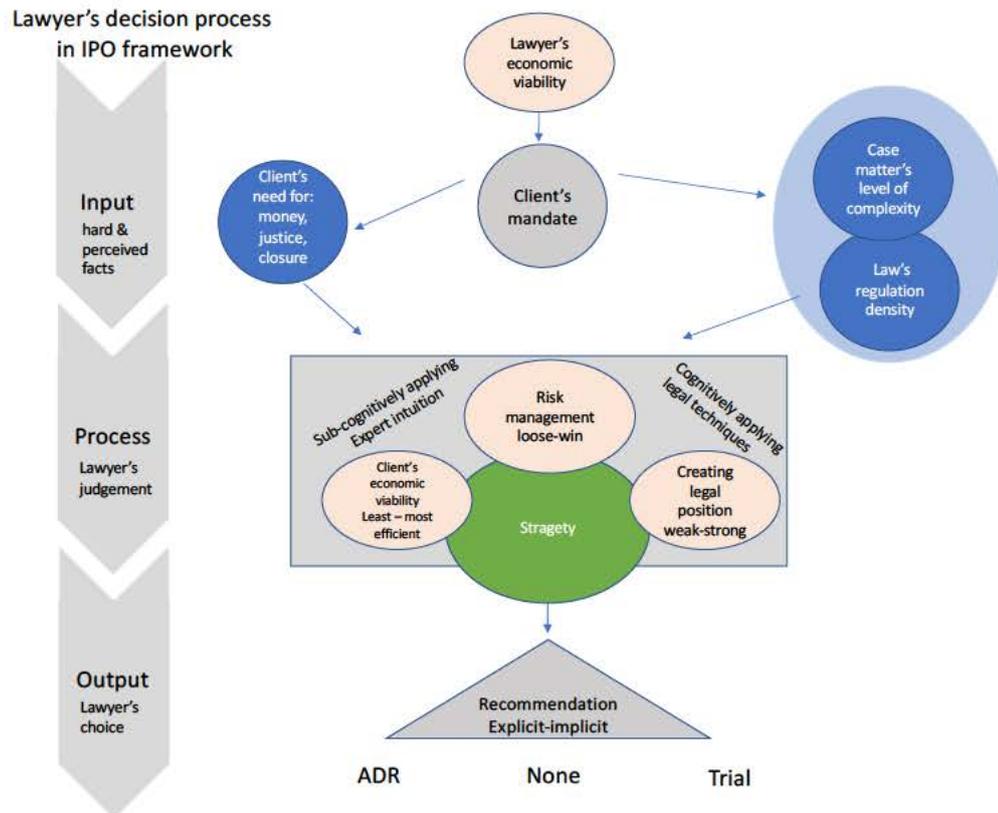


Figure 17:
(ADR-Non-Trial) ANT Recommendation Model

In the input phase, lawyers follow a policy of sticking to fields of expertise. The behaviour can most prominently be observed in stage I. This policy is closely related to the concept of economic viability from both client and lawyer perspectives.

The setting of the case in terms of the case matter's complexity, the clients' explicit mandate, and their underlying needs, combined with the regulatory density of the field of law, is the first underlying decision driver for the lawyer. Once the lawyer has accepted the client, the client's expressed mandate is the starting point in the decision process.

The client's needs for money, justice, and closure, which occur in various combinations and weights, underpin each mandate. In addition to these three most prominent needs, there are many additional personal needs. Most of them are related to money, justice, and closure in one form or another.

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The content of the case places the mandate into a specific field of law. The degree of complexity of the matter is one important feature of the case.

The four elements – client's mandate, client's needs, case matters' level of complexity and law's regulation density – are the main influencing factors of a lawyer's recommendation. Even before the legal evaluation has begun, lawyers report that they have a first impression and gut feeling about how open a client might be to accepting consensual procedures when considering these four elements and applying expert intuition.

A policy lawyers follow during all three phases is to observe professional rules of conduct. This concept is closely related to the lawyer-client privilege and serving legitimate legal needs. It can be observed most prominently in Stage II in the input phase when lawyers clarify the client's interests.

In the process phase, lawyers follow the policy of managing clients' expectations. This behaviour can most prominently be observed in Stages IV and V when lawyers discuss litigation options and possible outcomes with clients. This policy is closely related to clients' time constraints and risk propensity. When lawyers judge the strength of the legal position and consider the efficiency of different procedural options, they manage the overall risk of losing the case.

Evaluating legal options to achieve the client's aims and fulfil their needs, lawyers consider at the same time what risks are involved in different options and how economically viable the different options are. Lawyers then judge the risks, costs and chances involved, in a conscious and cognitive way through subsumption and individual techniques of literature research as well as finding precedents. At the same time, lawyers apply their expert intuition to creatively find new ways of interpreting and combining laws. Balancing the three elements of the legal position, client's economic viability and risk management considerations, lawyers often start to develop a multi-step strategy.

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To create a strategy combining ADR and trial procedures, lawyers use their expert intuition as a third decision driver.

This behaviour can be observed in Stage III when lawyers report that they override a cognitively reached assessment with a gut instinct assessment.

In the output phase, lawyers follow the policy of empowering clients to make an informed decision by going to trial or using ADR procedures. The policy of empowering clients is closely related to the concepts of meeting the client on an equal footing and leaving the final responsibility for a procedural choice and his/her mandate with the client, except in cases where a client is about to make a harmful decision. In this instant, the lawyer's risk management duty comes into play, and the lawyer will try to avert such a negative decision by the client. This behaviour can be best observed in Stage VI. The choice between recommending going to trial or using an ADR procedure, explicitly or implicitly through framing, is the final step in the decision process before the lawyer informs the client about the recommendation.

The following tendencies could be identified:

1. The stronger the legal case, the stronger the recommendation to go to trial.
2. The more complex the case matter, the stronger the recommendation to slice the problem into a sequence of trials and ADR procedures.
3. The greater the absence of firm timelines and narrowly defined legal terms, the greater the openness to recommend using ADR.

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5.3 Summary

To fulfil the aim of developing a new model of lawyers' procedural recommendation process, two objectives must be achieved. The fulfilment of the first objective, to theoretically derive a model from current literature, was achieved as described in Chapter Three. The second objective, to empirically refine the theoretically derived model, has been achieved throughout this chapter.

The data analysis uncovered the limitations of the theoretically derived model while also expanding current understanding of the decision process based on new empirical data. On an empirical level, real-life experiences show that lawyers follow a seven-stage decision process. On the actual level, the data revealed four central policies lawyers follow. The interpretation of the data indicates that several factors on both micro and macro levels influence lawyers' decision-making in practice. The relationships between key elements of lawyers' decision process and the fundamental drivers were identified and finally presented in the form of a new ANT Recommendation model.

Although the schematic model greatly simplifies reality, it still effectively facilitates discussion of important underlying motives that influence lawyers' long-term procedural decision-making. The identified motives and drivers challenge the previous theory that suggests lawyers' decision processes are simple and that lawyers' profit orientation in a capitalist economy is a key factor in procedural choices. The new findings demonstrate that the decision process lawyers undertake is complex and that they consider the client's perspective when making procedural recommendations.

The analytical process demonstrated how lawyers' interactions with clients translate into the main policies they follow and into key drivers of their decision-making process. However, the discussion chapter will adopt an opposite perspective.

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It begins by examining how the key drivers influence policies, which then impact observable behaviour. The subsequent discussion contextualises these findings within current knowledge and highlights the project's theoretical and practical implications.

6 Discussion

This chapter aims to demonstrate the deficiencies in the literature as revealed by the findings. The presentation of findings in the results chapter followed the analytical process of a critical realist's empirical, actual, and real levels of knowledge. However, this chapter will start to discuss the structural results in Section 6.2 first. The discussion about the reality of a lawyer's decision process will then lead to section 6.3, with the discussion about the implications of policies lawyers follow on an actual level. Section 6.4 filters these discussion results into the discussion about the different stages of the decision process on an empirical level. Section 6.5 summarises the discussion results in four claims.

The theoretically derived L/C-PC (**L**awyer/**C**lient – **P**rocedural **C**hoice) model took findings from the fields of decision-making in hierarchical teams, procedural preference research in the legal field, research about trust concepts and expert intuitive decision-making, as well as the role of lawyers in the judicial system into account. The empirical testing showed that the model needed substantial refinement. The initial model stressed the interaction between client and lawyer assuming trust being a central influencing factor in procedural choices. Yet, the final ANT Recommendation model still includes the interaction between lawyer and client. However, the name of the model stresses the outcome in the form of recommendations for either **ADR** or giving **No** recommendation or recommending **Trial**.

6.1 Discussion of structural results as presented in 5.2.3

The ANT Recommendation model is structured in an input-process-output (IPO) framework. The model includes five input themes, six process themes and one output theme.

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Input themes are about hard and perceived facts, process themes are about lawyers' judgment, and the output theme is about lawyers' choice to recommend either ADR or no procedure or trial.

This section includes four subsections. Section 6.1.1 deals with the input level, with the theoretical and practical implications of the settings of a case. The following three subsections discuss risk management (6.1.2), client's economic viability (6.1.3) and expert intuition (6.1.4) on the judgment process level. Each subsection elaborates on the theoretical and practical implications of these drivers.

The selected parts have been chosen because they represent new insights into four fundamental drivers of procedural choices. Further discussion of other parts remains to be done in a follow-up paper. However, the following discussion demonstrates how the ANT Recommendation model starts to fill a lacuna in the literature.

6.1.1 Setting of the case

This section of the discussion will focus on the setting of the case, firstly, in terms of clients' needs for money, justice, and closure, and secondly, on the regulatory density of applicable legal norms. These two drivers have been chosen to discuss new insights into perceived and hard input factors.

6.1.1.1 *Clients' needs*

As a decision-making factor, clients' priorities of their needs for money, justice, and closure are reflected in the policies lawyers follow most obviously when they aim to manage client expectations.

Lina; File 69; Reference 93

And sometimes I'm straightforward and honest and say to the client: "That's what you want is impossible." And then they thank me because they know that this is the wrong path.

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*I can do that. It's not just a cuddly approach. I can be clear and precise.
But I also have no problem if someone points out a mistake to me.*

Lawyers frequently manage clients' expectations. They do this, for example, in Stage I when they decide to accept a client. To identify high-maintenance clients, lawyers partially follow their intuitive personal impressions and partially the explicit requests clients express. Lawyers will communicate clearly, for example, the way and frequency with which clients can expect feedback about their case's current status. In stage two, when lawyers clarify clients' mandates and interests, they figure out what motivates the client. Lawyers explain that it is highly likely that disappointments will occur at some point in the process. Lawyers also manage expectations in Stage V when they reason about possible outcomes and gauge the client's ability to compromise and talk about inherent risks in every chosen procedure.

a) Theoretical implications

The literature has long discussed procedural fairness as a central theme in procedural choices (e.g. Leventhal, 1980; Thibault & Walker, 1975; Tyler, 2004). More recent research looked at lawyers' advice, the costs and duration of proceedings and a client's criteria for procedural choices (e.g. Kals et al., 2018b; Shestowsky, 2018). All these studies focused on the client's perspective of procedural choices. Investigating the decision-making process from a lawyer's perspective leads to reframing the client's needs for fairness, cost, and time efficiency as input factors into the lawyer's decision-making.

Although the theoretically derived L/C-PC model was structured in an input-process-output (IPO) framework, it did not specifically account for clients' needs as an input factor.

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Input factors have been broadly described as “informational artefacts and cues.” As described in section 3.2.7, the sub-system “client” included the client's human condition as well as the nonspecific surrounding conditions of the case. However, the findings revealed a more fine-grained picture. Empirical data shows that input factors can be differentiated into clients' expressed mandates, clients' needs for money, justice and closure, and laws' regulation density, as well as the level of complexity of case matters.

b) Practical implications

Clients generally have control over and determine their need for money, justice, and closure. Since lawyers are service providers commonly running for-profit businesses, they strive to get their clients what they want. To do that, lawyers need to figure out what the client wants. The client's expressed mandate is the starting point. The mandate is driven by interests, which are in turn driven by needs. For example, the uncertain fate of a family home in a divorce case spurs the ex-husband to hire a lawyer. The mandate is to sue the ex-wife to leave the house so it can be sold, and the sales price can be split. The underlying interest may be to be free to get a fresh start in life. The underlying needs are independence and closure.

