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Road Accident Mediation in Córdoba: in the crossroad of fields, strategies, and positions

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Abstract

Court-related mediations have become commonplace in many legal systems around the globe. In this research I will focus in road accident mediations taking place in a public mediation center in Córdoba (Argentina), where mediation is mandatory for an important range of cases. Throughout the thesis I attempt to grasp the set of practices that take place in those mediations; which have mediators, lawyers and parties as main actors. To endeavour to do this, I will rely on the concepts and ideas developed by Pierre Bourdieu. I intend to analyse the strategies, positions, *habitus*, and capitals of mediators, insurance companies (and their lawyers) and plaintiffs (and their lawyers). I attempt to show how road accident mediation constitutes a particular field, with its own *illusio*, which rules are continuously under struggle. The interconnections among the different agents are highlighted as well as the opportunities and constraints their position imposes above their practices.

Key words

Mediation; court-connected mediation; road accidents; Pierre Bourdieu; mediators; lawyers; lawyer-client relationship; insurance companies; Argentina

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1. Introduction

Mediation can be defined as a dispute resolution method in which the disputants are assisted by a neutral third party to address and perhaps resolve a dispute (Menkel-Meadow et al 2005). Nevertheless, the very concept of mediation is under discussion. Mediation is one of those terms that can provoke a variety of disparate feelings and opinions among different persons: hope, apathy, suspicion, rejection, and so on. Promoters and detractors can be found everywhere.

Certainly, mediation has been able to provoke a great deal of enthusiasm among various groups. Alexander (2004, p. 9-10) describes this enthusiasm clearly:

> Courts were keen to introduce forms of ADR which would improve access to, and the delivery of, justice in the courts. Politicians agreed with the need to reduce court backlogs and, additionally, saw the benefits of providing dispute resolution that was quicker, less expensive and satisfactory to the parties – in other words, providing would-be litigants with a dispute-resolution option that allowed them to avoid the courts altogether. Disillusioned lawyers saw the opportunity to enhance client-centered service. Many professional advisers including lawyers, social workers and psychologist saw an opportunity to provide disputants with an opportunity to have greater control over the outcome of their disputes and potentially transform their dialogue and their relationships. Community advocates saw in mediation the benefits of bringing responsibility for, and management of, conflict back into the community (de-legalization of conflict)

Its alleged benefits, and the enthusiasm of its promoters, together with claims for a better response of the Courts to the problems related to access to justice contributed to the creation of several court-sponsored mediation programs, namely an institutionalization of mediation. Cappelletti (1993) call this the third wave of access to justice; which came after the promotion of legal aid to address economic obstacles (first wave) and the introduction of class actions to overcome organizational barriers (second wave).

Court-related mediations have become commonplace in many legal systems around the globe. But this institutionalization has resulted in the proliferation of mediations under circumstances not always foreseen by the founders of the ADR movement. Perhaps the increase of mandatory mediations as well as the pervasiveness of lawyer are paradigmatic, given the importance of voluntariness and direct communication between the parties in the original theory and design of mediation.

The city of Córdoba, in Argentina, has also been reached by this phenomenon. Since the year 2000 mediation is mandatory for an important range of cases, which are referred by the Court to the *Centro Judicial de Mediación* (CJM).

In this research, I focus on cases concerning another phenomenon, unfortunately, widespread throughout the country: road accidents. Many persons that have taken part in a road accident go to Court seeking for someone to pay for damages, where—in due time and if the law provides—are referred to mediation. Once there, a set of practices—which have mediators, lawyers and parties as main actors—take place. It is those practices that I attempt to grasp throughout this research.

To endeavour to do this, I will rely on the concepts and ideas developed by Pierre Bourdieu. In this context, the concept of 'field' comes to be central. In his words:

> a field may be defined as a network, or a configuration, of objective relations between positions. These positions are objectively defined, in their existence and in the determinations they impose upon their occupants, agents or institutions, by their present or potential situation (situs) in the structure of the distribution of species of power (or capital) whose possession commands access to the specific profits that are at stake in the field, as well as by their objective relation to other positions (domination, subordination, homology, etc.) (Bourdieu and Wacquant 1992, p. 97).