It is now up to the lawyer to determine the priorities because the clients will judge the service quality based on how much the lawyer got them what they wanted. Lawyers always have incomplete information about the case because we all always have incomplete information about a specific situation. For example, a client might mandate a lawyer to collect overdue claims from the client's customer. The customer claims that he had lost his job because he had been caught driving under the influence of alcohol and, therefore, lost his driver's license. He promised to pay as soon as he got a new job. Since the client has personal experience with a family member's alcohol problem, the client is particularly rigorous with the current case and wants to go to court right away.

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The lawyer probably wouldn't know about the history of alcohol because the client doesn't consider this information relevant to the case. As lawyers' working time is a scarce resource, they try to filter only the relevant information from the client's reports rather than listening to entire life stories. Judging clients' priorities intuitively provides the necessary shortcuts in a capitalistic system.

The results that clients' needs for money and justice are influential are in line with the results of the new report commissioned by the Federal Ministry of Justice (Ekert et al., 2023, p. 98). Previous research has also confirmed the assumption that lawyers take clients' expressed mandates seriously.

A joint study of the German private University Bucerius Law School and law firm Taylor Wessing by Aschenbrenner (2012, p. 8) investigated the role of external lawyers in mid-size and large companies regarding the company's internal conflict management system in B2B (business to business) conflicts. They found that companies experience external lawyers as rather ADR averse. However, lawyers serve their mandate when companies are interested in solving a dispute via ADR.

This result from Aschenbrenner et.al. (2012) is somewhat contrary to the result of this study that lawyers stick to their field of expertise. Aschenbrenner et. al. suggest that if lawyers' expertise does not include special knowledge about ADR procedures, lawyers might tend to convince their clients to go to trial.

Yet the results of this study show that lawyers are generally more open to using ADR procedures than their clients. Since the Bucerius study is more than ten years old, the new results could hint that sentiment towards ADR procedures has shifted. More research is necessary to investigate a possible shift further.

6.1.1.2 *Laws' regulation density*

Different law fields have different regulation density levels in terms of deadlines and definitions of legal terms. These differences significantly influence lawyers' decisions to recommend going to trial or using an ADR procedure.

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For example, labour law has a high regulation density, which leads to a comparably low ADR recommendation rate. In contrast, inheritance law has a low regulation density, leading to a comparably high ADR recommendation rate. The influence of regulation density is prominently reflected in the different tendencies to recommend ADR procedures in distinct fields of law.

Rosa; File 74; Reference 110

Sometimes, it doesn't work without a trial procedure. However, especially in inheritance law, I try to avoid trial procedures as much as possible.

As described in section 5.2.2 about the policies lawyers follow, they tend to stick to their fields of expertise in terms of law and, as an additional area of expertise, become certified mediators. How this policy translates into distinct behaviour can be observed exceptionally well in stage one of the decision process. For example, when employers ask a lawyer who advises their company on labour law issues to represent them in a family case, the lawyer, who is an expert in labour law, will refer the client to a colleague who is an expert in family law. The same behaviour can be observed in stage four. While lawyers search for and collect facts when they evaluate the legal position, they might find that the case also needs to be rooted in another field of law that is not in their specific field of expertise. In this case, lawyers report that they will consult colleagues.

While previous procedural preference research has focused on fields of law that generally deal with conflicts where the conflict parties have long-term relationships, these results demonstrate that the regulation density of the field of law is a crucial influencing factor on procedural recommendations. The duration and form of the relationship between the conflict parties are only a lower-ranking factor.

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While the ADR community uses long-term versus one-encounter relationships as a criterion to categorise cases into better or less suitable for ADR procedures, the German legislature does not account for differences in long-term relationships and one-time encounters between parties when writing new laws. Laws are abstract rights. Trial procedures allow only, for example, the claim of money, the right to information, or the request for an injunction. The impact abstract laws have on life circumstances is hard to understand for laypeople. In contrast, the difference between a long-term relationship and a one-time encounter is easy to understand. Although human minds like to simplify and use heuristics to make decisions easily, the simplification leads to mixed results. It is wrong to assume that all cases involving long-term relationships are generally suited for ADR.

a) Theoretical implications

Laws are abstract rights. They regulate society by following postulates when legislating. Important postulates are equal treatment, morality, and rationality. These postulates guide the interpretation of rules concerning the historical development of a rule. The legal doctrine of interpretation comprises four steps. The first step is to interpret the wording of the law. The second step is to interpret the rule from context systematically. The third step is to interpret the rule according to its meaning and aim, and the last step to interpret the rule in the light of guiding postulates.

The role of a lawyer within the civil law system is to apply life circumstances under abstract rights and represent clients in court. Therefore, lawyers are trained for adversarial trial procedures. Their main task is to present facts, contest the facts presented by the opposing party, and traverse allegations from the opposing party. In areas where legal terms are broadly defined, lawyers can argue about different interpretations of legal rules.

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Besides the density of the legal rules, the case matter is another critical input factor. Complex case matters offer ample room for different views about which rules must be applied and how they are interpreted. These other options create uncertainty. It is hard to predict which view judges would take and which argumentation they would finally follow.

Lawyers will estimate the effects of input factors in the judgment process phase of the decision process. Lawyers must handle the uncertainty about possible outcomes of a trial procedure regarding risk assessment and management. They weigh the legal strength of the case and the chance to win a trial against keeping control over the outcome with an ADR procedure. They consider how efficient the proposed procedure would be from a client's perspective regarding time, effort, and money. The ADR community argues that, for example, labour, family, and inheritance law are well-suited for ADR procedures because they typically involve long-term relationships or non-litigable claims, like forcing somebody to cooperate. However, the currently low numbers of ADR procedures performed are inconsistent with that view. Consequently, the theoretically derived L/C-PC model captured the different fields of law only generally as "informational artefacts and cues" as an input factor.

However, this study's findings show that the regulation density level, rather than the field of law, is a key influencing factor in lawyers' decision-making process when recommending trial or ADR procedures to a client. Therefore, the ANT Recommendation model includes the laws' regulation density as a new important influencing factor in the input phase of the lawyers' decision process. Current literature has discussed this factor only marginally when implementing conflict management systems in organisations (e.g. Gläßer & Kirchhoff, 2017; Kirchhoff et al., 2013). The community of judges, which is also concerned about the decreasing number of civil lawsuits filed, has a slightly different take on the issue of regulation density (Nöhre, 2023). The community of judges argues that the problem is, instead, the code of civil procedure (ZPO), which needs fundamental refinement.

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Allowing e-files instead of paper trials, conducting hearings online and streamlining court fee payment files would make procedures faster and more efficient.

Since dealing with ZPO regulation is necessary in every civil trial, it is implicitly included in the regulation density input factor in the ANT Recommendation model.

b) Practical implications

The legislature controls the density of laws and regulations. However, EU rules curb national rules and the discretion of the German parliament. Examples are the Act on Alternative Dispute Resolution in Consumer Matters (VSBG) and new rules about compensation litigation, such as those for unduly long trial procedures or official hearing litigation.

Lawyers have two angles to influence the input factors. Firstly, they can reduce the complexity of cases by leaving out certain parts entirely (for the time being) because they are of minor value or concern. Secondly, they can divide the case into litigable claims and non-litigable claims. Although in general, nearly all claims are litigable. Slicing the case matter into parts better suited for ADR and parts that can be prosecuted better reduces complexity, too. For example, one participant reported that a client who lived in an apartment house used to feed birds from their balcony regularly. Since other tenants started complaining about pigeons and rats showing up, all tenants got a letter from the premises department saying that it is forbidden to feed pigeons and rats on the balcony and that they should stop doing it. The client saw it as his right to feed birds as he wished and wanted the lawyer to forbid the premises department from harassing him with letters and prohibitions. Since the client wasn't named personally in the letter, the lawyer told him there is no legal ground in the civil code to go after the premises department or other tenants.

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The only litigable option was to file a defamation suit against a particular neighbour on shaky grounds with high escalation potential.

However, what lawyers can't do is choose which rules must be applied in the case. For example, subsuming a case matter under the general rules of (BGB) (German Civil Code) or rules of special laws with higher regulation density is a matter of "lex specialis" rule. This means special law rules trump general law rules.

Keeping up deep knowledge in different areas of special law is not feasible because of information overload due to constant changes in rulings. The bar association permits each lawyer to specialise in three out of 24 different specialities. To overcome this limitation, participants reported that they regularly collaborate with colleagues from their network to have a broader range of options, thus presumably fulfilling clients' needs better than young private practice lawyers. This project identified that experienced lawyers follow a policy of sticking to fields of expertise throughout the whole recommendation process.

6.1.2 Risk management

As described in section 5.2.3.2, estimating the probability of winning or losing the case, respectively managing clients' expectations about the likelihood of getting them what they want, are key drivers within the lawyers' judgment process. Clients will then balance the risk of losing with the costs incurred and the time invested. A particular situation occurs when clients are insured against legal expenses. This alters the pros and cons of a trial substantially because there is no cost risk involved when the case is lost. However, legal expense insurers only agree to cover a case if lawyers can argue that there is a reasonable chance of winning. The driver is best reflected in the policy to empower clients.

How lawyers empower their clients to make informed procedural decisions can be best observed in stage four, explaining litigation and ADR options, and in stage five, reasoning about possible outcomes.

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Miro; File 72; Reference 65

I usually give the clients envelopes in the consultation meetings. I usually tell them, "You can do this. You can do this; you can do that, or you can do that. It's up to them to decide. So, if you want to do this, this will happen, and if you do that, that can happen, or if you do that, that can happen". So, I show them alternative ways. Then I'm usually asked: "What would you do?" Then I give them my assessment. Yes, and give them a way forward. And vice versa, we also have to somehow see how we can capture the opponent on the other side so that the clients can best implement it to achieve their goal. And I always say 30% of the time you shouldn't lose. You can't win 30% of the cases. Yes, and in between is a grey area, and this grey area is not only decided by the legal aspect, but there are certain other grey areas.

When lawyers explain in stage four how the legal system works primarily in terms of timelines, costs, and control over the outcome, they compare trial procedures with ADR procedures. Together with providing general information, lawyers reason why they expect a specific outcome with an estimated probability. In other words, lawyers offer their confidence ratings for expected outcomes. Educating the client about legal options and lawyers' confidence ratings empowers the client to make an informed decision. Lawyers manage the risks from a client's perspective and their potential liability risks resulting from misleading advice or failure to protect the client from making a harmful decision.

a) Theoretical implications

The theoretically derived model suggested that lawyers would confirm or revise their recommendations in iterative feedback loops depending on whether clients took or rejected their advice.

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However, empirical data show that lawyers tend to give no explicit recommendation, arguing that it is their role only to inform and empower the client to take an informed decision. Lawyers don't feel obliged to give an explicit recommendation except to prevent the client from making a harmful decision. However, clients commonly expect to get a recommendation because they think that is what they pay for. Empirical data further shows that lawyers give implicit recommendations by framing trial and ADR options differently. Lawyers use these implicit recommendations to fulfil clients' expectations.

The theoretically derived model had to be revised according to the empirical findings. The new model includes the option of "no recommendation".

b) Practical implications

Lawyers intend to fulfil clients' expectations by managing their potential liability risks with implicit procedural recommendations. However, lawyers' educational programs do not include any training or awareness-raising about framing as a (sub) consciously applied technique and its potentially manipulative power. Communication coursework is part of lawyers' educational training, but it is instead focused on how to perform adversarial trials. When lawyers are trained for adversarial trial procedures, their main task is to present facts, contest the facts presented by the opposing party, and challenge the allegations of the opposing party. Contesting and traversing come with a particular communication style and selection of terms. It comes with rather black-and-white positions and closed questions. In amicable procedures, other communication styles are needed. More balanced opinions give the other party the option to save face.

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6.1.3 Client's economic viability

Another critical driver of lawyers' decisions on which procedure to recommend is the assessment of how efficient a proposed procedure will be from a client's perspective. To determine the effectiveness of a trial procedure, conflict parties balance the chance of winning with the investment of time and costs, as well as the psychological stress a trial procedure will cause compared to alternative procedures. Lawyers adopt this client perspective.

Yet, they add another layer to it. Lawyers gauge whether a client can endure the stress of prolonged trial procedures or is ready to assume the self-responsibility required in ADR procedures. Participating in ADR procedures requires clients to take on a more active role in the process. The success rate of amicable interest-driven procedures depends on personal conditions, power imbalances, and the case matter. Ideally, clients and the opposing party must be able to clearly articulate their concerns, interests, and agenda. Both disputing parties should be able to demonstrate that they are willing to solve the problem at hand. Clients should be able to reflect on how they acted in the conflict situation. Finally, clients should be willing to change their perspective, imagining being in the other party's position. All these considerations are reflected in lawyers' policy to manage clients' expectations.

Kurt; File 68; Reference 3

After more than 20 years as a lawyer, I can say that you won't get justice in court or for a long time. They usually get a judgment. If you're lucky, it's well-founded; if it's not, you can have it reviewed by the next instance. Many clients or litigants are usually given stones instead of bread.

Managing clients' expectations can be observed at an empirical level in stage V, reasoning about possible outcomes.

Lawyers report recommending court mediation services because the costs are included in the court fees anyway, to save additional mediator fees.

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However, recommending the most efficient procedure also includes solving the dispute as soon as possible. According to the most recent representative poll among German citizens conducted by a well-respected German institute for public opinion (Institut für Demoskopie Allensbach) on behalf of the leading legal expense insurer ROLAND Rechtsschutz-Versicherung-AG, 81% of citizens think that trial procedures take too long (Gebhard & Sommer, 2022, p. 16). Therefore, lawyers must balance higher costs for private ADR procedures against trial duration to decide the most efficient procedure to recommend.

Lawyers report further that they aim to create a long-lasting result to prevent follow-up legal procedures. ADR proponents argue that long-lasting results are better achieved within ADR procedures with amicably reached results than in a trial procedure that regularly produces a winner and a loser. Thus, resolving a dispute sustainably in an ADR procedure would save costs on another trial in the second instance if the loser in the first trial seeks to overturn an unfavourable judgment.

Current findings in the literature about how clients rate economic viability are inconclusive. The average litigated claim in 2021 was about 3,700 € (Gebhard & Sommer, 2022, p. 20), and 24% of German citizens have been involved in civil trial procedures within the last ten years either as litigants, defendants or witnesses. It is unclear how this relates to more than half of citizens (56%) having a favourable view of ADR procedures. One way to look at it is that there are about 83 million adult German citizens. About 83% are between 18 and 65 years old. This would be about 69 million people in an age group, possibly involved in substantial conflicts. According to Gebhard & Sommer, 24% report having been involved in a trial procedure, this would be 16,5 million people.

Assuming that, on average, each trial involves one litigant, one defendant and two witnesses, this would come up to about 4,1 million trial procedures within ten years or 410.000 on average per year. In comparison, about 1 million civil trial cases are filed per year.

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One possible answer to the mismatch is that people tend to favour ADR procedures if others are concerned. Yet, when it is about one's own conflict, trial procedures are preferred, although they tend to be less economically viable than ADR procedures.

However, the finding that people seem to use costly trial procedures is not in line with the most recent report from Ekert et al. (2023) that describes "economic realities" as an important influencing factor for the decreasing number of new civil lawsuits filed yearly. The authors concluded that many factors contribute to the drop in incoming lawsuits (Ekert et al., 2023, p. 341). The report describes the main influencing factor as the "change in the business world and economic realities marked by acceleration and pronounced conflict avoidance and conflict resolution behaviour."

Concerning this project, economic realities are interpreted as a composition of time, money, and soft parameters, like stress. As the authors point out, since litigants become ever more sensitive to unthrifty trial procedures, one would expect the number of ADR procedures to go up. However, research has yet to find reliable and effective ways to measure the quantity and quality of ADR procedures conducted in the private market. Without reliable statistics, trends cannot be detected in the future. Yet, the means to "count" ADR procedures are currently unavailable in the literature.

The community of judges agree with the assertion that dispute parties are sensitive to unproductive procedures. However, they argue that this is relatively true for small litigation values at lower courts (Nöhre, 2023). The balance between court fees and the procedure duration for a possible win of a small litigation value is unfavourable for trial procedures. However, the judges' community argues that relinquishing litigation and justice options is not suitable for a rule-of-law state because it curbs transparency in the justice system. Judges see it as a political task to change the relationship between fees, duration, and possible wins.

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The German government is running several campaigns to digitalise the public administration and reduce bureaucracy (e.g. IV, 2024; Verkehr, 2022). However, Ekert et al. (2023) argue that implementing online trial procedures is likely not attractive to dispute parties in lower courts because the costs are still not zero. Parties without a lawyer representing their claims would lack the “caretaker” effect of delegating the hassle. Another concern the authors do not mention is that online procedures are discriminatory against all those parties who lack the technical access or expertise to participate in online trial procedures. This applies especially to clients without legal representation.

Further, clients’ economic viability considerations are closely related to lawyers’ fees. Legal services have become ever more competitive. Wolf (in Gaier, 2019, p. 98) argues that lawyers’ economic leeway has been expanding considerably in the last decades. The allowance of law firms, contingency fees, and cooperation with pharmacists and doctors have lowered the weight of lawyers’ function as protectors and promoters of “Gemeinwohl” or common good as an ideal value because the motivation to make a (greater) profit has become more important to lawyers.

a) Theoretical implications

The literature focuses on easy-to-measure variables like cost, time, and control over the outcome to investigate the client’s economic viability considerations as a predictor of the client’s decision to go for trial or ADR (e.g. Kals et al., 2018b; Shestowsky & Brett, 2008). The approach assumes that clients would follow the facts of a case rationally according to the frame conditions of the case.

A more nuanced approach by Kals investigated the soft factors that hinder clients from going for ADR. For example, people trust ADR procedures less than trial procedures to produce just outcomes (Kals & Ittner, 2018a). Based on these current literature findings, the theoretically derived L/C-PC model indirectly accounted for the client’s economic viability considerations within the judgment and reasoning process.

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However, the literature needed to include a change of perspective. The research so far has investigated how clients determine economic viability. Yet, lawyers take the perspective of the client's position, trying to figure out the client's individual economic viability considerations, as this project's empirical data revealed this critical influencing factor for lawyers' procedural recommendations.

b) Practical implications

When lawyers routinely consider how efficient a proposed procedure will be from a client's perspective, they need to have a good understanding of the client's personal situation and way of thinking. Efficiency factors that lawyers consider include, for example, whether clients are legally insured for expenses or if the court offers video attendance. A thorough understanding of the client's personal situation is key.

The guaranteed lawyer/client privilege is an important protection that allows open conversations. Lawyers need to know, for example, how urgent the money claimed is needed to fund basic needs or to what extent the client would be willing to compromise and is financially able to do so.

Apart from finding out clients' real objectives, lawyers gauge whether clients are fit to withstand the stress of a trial or can bear the self-responsibility an ADR procedure requires. To gain this understanding, lawyers need to be well-trained in communication skills, especially to be empathetic listeners, to build rapport as a base for a trusted relationship early on.

6.1.4 Expert intuition

As described in section 5.2.3.2, the analysis of interview data supports the assumption that lawyers use expert intuition to develop recommendations.

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The findings provide first cues that expert intuition is based on the knowledge of the inner workings of the justice system, the attitudes of judges and colleagues, the scheduling of court dates in specific venues, discussions about upcoming legislation, and so forth. Expert intuition is also based on correctly judging clients' human condition, such as their risk propensity, stress resilience, need for closure, money, and justice over time.

Henk; File 62; Reference 108

Exactly, so that's a bit of a feeling thing. How do I now assess the information from the past and everything that has happened and what I have experienced myself? It's also a matter of feeling. How do I assess the other person now?

However, experts' reliance on their legal intuition when overriding objective, evidence-based assessments leads to ambiguity about whether this intuition serves the client's best interest. Depending on lawyers' personal experiences and traits, intuitive decision-making can introduce bias and overconfident behaviour.

The nature of expert intuition presupposes that it can only be acquired through years of practice, in a distinct field of law. Experienced lawyers went through various litigation waves, such as the last diesel scandal at Volkswagen, in which the duration of trial procedures increased because of overload in the court system.

For example, between 2005 and 2019, the average duration of trial procedures in lower courts rose from 4.4 to 5 months and at county courts from 7.4 to 10.4 months (Nöhre, 2023). Experienced lawyers have witnessed this trend, yet young professionals have not. Experienced lawyers, being aware of the consequences of large litigation waves, can anticipate a new wave and the consequences for their current and future mandates.

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For example, if a systematically relevant energy provider goes bankrupt, and customers file indemnity claims in large numbers simultaneously. This implies that experienced lawyers likely develop different procedural recommendation patterns than young professionals, who rely on personal intuition and learned legal techniques.

Sticking to fields of expertise on the policy level reflects that lawyers use and value their expert intuition. On the empirical level, intuition can be observed, for example, in stage two, when lawyers gauge clients' priorities and human condition.

a) Theoretical implications

Most of the literature discusses expert intuition in general. Research comes up, for example, with performance mechanisms (Salas et al., 2009) and implicit learning processes (Evans, 2008). Maybe because the legal domain is commonly described as a profession that requires critical analysis, evidence-based decisions, and dispassionate action, it did not attract that much interest in researching legal expert intuition.

However, the findings in this study show that lawyers' expert intuition plays an essential role in their procedural choices. The results are in line with Brozek (2019, p. cover page), who argues from an epistemological viewpoint that legal thinking is „an interplay between intuition, imagination, and language.” Therefore, the ANT Recommendation model includes lawyers' intuitive decision-making in the process stage, validating the theoretically derived L/C-PC model. The L/C-PC model emphasises lawyers' intuitive decision-making when balancing contradictions between their judgments and the client's judgments on procedural choices. Incorporating expert intuition as a mediating force into a lawyer's decision-making model represents a new theoretical approach.

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b) Practical implications

Expert intuition cannot be taught in educational programs. It takes time to practice law. Young professionals must rely on their general intuition. They will probably instead stick to their analytical results when making procedural recommendations. However, in law firms with several partners or within networks, young professionals can consult highly experienced colleagues as mentors and profit from their expert intuition. Acknowledging expert intuition as an essential skill could lead to more mentoring and faster development of young professionals.

6.2 Discussion of policy results presented in 5.2.2

This chapter presents four central policies lawyers follow when they advise clients and decide what to recommend. Each policy will be linked to the structural results presented in section 6.1 and empirical results in section 6.3 accordingly. The implications for each policy will be discussed separately. However, the policies are not clear-cut, so the discussion of implications will partially overlap.

6.2.1 Sticking to fields of expertise.

The law covers all aspects of life to some extent. Because it's not practical to keep up with all the new legislation and the intricacies of legal administration, lawyers' associations have developed 24 different specialisations.