I intend to show how road accident mediation (hereafter RAM) constitutes a historically constructed field, which rules and limits are continuously under struggle[1]. Each of the following chapters corresponds to different agents occupying certain position in the field (namely mediators; the insurance companies, the insured and their lawyer; and plaintiffs and their lawyers). In each chapter the reader will find, not only a focused description of the agents in that position, their strategies and *habitus*, and the constraints imposed by that position, but also continual references to the other positions. That is because "to think in terms of field is to *think relationally*" (Bourdieu and Wacquant 1992, p. 96, emphasis in the original). Furthermore, I will try to present both a synchronic and historical perspective of the field, as much as my data allows me to do so[2].

By doing so, this research intends to fill the gap between the micro analysis of the roles of mediators and lawyers in mediation and the macro analysis that criticizes mediation for its hidden support for the usual players. Understanding mediation as social field continuously acted and constructed by the agents, which in turn are constrained by their (actual and historical) position in the field permits us to rescue the agents without considering them as individuals fully and freely deciding their course of action[3]. Besides, bearing in mind the constant interaction of mediation with other fields that dispute its value and scope (especially the legal field) highlights the manifold nature of the agents' interests, whose practice will not always nor necessarily respond to the logic of the mediation field.

Therefore, I do not attempt to assess Córdoba's RAM's outcomes nor do I try to measure the level of satisfaction of the agents involved. Further, I do not departure from a given definition of what a 'good mediation' should be. On the contrary, I intend to make sense of the assessments and 'ought' expressed by the informants as part of the position they occupy in the field.

All in all this thesis seek to contribute to the socio-legal literature on mediation, by providing a description of some dynamics produced by the institutionalization of mediation as regards a focused kind of conflict in a concrete social space. It may help to show the usefulness of Bourdieu's theoretical framework to interpret and make sense of those dynamics.

2. Methodology

This research is the result of a mixture of methods. As pointed out below, I conducted questionnaires and interviews as well as I observed mediations. Besides, quantitative data was obtained from the selected Mediation Center.

The Centro Judicial de Mediation was the selected setting where to carry out this research. The CJM was chosen as the site for the research because of its high volume of caseload as well as for its close relation to the Court. Actually, the CJM is a "support office" of the Judiciary. It is the only public Mediation Center in Córdoba in which legal counsel is mandatory.

The observed mediations were not random, but the result of a previous selection made by the Center's secretary whose criteria is unknown (although I had asked for

[1] Dezalay and Garth (1996, p. 293) have studied mediation in the U.S. (as well as international commercial arbitration) as "mini-fields characterized by their own rules of the game and players". They sustain, and I follow them in this point, that the definition of each forum does not have to do with certain essence of the form but to the success of a group in defining it in certain terms; thus the historic construction of the field is clearly pointed out.

[2] As Bourdieu puts it: "we cannot grasp the dynamics of a field if not by a synchronic analysis of its structure and, simultaneously, we cannot grasp this structure without a historical, that is, genetic analysis of its constitution and of tensions that exist between positions in it, as well as between this field and other fields, and specially the field of power" (Bourdieu and Wacquant 1992, p. 90).

[3] In Bourdieu's words: "to escape from under the philosophy of the subject without doing away with the agent, as well as from under the philosophy of the structure but without forgetting to take into account the effect it wields upon and through the agent (Bourdieu and Wacquant 1992, p. 122, citation omitted).

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civil cases). She decided based on the daily list provided by the clerks in which only the nature of the case and the mediators' and parties' names were available. Once she has chosen a mediation, she introduced me to the mediators and asked them if they would accept to be observed. If they agreed, they asked the same to the lawyers who in turn asked their clients. Only in two cases a mediator and a party preferred not to participate in the research.

2.1. Data collection

2.1.1. Observation

I observed nine mediations, six of which were road accident mediations (RAM). In four of them the insurance company refused to mediate; in one it expressed its willingness to mediate and it finally ended up in settlement, and in the other one there was not an insurance company involved and the parties did not settle. As regards the other three mediations, one was a family mediation regarding child support, other was a civil matter regarding a barter of two houses and the third was a small claim in which a company claimed for a credit card debt. I observed the first session of the family mediation and three sessions of the barter case but I could not follow them till the end. As regard the debt claim, it did not take place because the debtor did not attend. These observations were taken in a room with a one-way mirror, allowing a less intrusive participation. However, all the parties, lawyers and mediators knew I was behind the one-way mirror and had given consent to it.