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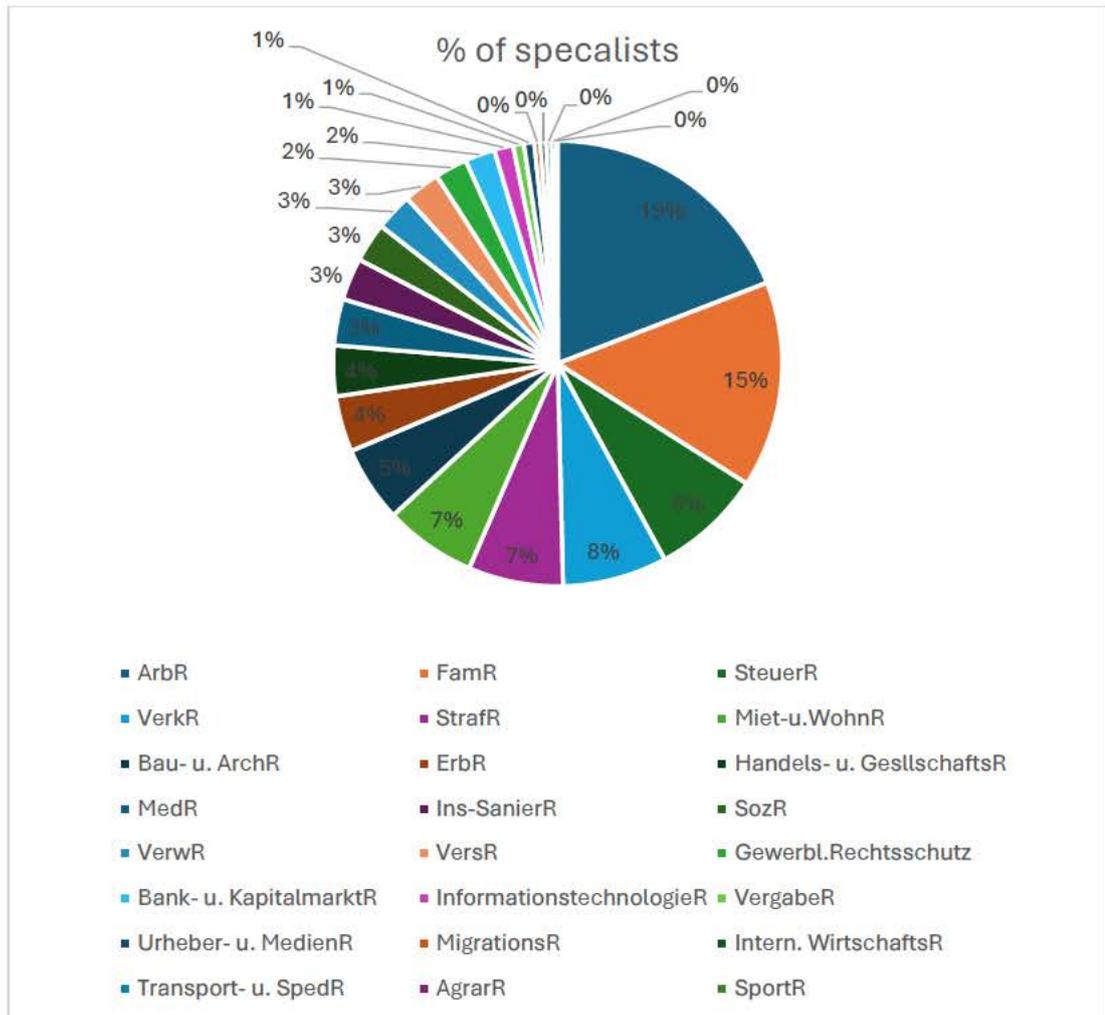


Figure 18:
Specialisation in fields of law per 01.01.2024

The Lawyers Bar Association’s statistic of registered lawyers shows that 58.474 out of 165.776 lawyers held specialist certificates (Witte, 2024). Participants in this study reported explicitly or implicitly that they stick to their fields of expertise in their work. Following this policy is mirrored within the structural results when lawyers perform risk management evaluations. Building a reputation is another real-life aspect lawyers consider when they decide to stick to their fields of expertise.

On the empirical level, lawyers following this policy can regularly be observed in the first stage when deciding to accept a client and mandate. This policy can be observed in feedback loops when lawyers evaluate the legal position.

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The underlying motivation of lawyers to follow such a policy is, on the one hand, their individual risk aversion curve to losing a case. This implies that lawyers know the liability risk for faulty advice or technical failure. On the other hand, lawyers are motivated to avoid extra hassle when serving a client. This implies that lawyers try to identify high-maintenance clients early to prevent them.

Sticking to fields of expertise has another advantage. Lawyers tend to create templates with standardised text elements that occur frequently. These templates are used by back-office personnel to create legal documents. It is time-consuming to create new templates for new fields of law.

About 30% of lawyers specialise in at least one field. Less than 20% of those specialise in a second field. Those who are not specialised are often young professionals or serve in rural areas with a low density of practitioners. Participants in this study recounted that it took them some years of training on the job before they pursued a formal specialisation. Yet, participants also reported that they know senior colleagues who still serve clients in all different fields of law, albeit with a lower success rate. To support a lower success rate, more research is necessary.

The theoretical implication of lawyers sticking to specific fields is that specialisation matters. Thus, further research might reveal that subsets of the ANT recommendation model might be better suited to account for specific areas of law or general environmental settings, such as rural versus city, culturally diverse versus homogenous communities, or high versus low-income communities.

6.2.2 Observing professional rules of conduct

The Lawyers' Bar Association regulates professional rules of conduct in the Code of Professional Conduct §§ 12, 2 BORA (Berufsordnung für Rechtsanwälte), which includes 211 sections.

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In addition, federal law, in the form of a federal code for lawyers § 1 BRAO (Bundesrechtsanwaltsordnung), which consists of 209 sections, governs how lawyers provide legal services.

In daily legal practice, rules about lawyer-client privilege and conflict of interest issues are critical. In contrast to US attorney-client privilege, communication between the lawyer and client in Germany is not privileged. The Civil Procedure Code (ZPO) includes no specific rule about the extent of confidentiality regarding communication between lawyer and client. Lawyers rather have the obligation and the right not to disclose confidential information. Disclosure issues don't typically play an essential role in civil law procedures. However, this is different in ADR procedures. ADR procedures require the parties to openly discuss the interests behind their positions and the needs underlying those interests. Therefore, confidentiality in the form of attorney-client privilege is necessary to open discussions between parties.

The legal community widely discusses how to handle conflict-of-interest issues. Lawyers shall not put their own or anyone else's interests before those of clients. This includes law firms' staff as well as current or former clients. Violating this rule is a serious fault and is sanctioned if a client files a complaint with the lawyers' association. Therefore, lawyers usually pay full attention and use checklists to prove and document their assessment before accepting a mandate.

Following the policy of observing professional rules of conduct is mostly mirrored within the judgment phase of the decision process, resulting in structural outcomes when lawyers create a legal position, keeping the client's economic viability in mind.

On the empirical level, lawyers following this policy can regularly be observed in the first stage when deciding to accept a client and their mandate. This policy can also be observed in feedback loops when lawyers evaluate and reason the legal position described in section 5.2.2.

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The underlying motivation of lawyers to follow such a policy is twofold. On the one hand, lawyers want to prevent being called upon by the bar association. On the other hand, lawyers want to provide high-quality services and further develop their professional reputation. The counterargument that there are black sheep in every profession who bend the rules to an extent that violates the rules must be accepted.

This might happen in pursuing profit or gaining a reputation among clients willing to use grey zones or go beyond to “get their rights”. However, on the global corruption index, Germany still ranks in one report ninth out of 180 places in 2023 (*Transparency perceptions index*, 2024). This indicates that black sheep are a minority.

Clients commonly rely on lawyers and tax consultants to follow professional rules of conduct in these strictly regulated services. Therefore, implications for practice include that consulting services are sufficiently predictable from a client’s perspective and that lawyers avoid liability risks. Lawyers have been practising law since the republic's inception, and many citizens have had their own experiences being advised by a lawyer or know a person who has been advised.

However, only a tiny fraction of citizens had been involved in ADR procedures and how lawyers advise in such a setting. Since ADR procedures are often used as a less escalating action before a dispute party initiates trial procedures, lawyers will advise their clients on confidentiality issues to prevent disadvantages in a follow-up trial procedure if the ADR procedure does not produce a settlement.

For example, sometimes, a party must disclose sensitive information in an ADR setting to promote the discussion and reach a solution. The information will only be released if the other party agrees to a penalty clause to prevent undue use in a later trial procedure.

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Conflict of interest and confidentiality issues are fundamental when a client decides to approach a specific lawyer and when a lawyer chooses to accept the client. This process—how client and lawyer find each other and become a temporary team to pursue claims—is not modelled in the lawyers' procedural recommendation process. Further research is needed to extend the current ANT Recommendation model.

6.2.3 Managing clients' expectations

When clients start to contact a lawyer, the dispute they are involved in has usually escalated.

As the participants in this study indicated, clients seldom ask for an appointment solely to get general or legal advice on a future deal. Regarding Glasl's (1982) escalation model, people start to look for lawyers' representation on levels four to six.

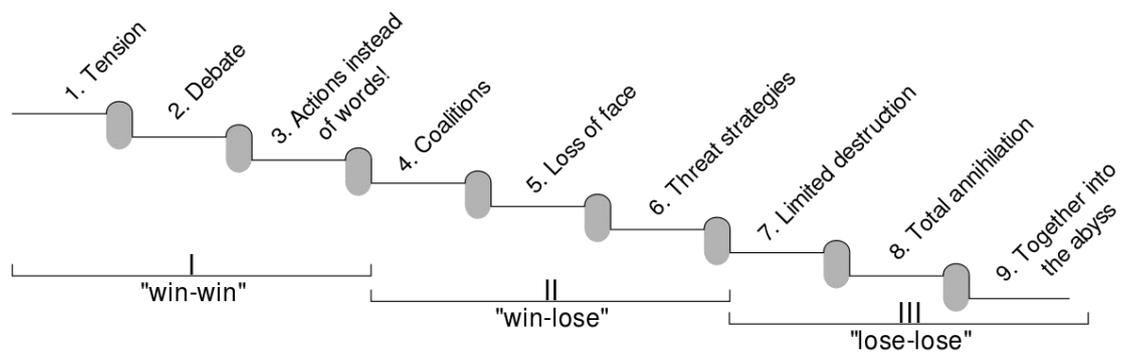


Figure 19:
Glasl's model of conflict escalation, Glasl (1982)

The policy of managing client expectations is mostly mirrored within the judgment phase of the decision process.

Lawyers communicate how strong a legal position is and which risks are involved in trial procedures compared to ADR procedures. Managing expectations applies to a possible outcome and expectations about how the chosen procedure would unfold.

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Lawyers talk with clients about possible stressful situations and various emotional forces associated with trial and ADR procedures. On an empirical level, managing expectations can be observed throughout all stages to varying degrees. However, it is most clearly observed in stages four and five when different procedural options are explained and reasoned.

Lawyers react to feedback from clients and their changing preferences. The data in the interviews show that clients' changing preferences about procedural options are in line with Shestowky's (2004) findings. Lawyers are transparent about trial and ADR procedures' costs, time, and potential outcomes. It is essential to lawyers that they explain and present in various ways the stress involved in lengthy trial procedures and the burden of self-responsibility required in ADR procedures. Being transparent, lawyers try to create rapport with their clients, which is a starting point for a trusted relationship, allowing lawyers to manage clients' expectations to a certain extent.

The counterargument is that managing clients' expectations on a deeper level is a coaching intervention. Yet, coaching interventions that might alter clients' thoughts, feelings, and experiences or even their motives and attitudes belong to experts in psychology. Lawyers are not professionally trained in this regard. Thus, they should keep managing expectations at a publicly observable level of clients' behaviour, expressions, achievements, and resonances. For example, what does a client say? How does a client behave? How does this resonate with others? This is generally good advice. However, lawyers will encounter clients who reflect voluntarily on their feelings, experiences, and attitudes. In this case, clients invite and trust lawyers as their advisors to manage expectations on a deeper level, aiming to get the best recommendation on a procedural choice.

Managing clients' expectations involves risk assessment. To detail the ANT recommendation model regarding lawyers' judgment processes, the judgment phase of how lawyers perform this assessment during the counselling process must be further investigated.

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6.2.4 Empowering clients

Empowerment is commonly described as making somebody else more potent and confident in controlling one's life and claiming one's rights. In a lawyer-client advisory setting, lawyers share their knowledge about the workings of the justice system and the relevant rule of law in easy-to-understand language. Making clients aware of their positions in a particular case in the legal system and the various options available creates a sense of control and power for the client.

The empowerment effect is represented in the output phase of the ANT Recommendation model. Giving no explicit recommendation reflects lawyers' trust in the client's decision-making. On the empirical level, empowering clients can be observed in phase two, clarifying clients' interests and mandates. Lawyers aim to support clients by being focused and steadfast in their claims. Stage seven is the most apparent phase in observing empowered clients who confidently use trial or ADR procedures.

To enable clients, experienced lawyers focus clients on a resource-oriented viewpoint instead of a deficiency-oriented perspective, which is much more common in our conflict culture. Applying such a humanistic psychology approach focuses clients on future actions instead of trying to unwind from past failures and assignments of guilt. However, young professionals need role models who apply resource-oriented management skills because the current educational program for lawyers doesn't include such training.

The argument that empowering clients is just a positive way to describe that lawyers are shifting responsibility is only partially valid.

Firstly, since it is impossible not to communicate implicitly, for example, through framing or timing a statement, lawyers seldom give no recommendation at all. However, the question of how clearly the clients receive the implicit signals and decode them correctly remains to be answered.

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Secondly, if a client is about to make a harmful decision, lawyers will give an explicit recommendation, not leaving the responsibility to the client. Lawyers balance between empowerment and intervention depending on their perception of how well a client has understood the possible consequences of a choice. However, if lawyers encounter advice-resistant clients, they purposefully leave the responsibility for procedural choices with the client.

Section 6.2 discussed the results on the actual level in the form of four central policies lawyers follow when they advise clients and come up with procedural recommendations. Firstly, each policy has been linked to structural results summarised in the new ANT Recommendation model described in section 6.1. Secondly, each policy has been linked to the different phases of the lawyers' decision process on the empirical level. This link leads to the next section, 6.3, in which empirical results will be discussed.

6.3 Discussion of empirical results presented in 5.2.1

This section compares the seven-stage decision process uncovered in empirical data with the theoretically derived three-stage decision process within the L/C-PC model.

Afterwards, the differences and commonalities will be discussed in light of current literature findings.

6.3.1 Synopsis of L/C-PC model and the seven stages of the decision process

The comparison between the initial theoretically derived L/C-PC model with a three-stage decision process and the new structure of the decision process shows how the empirical findings challenged the literature in several respects.

As revealed by the findings, the theoretically derived model is wrong in three main aspects: 1. Lawyers' decision-making process is more fine-grained than the literature suggests.

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2. The recommendation is not a choice between two options—trial or ADR—but a choice between three options: trial—no explicit recommendation—and ADR.
3. Trust between lawyer and client doesn't play a central role.

However, the theoretically derived model got three aspects right: 1. The occurrence of feedback loops, 2. The iterative nature of the process, 3. The central role of interaction between lawyer and client.

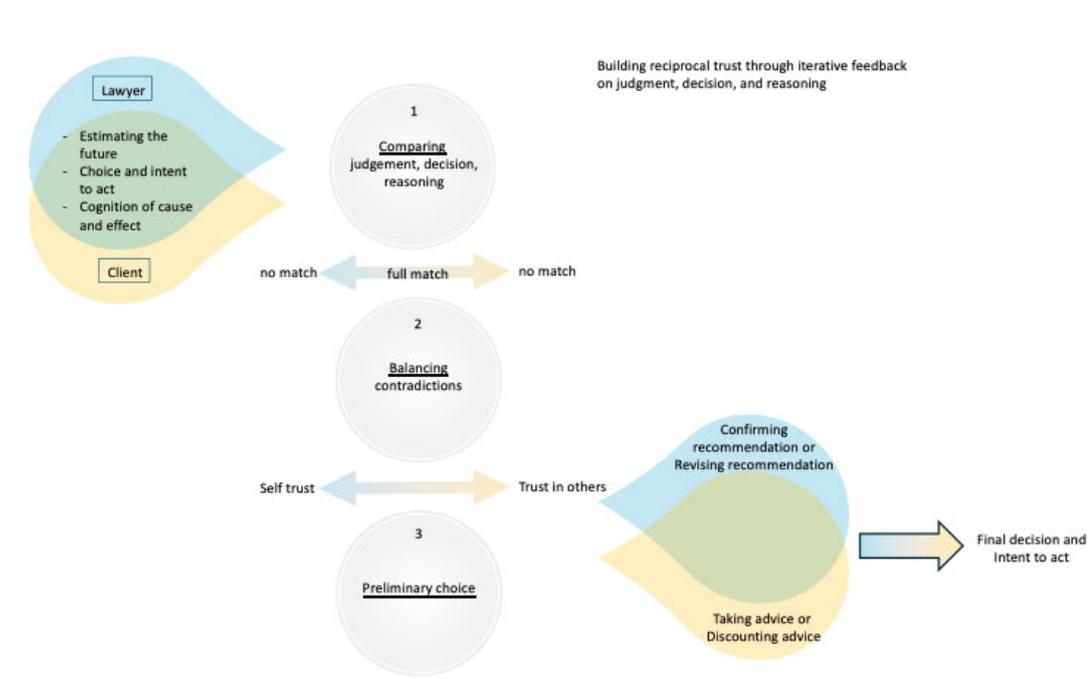


Figure 11:
L/C-PC model – magnifying lens

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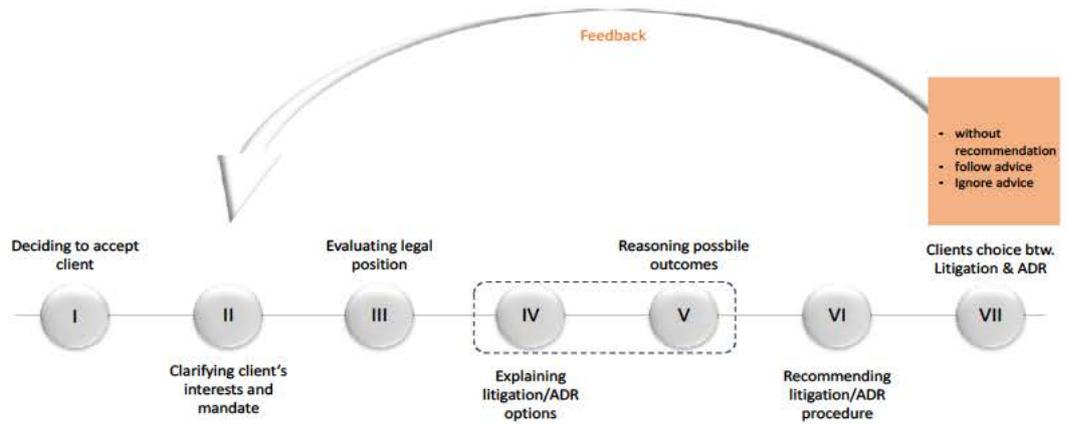


Figure 13:
Structure of the decision process

The initial L/C-PC model described the decision process in three stages. However, the empirical data show a more detailed seven-stage decision process lawyers go through to make a recommendation. Each stage adds specific value; otherwise, the stage would not occur consistently in every decision process. Yet the stages occur in a different order depending on the individual situation. The presented order is the most common one.

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Comparison

*Table 14:
Synopsis btw. the structure of the decision process & the L/C-PC Model*

Structure of the decision process	L/C-PC Model
Difference in regulation density	The model did not account for differences in regulation density.
Complexity of the case matters	The model did not account for the case matter's complexity.
Clients' needs for money, justice, closure	Only generally as informational artefacts and cues.
Risk management	Only generally through estimating the future outcome.
Clients' economic viability	Only generally through judging the case/situation
Three possible options: Trial, No (explicit) recommendation at all, ADR	Two possible options: Trial or ADR
Role of expert intuition	✓
Occurrence of feedback loops	✓
The iterative nature of the process	✓
Central role of interaction btw. Lawyer & Client	✓

The initial model did not account explicitly for the following themes:

- differences in regulation density in legal fields or,
- the complexity of the case matters as an influencing factor,
- clients' need for money, justice, and closure,
- risk management
- economic viability from a client's perspective,
- The option is that a lawyer won't give an (explicit) recommendation.

However, the following themes that are included in the initial model have been confirmed by the empirical data.

- the role of intuition in decision-making (see the extended L/C-PC model section 3.2.2)
- the occurrence of feedback loops when comparing judgments and reasoning

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- the iterative nature of the process
- the central role of interaction between lawyer and client
-

The L/C-PC model included trust between lawyer and client as a central theme. However, participants did not talk about trust at all. They described a relationship with clients that needs to be based on mutual respect. How respect relates to trust in a lawyer/client setting and how both concepts influence advice discounting needs to be further investigated.

The theoretically derived L/C-PC model accounts for two-way communication when lawyers and clients compare their judgments and reasoning. A feedback loop occurs when either confirming or revising a recommendation and taking or discounting advice. Several feedback loops represent the iterative nature of the three-stage decision-making process lawyers use to decide which procedure to recommend. This finding is in line with the generally well-accepted fact within the decision-making literature about the iterative nature of decision processes. Feedback loops occur when people interact with other people, machines, or other things.

The following section discusses the implications of the differences and similarities between the L/C-PC model and the ANT Recommendation model.

6.3.2 Discussion of differences and commonalities

The literature on procedural preference research in the legal field focuses on clients' decision-making. The advisory role is instead examined as an influencing factor in clients' decisions (Clement & Krueger, 2000; Sniezek & Buckley, 1995; Van Swol & Sniezek, 2005). The finding that lawyers' decision process takes seven stages with a lot of information gathering is in line with Jonas and Frey (2003) findings that advisors conduct a more balanced information search than they do for personal decisions. However, Jonas and Frey used a setting where the advisors were not paid for their advice.

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On the contrary, lawyers charge for their services, which brings liability and reputational risks if a balanced information search is missing.

In contrast, the L/C-PC model indirectly accounts for different ways to balance information when lawyers consider clients' judgment of the case with their own judgment.

The findings in this project do not support Kray and Gonzales' (1999) findings. The authors concluded that advisors place a higher weight on dominant dimensions like money than the advised party. They further suggest that advisors instead think of what would make most advised parties happy while parties pay more attention to individual preferences.

Yet, the findings here show that lawyers make considerable effort and invest time to continuously ensure that they understand clients' individual needs and changing preferences. The L/C-PC model describes that a critical feature is that lawyers and clients gauge their respective confidence ratings based on their judgment of the case matter and the chance of winning or losing the case correctly. For example, clients use the confidence rating that an advisor attributes to a specific choice as a substitute for their own confidence ratings.

However, empirical data could not confirm that trust is necessary in a working relationship between lawyer and client. Consequently, the final ANT Recommendation model does not include trust as an essential concept.

6.4 Discussion summary

This study aims to develop a new model of the lawyers' procedural recommendation process by answering the posed research questions. Chapter Three achieved the first objective by theoretically deriving a model from current literature.

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Chapter Four set out the methodology and methods to collect a new set of data to refine the theoretically derived model according to empirical data, which was presented in Chapter Five, fulfilling the aim by presenting the new ANT-Recommendation model. Finally, the discussion of findings in this chapter lays the groundwork for fulfilling the third objective of deriving theoretical and practical implications.

This section has three subsections. The first provides context information about the German market environment for the postulated claims. The following section summarises the discussion in four claims. 1. Lawyers' procedural recommendation process is more intricate than theory suggests; 2. The field regulation density is a crucial given input factor 3. Lawyers care about clients' needs, empowering them to make informed decisions between trial and ADR as two valid options; 4. Clients' economic viability, risk management and the lawyer's intuitive decision-making are fundamental drivers of the lawyer's decision process. The last section suggests where these claims will lead the field.

6.4.1 Context for postulated claims

The postulated claims are posed considering the perspectives of different stakeholders on procedural preferences between trial and ADR procedures.

Since 2011, according to EU Regulation (EU Parliament, 2008), all member states have been required to implement regulated ADR options alongside trial procedures. Among the major European economies, Italy was the first to enact national legislation in March 2010, followed by France in January 2012, while Spain and Germany introduced mediation legislation in July 2012. Italy remains the only country with mandatory mediation in specific legal areas, such as family and labour law, before parties can proceed to trial. In France, judges can order parties to participate in mediation; however, parties retain the right to oppose such orders. Spain and Germany rely on voluntary participation.

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Although there are slight differences in national legislation, the findings of this study broadly apply to the European context, since lawyers act as gatekeepers in all jurisdictions. However, the description of the following stakeholders refers specifically to Germany.