Performing these observations also meant I had to spend time in the CJM's lobby and entrance. This allowed me to observe the way employees work as well as the attitudes, dialogues, and behaviours of mediators, lawyers and parties while waiting for a mediation to start or after it ended. It also gave me the opportunity to have short but invaluable conversations mainly with some of the mediators as well as with some lawyers and parties. Besides, this allowed me to pay attention on the setting of the rooms, the leaflets, posters, etc. Special attention was given to the official leaflet of the Center, available for new comers to read it. All along fieldnotes were taken.

2.1.2. Questionnaires

Before each of the RAMs I observed started, each participant was asked to fill a two-page questionnaire. Most of the questions were closed but some were open-ended (De Vaus 2002, Chapter 7). It had different questions for mediators, lawyers and parties; even though it was very similar for the last two. They were asked about their perception of mediation, their expectations of the process and of each other. Finally it asked some question regarding the lawyer client relationship. For its part, mediators responded on what they considered the role of each participant to be and about how important they considered lawyers and parties to attend.

The difference between the questionnaires was due to the fact that mediators only know what the case is about or who the parties are after the mediation started. So, these questions intended to inquire about their general/abstract vision of the process; while the posterior interview would focus on the particular observed mediation. In the case of lawyers and parties, the intention was to grasp their general conception of the process (what they expected from the process, the mediators, the other parties and their lawyer/client; previous experiences, as well as some features of the client-lawyer relationship). The answered questionnaires facilitated the construction of the posterior interviews, suggesting general and even specific questions to certain interviewees.

Before my 'formal' observation and interviewing took place, I started talking to lawyers and mediators trying to get into the Center. These informants gave me a glance on how things worked and it was extremely useful to construct the questionnaire.

2.1.3. Interviews

My research also relies on in-depth open-ended interviews conducted with mediators, lawyers and parties after the mediation had ended. I conducted thirteen interviews in total. Eight mediators (four of them in pairs), four lawyers and three plaintiffs (one of them was a lawyer) were interviewed. Each of them took, in average, forty minutes and they were conducted mostly in the CJM, but some in the lawyers' office and the plaintiff's house. They were all conducted in Spanish, recorded (except from two where the interviewee preferred not to) and then transcribed. Only the extracts presented here were translated (by myself). Names were changed to safeguard anonymity.

The questions were intended to get a detailed description and assessment of the mediation by the participants. The interviewees were first asked to describe what happened during the session, and then they were asked to assess the performance of each of the participants and the mediation as a whole. These questions worked as a trigger; allowing the interviewee to construct his/her narrative in his/her own terms while focusing in certain key points.

2.1.4. Secondary data

Finally, the quantitative data presented in this research was kindly provided by the CJM's employees. They correspond to the cases filed in the year 2010. It consisted of the number of cases initiated, whether they were voluntary or mandatory, their nature (family, civil, criminal, etc), and their outcomes. Besides they provided me with the number of mediators enrolled in the CJM in 2011 and their profession and gender. Even though I did not attempt to exhaustively analyze these data, it allowed me to frame my analysis within a bigger picture.

2.2. The analysis of the data

Data gathering was divided into two main moments: before and after the CJM's holiday in the first days of July 2011. This gave me an early opportunity to start the analysis of my data. The fieldnotes, the questionnaires and interviews were first coded following a series of very general categories: (a) Mediation, (b) Expectations, (c) Mediators, (d) Lawyers, (e) Parties, (f) Lawyer-client relationship, (g) Legal System. In each situation of them I gathered together impressions, descriptions and assessments regarding those key concepts; at this time single items were sometimes coded in more than one category (Lofland et al 2006, p. 208). Afterwards, the accounts of each were reread, memoing what came up from words, lines and paragraphs—microanalysis (Strauss and Corbin 1998, Chapter 5). After the holiday ended I continued to gather new data. When it was analysed new topics emerged as well as others appeared as less meaningful.

This allowed me to think of other—more focused—categories and some relationships among them. Thus, a second categorization was made, which basically coincides with the chapters and sections of this report. Finally, the categories were reread again producing new memos which ultimately constitute this thesis.

Coding was done by hand in the printed version of the fieldnotes and interviews and then put it together in computer word processor files (copying and pasting from the digital version).

All the data aforementioned was equally important to development of this research. However, as seen along the paper, special emphasis is given to the interviews. This responds to my intention of giving importance to the informants' discourse, expressed in their own terms.

2.3. Reflexivity

I myself am a practicing lawyer, as such, I have my own trajectory and position in the legal field. This has undoubtedly shape my research. On the one hand, it

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allowed me to have access to the setting I intended to study and it helped me "to see alternative explanations and to recognize properties and dimensions of emergent concepts", but what does not mean to take my own experience and knowledge as data (Strauss and Corbin 1998, p. 59). However, it may have also prevented me from fully grasping the meaning and significance of the events and narratives I saw and heard inasmuch my own dispositions to perceive, assess and think in certain way may have shaped those meanings and significances. Notwithstanding, and accepting the fact that the extent to which my own *habitus* may have shaped my analysis is unknown, a continuous attempt to "objectivize the objectivizing subject" was made ("participant objectivation" Bourdieu and Wacquant 1992, p. 68).

3. The *Centro Judicial de Mediación*

3.1. Rules and cases

As I have pointed out, court-connected mediation programs have been spread all over, and Argentina has not been the exception. Since the year 1998 the Province of Córdoba has incorporated a Court-related mediation program carried out by the *Centro Judicial de Mediación* (CJM, Judicial Mediation Center)[4].

In 2010, there were filed 7920 cases in the Center, which represents an increase of around the 10% with respect to the previous year. The Centre deals with voluntary as well as mandatory mediations. But, as seen in Table 1, the latter represents the vast majority of cases handled in the Center. In both cases, it refers to lawsuits referred by Court.

Table 1. Voluntary and Mandatory Mediations
(CJM, 2010. Unpublished data, Córdoba, Argentina)

Voluntariness	**N**	**Percentage**
Voluntary Mediation	283	4%
Mandatory Mediation	7637	96%
TOTAL	7920	100%

The Center receives civil, family, labor, criminal and minority cases. However, family and civil cases constitute the vast majority, as shown in Table 2.

Table 2. Nature of the conflict (Idem)

Nature of the conflict	**N**	**Percentage**
Family cases	5021	63%
Civil cases	2690	34%
Other	209	3%
TOTAL	**7920**	**100%**

The law provides that the parties must attend to the Center when the case is referred to mandatory mediation[5]. It distinguishes among legal persons and natural persons. The latter, unless justified impossibility, cannot appear by proxy: they must attend personally (though legal counsel is mandatory). However, in order to safeguard the voluntary nature of mediation, the parties can express—once in the table—their unwillingness to participate in the mediation, having to pay a given

[4] From 1998 to 2000 the Center worked as a pilot experience. In 2000 the law that provides mandatory mediation was enacted (Law N° 8858). For quantitative data and a report on the users' view on the first years of the CJM see Bergoglio et al 2005.
[5] Article 18°, Law 8858.

amount in mediators' fees[6]; this will be called refusal or to decline mediation[7]. As it will be seen later, it is very common in road accident mediations. When the parties failure to appear they are fined.

According to the Center records (Table 3), in 2010 a 36% of the cases were settled, a 28% were not (but the parties attended and did not decline), in a 15% the parties refuse to mediate, and in a 21% the parties did not attend.

Table 3. Mediation Outcomes (only finished mediations) (Idem)

Outcomes	**N**	**Percentage**
Settlement	2724	36%
No settlement	2137	28%
Nonappearance	1576	21%
Refusal	1167	15%
Others	69	1%
TOTAL	**7673**	**100%**

Civil mandatory mediations are generally referred by the judge just after the respondent has answered the plaintiff's complaint, but before the parties present their evidence[8]. The law sets forth three grounds for referring a case to mediation: (a) small claims, (b) when the plaintiff has asked for waiver of court fees[9], and (c) when the judge decides so based on the nature of the case and the complexity of the interests at stake[10]. Percentages of each are shown in the following table.

Table 4. Cause of referral in civil mandatory mediations (Idem)

Civil Mandatory Mediations	**N**	**Percentage**
Small claims	298	12%
Legal aid	2011	79%
Judge's decision	252	10%
TOTAL	2561	100%

3.2. Mediators

To enroll as a mediator in the CJM you have to have a law degree, to have worked at least three years as such, and then to have obtained a mediator license from a public agency: the *Dirección de Métodos Alternativos para la Resolución de Conflictos del Ministerio de Justicia de la Provincia de Córdoba* (DIMARC). This agency requires, among other things, candidates to pass an examination and then do an internship. Mediators from other professions (who do not have a law degree) can also enroll in the CJM, but they have to work together with a mediator who does have a law degree at least for three years. Two mediators are randomly drawn for each new case.