The public, legal businesses, the government, judges, lawyers and finally the ADR community are relevant stakeholders.

a) Perspective of the public

Citizens want fast, cheap, and easily accessible procedures to get justice. The German legal expense insurer ROLAND, Jurapartner Services Gesellschaft für Rechtsschutz-Schadenregulierung mbH, has surveyed the German public every year since 2010 about their attitudes towards the German justice system. The last report confirmed a long-running trend that about 70% of citizens have “very much” or “quite a lot” of trust in German laws and courts. However, 81% of the citizens perceive that trial procedures take too long. 56% of citizens are convinced that ADR procedures can solve many disputes. Only 31% are sceptical (Gebhard & Sommer, 2022).

Yet, this study's empirical results show that clients tend to reject lawyers' recommendations to use ADR procedures.

b) Perspective of legal businesses

Companies that finance litigation estimate that every year, claims worth two to six million Euros are not brought to trial because the likelihood of success is less than 70% (Gaier, 2019, p. 88).

Legal fees are firmly regulated in the Act of Remuneration of Lawyers (RVG). A lawyer must invest resources in a case based on the value of claims instead of workload and effort.

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The system is highly transparent for clients and one of the most transparent in international comparison. It relies on cross-funding of cases. High case values with low workloads are to compensate for low-value cases with a high workload. It is a mixed calculation from a lawyer's entrepreneurial standpoint. However, lawyers can agree on negotiated fees while abiding by §§ 49b BRAO und 3a ff. RVG instead of charging to RVG. And in trial procedures, negotiated fee agreements are, at a minimum, as high as RVG fees would be.

Lawyers must decide at the beginning of a mandate how to charge. Fixed fees apply for legal aid (PKH- Prozesskostenhilfe) or compulsory defence in criminal cases.

Since lawyers have sway over the projected profitability in each mandate, entrepreneurial and risk management considerations can influence procedural preferences on an individual, case-by-case basis. For example, when lawyers recommend ADR procedures, the client could opt to go through the procedure without being accompanied by the lawyer, since ADR procedures don't require legal representation. Whether the reluctance to recommend ADR procedures stems from these economic concerns, how widespread or limited to specific fields or types of disputes this reluctance is, needs to be further investigated empirically.

c) The perspective of the government

The government informed the parliament in 2017 about the results of the evaluation of the mediation law, presenting the results of the study by Zielkow et al. (2017). The government states that "mediation has its firm place in the conflict resolution landscape. However, it has not yet reached its full potential." Another conclusion is that no immediate legislative action is to be taken, especially not regarding the certification of mediators or MKH (Mediationskostenhilfe – public-funded legal aid for mediation procedures).

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However, based on these findings, the government will stay in touch with concerned circles to discuss how “to better reach the goal of promoting mediation long-term.”

Interfering as little as possible in the legal services market and citizens' freedom is a vital postulate that the German government follows. Introducing new, additional legislation would be such an interference. The evaluation report about the functioning of the mediation law, which was enacted in 2012, concluded that “...there is no immediate legislative action to be taken...”(Bundestag, 2017). Thus, the government wants to promote mediation by staying engaged with the ADR community, lawyers, and training institutes (Bundestag, 2017).

d) Perspective of judges

The steady decline of incoming civil law cases concerns the community of judges. They want to keep cases in the court system (Nöhre, 2023, pp. 538-541). Judges argue that public trial procedures are essential in a democracy to ensure transparency of legal rulings. Since judges are public servants, the court system can only slowly adjust the number of serving judges down or up when sudden changes in caseloads occur. According to the ROLAND Rechtsreport (Allensbach, 2023), 78% of judges and 92% of prosecutors think that their departments are understaffed.

e) Perspective of lawyers

In 1878, the German parliament, the Reichstag, established the first cornerstone of a free self-administration of lawyers independent from the state government. Until today, lawyers remain independent, discreet, and loyal advisors and representatives of clients (Gaier, 2019). According to the rulebook of lawyers' professional conduct, § 1 BORA, lawyers are an independent organ within the judicial system.

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Three trends can be observed in Germany's legal services market. Firstly, since 2016, the number of practising lawyers as entrepreneurs has slightly decreased while the number of in-house counsels has somewhat increased (Witte, 2024). Secondly, legal tech service companies which use highly standardised processes to provide cheap, online legal services for consumers are striving. Thirdly, from 1987 on, large, cross-regional law firms emerged, which increased the commercialisation of legal services markets. Three key rulings by the Federal Court of Justice allowed lawyers to found corporate entities, namely cross-regional partnerships, lawyers' limited liability companies and public limited companies (BGH, NJW 1989,2890, BayObLG, NJW 1995,199, BayObLG, NJW 2000,1647). These law firms' hourly rates for legal services are commonly higher than those at small or mid-size regional practices.

From a client's perspective, it must affect expected outcomes in civil trial procedures whether they are represented by a local SME law firm / private practice lawyer or a large law firm. Otherwise, the large firms with higher fees would not survive in a capitalistic market.

f) Perspective of ADR community

The estimated small number of 10,000 conducted mediations is unevenly distributed among practising mediators. Few full-time mediators hold over 50% of the overall market share, and part-time practitioners have limited earning potential. Therefore, the ADR community is unsatisfied with the development of the mediation market (Masser et al., 2018, p. 300).

Overall, mediators overrate the success rate of mediation (Ziekow et al., 2017, p. 196). The authors reported that although final agreements are signed by dispute parties, mediators answer the question: Conflict solved? 42% seldom or never, 34% every now and then, and 24% always or mostly. The authors conclude that a 50% success rate in private market mediation is like the success rate in court mediation (Güterichterverfahren).

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To promote market development, the ADR community has initiated several projects to lower the bar for disputants to try ADR procedures. Two examples are described here: an online platform, “Justice without altercation” (RoS “Recht ohne Streit”), and the “Round table on Mediation and Conflict Management of the German Economy” (RTMKM).

aa) “Justice without altercation” (RoS “Recht ohne Streit”)(RoS & conflict, 2023)

It is an online initiative from an interdisciplinary team of ADR incubators led by Em. Prof. Dr Reinhard Greger, a faculty member at the law school of Friedrich-Alexander-University of Erlangen-Nuremberg, Germany. Team members come from backgrounds in law, psychology, sociology, economics, and legal design. The project is an ongoing research project funded by residual research funds. The research team claims that ADR procedures are used “far too little” and that “... unnecessary lawsuits are conducted, and **legal claims are abandoned for fear of the associated inconvenience.**” The goal is to provide interactive guidance, information, motivation, and direction for the first steps by setting up a new online platform.

The platform “Justice without altercation” has been online and accessible to the public since January 2023. The website is constructed as an “interactive, lay-friendly guide to alternative dispute resolution.” In contrast to most other navigation platforms, this project uses a motivational approach, offering guidance for self-determined resolution finding. The tool helps engage people, companies, and institutions to reflect and, if appropriate, resolve a conflict through ADR procedures rather than going to trial. However, the platform does not provide legal advice. Using the tool is free for all. Since the project does not pursue commercial interests, no adverts are displayed, no other services are associated, and no users' data are collected.

The research team assumes the common position in the ADR community that ADR procedures should be used more often.

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Interestingly, they offer support in communicating the pros and cons of various ADR procedures from a neutral, non-commercial standpoint.

ab) “Round Table on Mediation and Conflict Management of the German Economy (RTMKM & Economy, 2007)

This initiative is a round table format of companies which are committed to promoting the understanding, acceptance, and use of ADR procedures. The RTMKM (Runder Tisch Mediation und Konfliktmanagement) was founded in 2008 as a consortium of companies. Founding members include, for example, Airbus Operations GmbH, Bombardier Transportation GmbH, and Deutsche Bahn AG. It is designed solely as a consultant-free user platform to allow business representatives to exchange experiences about conflict management themes. The round table provides support for implementing conflict management systems and conflict management initiatives, as well as the establishment of a transparent conflict culture.

The round table presents itself as an interlocutor for politics and associations. The purpose is to foster an understanding of the phenomenon of a conflict as a chance to change. Another goal is to solicit the well-reflected uptake of ADR procedures. The work of the round table is closely accompanied by researchers interested in the phenomenon of conflict as an opportunity for change. The Institute for Conflict Management at the Europa-University Viadrina (IKM & Management, 2006) regularly accompanies the project development.

ADR professionals believe that creating more personal experiences, for example, through ADR professionals themselves being role models using ADR procedures, is key to promoting the uptake of ADR. To create early personal experiences, ADR professionals support activities that are geared towards the next generation.

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One example of how to take knowledge about ADR procedures into elementary and mid-level schools is a project called “Clever quarrelling for kids” (Clever streiten für Kids), run by the German foundation for mediation (Foundation, 2007).

6.4.2 Summary in four claims

The findings of this project challenge the current view in the literature that lawyers’ decision-making process to come up with a procedural recommendation is rather simple. Based on the ANT Recommendation model, the following four claims are made.

1. Lawyers’ decision-making is more intricate than theory suggests.

The literature suggests that lawyers’ decision-making process to develop a procedural recommendation encompasses three stages, as described in the L/C-PC model in section 3.2.2. However, empiricism shows that lawyers go through a seven-stage process, each adding specific value. Performing seven different stages is more complex than going through a three-stage process. The skill set needed to perform these seven stages is much broader than for a purely legal evaluation of the case.

For example, stage two is about finding out what motivates clients and what their true interests and needs are. This stage requires eye-level interaction and appropriate communication skills, like active listening from the lawyer. Yet, the current educational training in German law schools prepares the participants to be generalists in all fields of law, a so-called “Einheitsjurist” (standard lawyer), to allow them to become judges. However, after the first bar exam, students serve only three months on the bench and nine months in law firms to gain their first professional experience before they take the final second bar exam.

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For both capacities, students are trained to take a purely legal perspective to become judges or lawyers. Coursework to broaden the skill set, for example, communication, decision-making, or risk management, is optional as long as it is offered at all.

2. Laws' regulation density is an essential given input factor.

The given context of a case, including its initial complexity and the field of law that regulates the issues, is out of the lawyer's control. However, lawyers have control over how to slice complex problems into smaller, straightforward claims. They can also reduce the complexity of cases by leaving out certain parts entirely (for the time being) because they are of minor value or concern. As described in section 6.1.1.2, different fields have different levels of regulation density.

Yet, the ADR community categorises fields of law according to types of disputes that they think are well-suited for ADR procedures. It is a well-accepted assumption in the ADR community that disputes that involve long-term relationships, for example, in family, labour, neighbourhood, or inheritance matters, are generally better suited for ADR procedures because parties must find sustainable solutions that cater to their needs rather than their positions.

However, this project's findings don't fully support this assumption. Rather than the duration or future relationship of dispute parties, lawyers' procedural recommendations are influenced by the regulation density of applicable law rules. The legislative body creates special laws with high regulation density to compensate for power imbalances that commonly occur when vital fundamental rights are concerned. In tenants and labour law, it's crucial to protect people's fundamental rights, as it's difficult to fully participate in society without access to shelter and a source of income. Many disputes arise between landlords and tenants, as well as between employers and employees, in the context of tenancy or labour law.

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In these settings, in the eyes of the legislator, the lessor and employer are more powerful than the tenant or employee. Therefore, the rules need to protect the rights of the tenants and employees through close-meshed rules. The high-density regulation, in turn, does not favour interest-based ADR procedures.

In contrast, family and inheritance law is governed by sections four and five of the Civil Code (BGB) rule book. The regulation density in terms of time limits, respite, and definition of legal terms is low compared to special law books like commercial or labour law.

3. Lawyers care about clients' needs and empower them to make informed decisions about trial and ADR procedures as two valid options for proceedings.

As independent, discreet, and loyal advisors, lawyers invest considerable effort and time into determining clients' priorities in terms of needs for money, justice, and closure, as described in section 6.1.1.1. Once lawyers have figured out what the client truly wants, they share their legal judgment of the case matter and reason what outcome can be expected. After clients understand their position and the available options as described in section 6.2.4, lawyers are generally confident that clients can make an informed decision on how to proceed. Although only informing clients about different options is a valid interpretation of professional rules of conduct, the practice shows that clients expect to get an explicit recommendation because they believe that is what lawyers are paid for.

However, as the results show, as loyal advisors and to guard themselves against potential liability risks, lawyers prefer to give only implicit recommendations except in situations when they want to protect clients from making harmful decisions. A typical example of a harmful decision is when a client wants to pursue a claim in court, although the likelihood of winning the case is unproportional low.

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In these instances, lawyers find it frustrating that they cannot convince clients to use ADR when they think it would be the best way to solve the conflict. As this study's results show, it is the client, not the advisor, who opposes ADR procedures. Thus, the uptake of ADR procedures must be promoted on the client side.

However, shifting the conflict culture in society is a complex, long-term project with unknown consequences. It certainly requires several different promoters, such as legislators, ADR professionals, the media, the legal community, people who have experienced ADR procedures, non-governmental organisations in community services, schools to start educating pupils, and online services to inform the public about ADR procedures. One example of how slow shifts occur is the round table initiative RTMKM, as described in section 6.4.1. It started 15 years ago, and lawyers still report that companies are sceptical about ADR procedures in 2023.

4. Clients' economic viability, risk management, and intuitive decision-making are fundamental drivers of lawyers' decision-making process.

The findings of this study suggest that the well-known drivers of economic viability and risk management in capitalistic systems are also the main drivers of lawyers' procedural recommendations. Lawyers want to run a profitable business by serving clients' needs. They work to create a reputation among clients and within the legal community of being a skilled, successful player in their field of law. They perceive constructing legal positions and representing clients in court procedures as their core value-creation process. Unique expert intuition helps to secure a competitive advantage. Part of being profitable involves lawyers' risk management. To be profitable in the long run, lawyers must limit their liability risk. This can stem from violating professional rules of conduct, for example, missing a conflict-of-interest issue when taking on a new mandate.

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Displaying overconfidence when predicting positive outcomes or missing preclusive time limits is risky, too. Taking on clients who default on their fee obligations is another risk lawyers must manage.

The results in this project show lawyers' direct testimony that they use intuition when judging the different aspects of a case, namely the risk of winning or losing a case and the degree of efficiency a procedure would provide from a client's perspective. There is a lively discussion in the literature about the nature and the importance of expert intuition; however, not in the legal field, apart from how to create strong legal positions. Since lawyers' expert intuition is an important influencing factor on procedural choices, it is crucial to investigate this aspect further.

A counterargument to the importance of expert intuition in lawyers' decision-making is that lawyers' professional role is to cognitively apply legal techniques and project possible outcomes of trial procedures to help clients make an informed choice. However, lawyers, like all other people, use heuristics in their judgment and decision-making. The lawyer described in the professional rule book is an ideal. Real lawyers, however, get only so close to the ideal in their decision-making as their expert intuition allows.

6.4.3 Where do these claims lead the field?

Two leads are proposed. First, structured diagnostics will be acknowledged as a pivotal part of lawyers' decision-making process. Secondly, lawyers' broader perspective beyond just legal issues will promote greater teamwork across different professions and specialisations.

a) Thorough diagnostics

As the results of this study show, lawyers clarify clients' mandates, interests, and needs in the second stage of the decision-making process.

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They engage in a meaning-making process by building a story of the conflict and intuitively matching clients' words with their behaviour.

However, in an ever-more complex and accelerating legal environment, more formal diagnostics will play a key role, supporting professionals in mastering complex matters faster with high-standard quality. Formal diagnostic processes are common in medicine, psychology, and economics. Also, for lawyers, performing a diagnosis will become more of a structured process, establishing good practice because a structured process allows for delegating parts of the process and streamlining admin procedures at the same time. This is not least because of lawyers' potential liability risks when they don't prevent clients from making harmful procedural decisions.

Potential starting points are platforms like the online RoS platform as described in section 6.4.1. Although the tool is mainly geared toward conflict parties, lawyers can use it too when they decide what procedure to recommend to their clients in a structured approach to better guess what the different needs of the client are. The tool equips lawyers with well-developed questions and well-thought-through structures to support clients' reflection process while providing accurate information about different ADR procedures. Once clients are clearer about what their real interests and needs are, lawyers can make better procedural recommendations.

Another starting point is a conflict cost calculator. In organisations large enough to have an internal legal department, they are requested to follow the processes that have been established to determine the most effective conflict resolution procedure, for example, to use tools like the conflict cost evaluator (Conflict-Cost-Calculator, 2009). Following a fixed process restricts knee-jerk reactions of internal advisors or managers from going for trial following trodden paths of the past. Looking strictly at economic parameters, thus using more ADR procedures, will likely be one contributing factor to the decrease in civil law cases. This is in line with the results of Ekert et al. (2023).

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However, lawyers as external consultants cannot use conflict cost calculating tools because they don't know all the relevant input data. Even clients from smaller organisations or private clients might be unable to put numbers and probabilities on several necessary input factors for the tool to work.

b) Increased teamwork across professions and specialisations

As the results of this study show, the client's economic viability is an important driver in lawyers' judgment processes. A broad range of expertise is necessary to consider the potential consequences of procedural decisions. Lawyers often collaborate with tax consultants, colleagues across legal fields, or colleagues in the same legal field but with a background in specific sectors, for example, medicine, banking, and tech industries. This trend will become more apparent when clients expect not only advice from a legal perspective but also a more holistic approach to fulfilling their interests and needs. Participants reported that cross-sectional teamwork, for example, with tax consultants or other experts, has become ever more common to serve the holistic approach as a problem solver. Such a holistic approach will lead to comparatively more elaborate strategies combining trial and ADR procedures.

Considering the four claims and two leads, recommendations on how to adapt the educational program for lawyers and how to adjust the judicial system are suggested in section 7.2.

7 Conclusions, recommendations, limitations, and suggestions for further research

*The lawyers' recommendation process is more intricate than
the theory suggests.*

7.1 Conclusions

This chapter summarises how the research aim and objectives have been met, and research questions have been answered.

The research aimed to create a new model for lawyers' procedural choices between trial and ADR, addressing the gap in existing literature. This was achieved through the development of the (ADR-**No** recommendation-Trial) **ANT** Recommendation model.

The first objective of Theoretical Model Derivation was met by creating a model of lawyers' decision-making processes regarding trial and ADR, based on existing literature. The Lawyer/Client-Procedural Choice - L/C-PC Model accounts for factors like lawyers' reputation and client trust.

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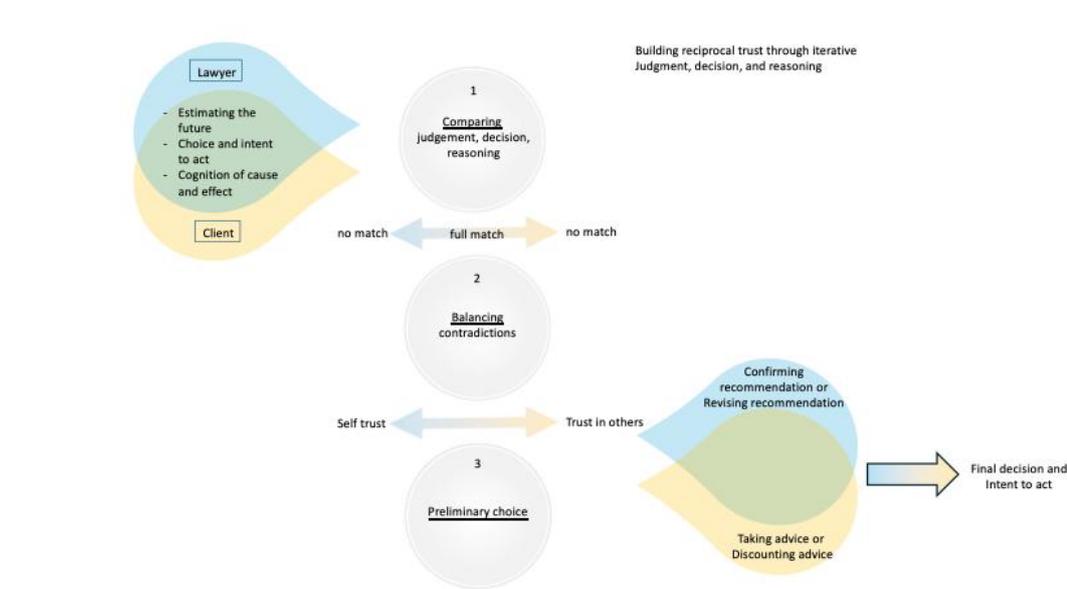


Figure 11:
L/C-PC Model – magnifying lens

The second objective, Empirical Refinement, was achieved using data from interviews with German lawyers. The research analysed audio recordings thematically and documented the coding and interpretation process.

The third objective was fulfilled by deriving theoretical and practical implications from the refined model, offering recommendations for further research and practice. The ANT Recommendation model serves as a theoretical base for further research into lawyers' procedural decision-making. The notion that lawyers' decision-making process is more intricate than theory suggests implies that lawyers must engage in thorough diagnostics through a structured process to reach the best decision outcomes. Establishing good practice requires constant quality controls of the decision procedure. Raising awareness about the importance of willfully adhering to good practice should be an ongoing task in legal practice.

The research questions and the following presentation of answers adhere to critical realists' ontological levels.

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(a) How do lawyers come up with procedural recommendations between trial and ADR?

(b) What are the different stages lawyers go through when recommending trial or ADR to their clients?

The research identified a seven-stage process lawyers follow.

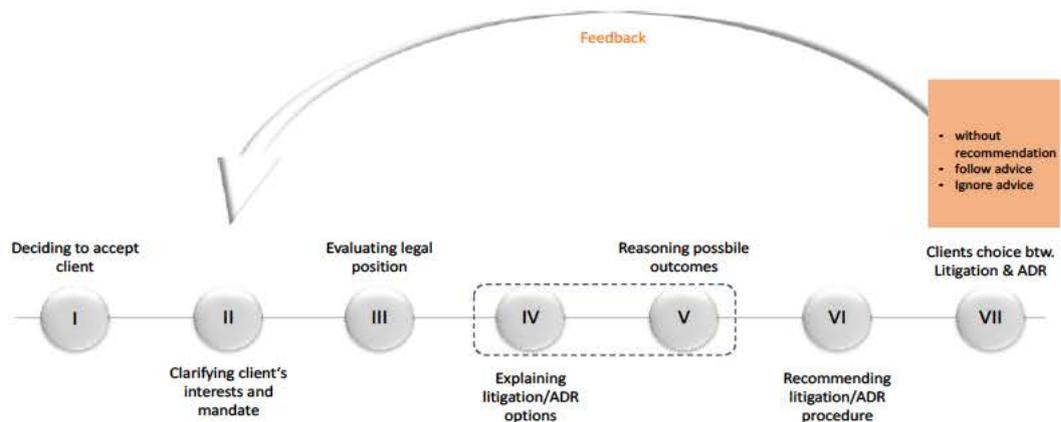


Figure 13:
Structure of the decision process

(c) Which policies do lawyers follow when coming up with a recommendation?

Lawyers adhere to field expertise, professional conduct, managing client expectations, and empowering clients to make appropriate procedural choices.

(d) What are the fundamental drivers of the decision process?

The drivers include case specifics as to clients' needs and laws' regulation density, clients' economic viability, risk management and expert intuition.

The ANT Recommendation model is based on an input-process-output (IPO) framework and illustrates the relationship between the drivers. Cultural and structural drivers further shape lawyers' decision-making on a macro level through German dogmatism, legal education, and the functioning of the justice system.

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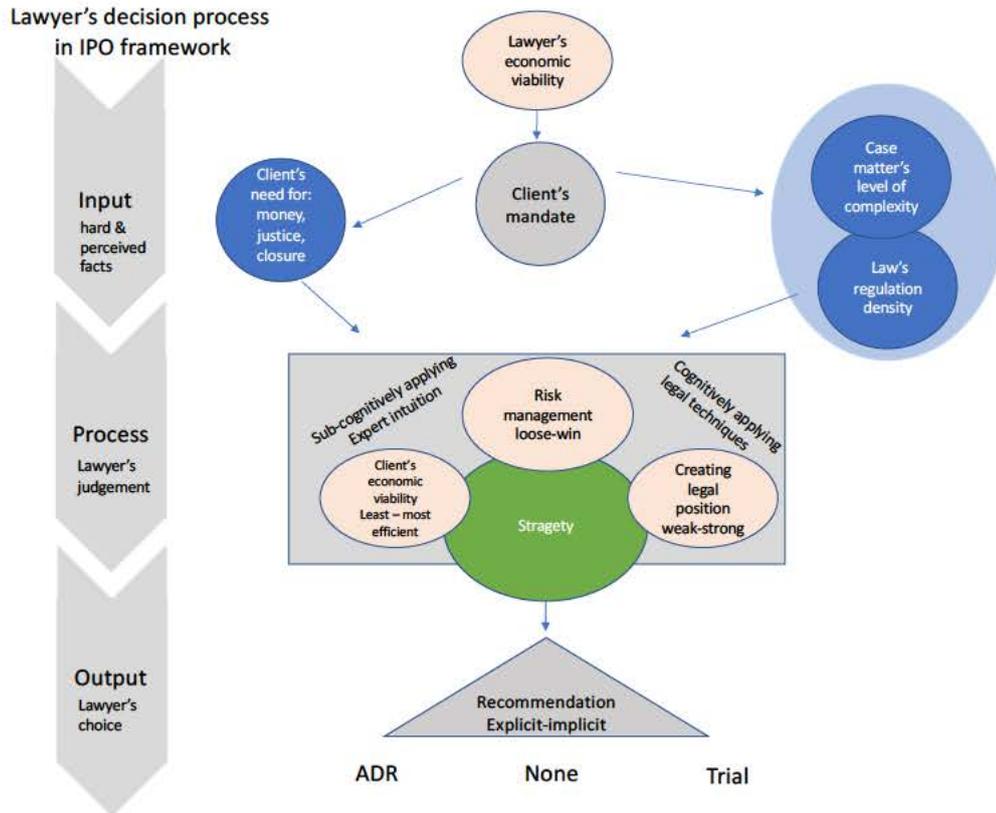


Figure17:
(ADR-None-Trial) ANT Recommendation Model

As a theoretical contribution, this study introduces the ADR-No Recommendation-Trial (ANT) Recommendation as a novel decision model. It is the first attempt in the literature to formalise lawyers' procedural decision-making between trial and ADR. By doing so, it fills a clear theoretical gap where no structured model previously existed. In terms of processual understanding, this research identified a seven-stage process lawyers follow when making procedural recommendations, adding granularity to what had previously been discussed only in fragmented terms. Isolating four fundamental drivers, this study contributes to the literature by showing how legal recommendations are the result of an interplay between structural, economic and cognitive factors, rather than linear rule application. The findings reinforce how professional codes (e.g. BRAO, BORA) intersect with client needs and lawyer expertise, integrating normative and practical considerations into a holistic framework.

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Contributing methodologically, this study pioneered a critical realist approach in legal research. Law scholarship seems more cautious or rooted in legal philosophy that uses realism in senses not fully aligned with Bhaskarian Critical Realism. Structuring the ANT Recommendation model within an input-process-output (IPO) framework introduces an organisational science perspective into legal research, opening interdisciplinary avenues for analysing professional decision-making.

On a practical level, the study shows that procedural recommendations follow a structured diagnostic process. The model provides a template for practitioners and highlights the increasing importance of collaboration across legal specialisations. At a systemic level, the findings suggest the need for judicial reforms that more effectively integrate ADR as a viable complement to trial.

7.2 Recommendations

This chapter recommends changes in two areas. The first proposes distinct changes in the educational program of law students to better prepare them for practice. The second proposes adjustments in the judicial system to strengthen the court system.

a) Adapting the educational program of lawyers

Diagnostic reasoning, expectation management, and risk evaluation are central to practice but underemphasized in training. The proposed changes reflect the actual processes identified in lawyers' decision-making.

Lawyers' decision-making on procedural choices is complex, as the results of this study show. As described in Section 5.2.1.1, three critical areas of hard and perceived facts go into lawyers' judgment process: 1. Client's needs for money, justice, and closure; 2. The level of the case matters in complexity; 3. The regulation density of the applicable field of law.

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And, as described in Section 5.2.3.1, three primary considerations influence lawyers' judgment process: 1. Client's economic viability in the least to most efficient procedure; 2. Risk management in terms of losing to winning the case; 3. Creating a legal position in terms of weak to strong positions.

As described in section 6.5.3, the lawyers' diagnostic process is pivotal yet receives only marginal attention in today's lawyers' formal education. Therefore, the program does not adequately prepare the students to handle client relationships, and programs must be adapted accordingly.

Therefore, the following changes are suggested:

- Develop and teach best practice diagnosis processes for procedural choices,
- Teach communication techniques, especially about framing effects, for example, by making ADR training mandatory,
- Teach risk management, especially about software-supported tools available
- Teach appropriate use of Artificial Intelligence applications

A common counterargument to more mandatory coursework is that lawyers' education already takes at least six years. The program focuses on educating students as generalists to allow them to work as judges. However, most graduates will become experts in distinct fields, counsel clients, and make procedural recommendations. The longer the education, the higher the following salaries must be, compared to professions with shorter educational programs, to get a good return on investment. An even longer education with more coursework would make becoming a lawyer less attractive. Such an effect could be mitigated by offering a more focused program to become a practising lawyer instead of a judge, thus staying in the current timeframe of six years or making the program even more concentrated and shorter.

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On the other hand, becoming a lawyer seems very attractive with current programs since Germany has one of the highest numbers of lawyers per citizen in Europe.

Another counterargument is that lawyers can take extracurricular activities to train their soft skills as they see fit. A standard additional qualification is becoming a certified mediator. Leaving the responsibility and freedom up to each student is in line with the government's high bar to intervene in a free market. However, it would be easier in terms of quality management if mandatory coursework were integrated into the program directly.

b) Adjusting the judicial system

Lawyers favoured ADR for complex or low-regulated fields of law but noted client resistance and structural barriers. Given the decline in civil lawsuits and the complementary role of ADR and trial, reform is needed. Findings from this and prior studies show that faster, more participatory, and cost-efficient procedures align with both client and lawyer preferences, making reform necessary to sustain the relevance of the court system.

Court statistics show that the number of incoming civil lawsuits is decreasing steadily. At the same time, this study's results show that lawyers generally have a positive attitude towards ADR procedures. Lawyers promote ADR procedures when they see fit regarding clients' economic viability, risk management, and strength of legal position. For example, economic viability can be measured in terms of the start and duration of the procedure, legal and other conflict costs, and control over the outcome. As this study shows, lawyers favour ADR procedures in complex case matters and fields of law with low regulation density, such as inheritance law. Complex case matters often require a holistic approach, which is served by teamwork across professions and specialisations.

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Resulting strategies frequently integrate ADR and trial procedures, combining fast and less costly non-adversarial negotiation phases with rather lengthy trial procedures, for example, when opposing parties are unwilling to come to the negotiating table or questions of law must be sorted out. The steadily decreasing number of incoming new lawsuits suggests that trials in civil matters are becoming ever less relevant. Therefore, the judicial system needs adjustments.

To serve the evolving needs of dispute parties and their lawyers better, the following changes are proposed:

- Create more flexibility to spread case load across available judges when sudden increases occur, for example, because of mass litigation like the recent VW emission scandal or passenger rights with flight schedule interruptions, or environmental cases, etc.
- Promote faster digitalisation in court communication systems and trial procedures, for example, for legal tech mass litigation, expanding the toolbox within the beA (besonderes elektronisches Anwaltspostfach) communication program for the legal community to integrate a safe and reliable e-file system, establish new rules around AI, invest in online trial equipment, as well as training programs for admin staff and judges.
- Adjust the procedural code of conduct to integrate ADR procedures better and account for mass litigation cases.

There is a profound counterargument against creating more flexibility by spreading caseloads after the fact. Assigning judges to cases after the fact collides with constitutional rule § 101, part 1 (Art. 101 Abs. 1 GG), which says:

(l) Extraordinary courts shall not be allowed. **No one may be removed from the jurisdiction of his lawful judge.**

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A 2/3 majority of parliament would be necessary to change this rule, which is unlikely to occur if one initiates the appropriate process. However, there are examples in other jurisdictions, such as Danish, Dutch or English case assignment processes (Fabri & Langbroek, 2007), that allow special task forces, comprised of serving judges, to create the necessary flexibility when mass litigation situations occur.

There is another counterargument against the recommendation to integrate ADR procedures better into the court system.

Even when lawyers promote ADR, going the extra mile, although it might not be in their business interest in terms of revenue and smooth office procedures, which are instead adapted to more streamlined trial procedures than to individual ADR cases, clients tend to reject the recommendations to use ADR. Typical reasons cited by clients include extra costs for ADR professionals, having to face the other party directly, concerns about being dragged over the table, and not having an enforceable agreement in the end (Kals et al., 2018b Annexe 5). Therefore, the need to integrate ADR better into the court system through new regulation is currently not supported by the legislator.

Another reason is that civil law cases are dropping faster than the current number of judges and brick-and-mortar courthouses. Judges can hardly be laid off. The number can only be reduced by natural fluctuation, which is retirement and no new hires. This means the average age of judges will increase in the next decade. What this implies for new case matters, for example, in connection with AI when hardly any digital natives enter the bench, needs to be evaluated by further research.

However, citizens also regard ADR procedures positively when they report that they perceive ADR procedures as less costly, faster, and having a voice in the process (Kals et al., 2018b Annexe 5).

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In combination with the findings of Ekert et al. (2023, p. 341) that trials lose relevance because of acceleration and changing conflict behaviour rather than because of available ADR procedures, the counterargument still holds some ground. Yet, in perspective, faster and more convenient trial and ADR procedures will likely increase the relevance of the court system again.

The recommendation to create a breathing court system with available resources for judges and administrative staff, as well as more digitalisation, will make trial and ADR procedures faster and more convenient. Adjusting the code of procedural conduct is a necessary consequence.

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7.3 Limitations and suggestions for further research

The potential limitations of this study are connected to the methodological approach and the conclusions drawn from the results.

Cultural and personal biases always affect the qualitative research process at every stage. Reflecting on and becoming aware of most personal biases and beliefs about the legal community helped to identify areas where the open-minded approach to what the data tells might have been compromised.

The purposive sampling approach and the sample size were a matter of the researchers' judgment and experience in determining the saturation point. A small sample size can overlook important cues and overemphasise findings. In this study, saturation occurred at a sample size common in qualitative research papers. However, the sampling of highly experienced German lawyers may limit the explanatory power of other groups of lawyers, namely, young professionals. Further, field studies don't include all possible confounders due to the complexity of social settings. Variables that have not been documented include, for example, the participants' personality types or emotional states at the time of the interview.

Analysing the data was influenced by translating German raw data into English quotes and codes by a native German speaker. Information might have been lost in translation. Due to financial constraints, it was not possible to use professional translation services. However, translations have been validated through back-and-forth translations with AI-powered tools, as described in section 4.4.1ad.

Further, this field study is set in a civil law environment. The explanatory power of case-law setting is limited because cost curves and risk distribution significantly differ in trial procedures depending on the judicial system.

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The research questions and aim of the study are sufficiently narrowly defined to allow conclusions to be drawn from the analysis of the newly collected data despite potential limitations.

Therefore, the ANT Recommendation model is up for discussion. It has been shared at conferences in the ADR community and received attention in ongoing projects on lawyers' recommendation practice; for example, the IBF Institute is currently running a survey on lawyers' recommendation practice (IBF-Institut für unabhängige Berufe). However, the model needs to prove its robustness through more empirical testing.

An exciting area for further research is investigating lawyers' expert intuition. The results suggest that expert intuition is vital in procedural choices between trial and ADR. To gain a better understanding of volumes, further research on how to measure the number of performed ADR procedures would provide valuable information for the government, legal, and ADR communities. The first study, which has estimated the number of ADR procedures at around 10.000 cases per year since 2014 (Masser et al., 2018), could only be a starting point. More research is needed to prepare public statistics for evaluating different measures to promote ADR over time.

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