However, it is important to highlight that the majority of mediators are lawyers. To date, there are 145 mediators enrolled in the Center; of which 72% are lawyers and the remaining 28% come from other professions (psychologists, social workers,

[6] Article 2° Law 8858 and Decree N° 1773/00, regulation to article 34°
[7] These words are a literal translation from the Spanish one *(desistimiento)*, which in fact is not very correctly used here.
[8] Decree N° 1773/00, regulation to article 7°.
[9] It is important to highlight that in the majority of cases the judge refers to mediation before actually deciding if the legal aid will be conceded.
[10] Article 2°, Law 8858.

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engineers, accountants, etc). In the following chapters this data will be specially taken into account, as an expression of the mediators' trajectory.

Table 5. Mediators' profession.
(CJM, 2011. Unpublished data, Córdoba, Argentina)

Mediators 2011	**N**	**Percentage**
Lawyers	104	72%
Non-lawyers	41	28%
TOTAL	**145**	**100%**

The gender dimension is also strikingly uneven. Of all the mediators enrolled in the CJM, the 88% are women and only the 12% are men.[11]

Tabla 6. Mediators' gender. (Idem)

Mediators 2011	**N**	**Percentage**
Female	17	88%
Non-lawyers	128	12%
TOTAL	**145**	**100%**

4. The mediators

Then, well, the mediations are this: I come here, I have the people and there starts my work, and that's good, for all (Magdalena, I-M04-M)[12]

In this chapter, I attempt to grasp the mediators' position in the RAM field and their strategies[13]. In the first sections my point is to stress how mediators' discourse is aimed at bolstering the mediation *illusio*, its value. In the last section, in turn, I will focus in the importance of their trajectory to understand their valuation of which should be the significant capitals in the mediation field.

4.1. The promises of mediation

Mediation is presented by its proponents as the proper method to address disputes with a problem-solving approach. It would allow putting on the table a broad range of issues related to the main conflict. While doing so, the parties are supposed to discover, communicate and address the deep needs and interests behind their apparent claims. This, in turn, is expected to facilitate achieving a win-win solution, because it would become easier to make trade-offs (Menkel-Meadow et al 2005).

[11] Given the extension of this report, there will not be a discussion of the role played by the mediators' (nor lawyers' or parties') gender; but it should be part of further research.

[12] The code after an extract refers to the method used to recollect the data (Q:questionnaire; I:interview; F=observation fieldnote), the mediation in which the speaker participated, and its role in it (M:mediator, P:plaintiff, PL: plaintiff's lawyer, and ICL: insurance company's lawyer).

[13] The following quotation attempts to make clear what it is meant by 'strategy': "The theory of action that I propose—affirms Bourdieu—(with the notion of habitus) amounts to saying that most human actions have as a basis something quite different from intention, that is, acquired dispositions which make it so that an action can and should be interpreted as oriented toward one objective or another without anyone being able to claim that that objective was a conscious design (…) the player, having deeply internalized the regularities of a game, does what he must do at the moment it is necessary, without needing to ask explicitly what is to be done. He does not need to know consciously what he does in order to do it and even less to raise explicitly the question (except in some critical situations) of knowing what others might do in return, as the view of chess or bridge players that certain economists (above all those who use game theory) attribute to agents would let us believe" (Bourdieu 1998, p. 97-98).

Mediation is said to allow the achievement of more and better settlements. This is in part because it would cost less and it would be faster, but especially because mediation would allow the parties to maintain control over their disputes.

> A central value of mediation is self-determination by the parties. Self-determination in this context means that the parties retain control over both their participation in the process of dispute resolution and the outcome of their dispute. … Mediators promote party empowerment and self-determination by carving out space and time for each side to tell their stories and be heard in a meaningful way. (idem, p. 270)

In this way, the parties' self-determination is raised as the flag of mediation. It would have value in itself, as opposed to court proceedings where the parties are divested of their conflicts. But it is also valued because—as both parties participate in the decision making process—mediation would facilitate more satisfying solutions. Furthermore, those solutions would be more creative (it is argued that it is possible to achieve outcomes that are not thinkable in litigation) and would point directly to the needs of the parties. In that sense, the solutions following mediation are also said to be more durable. (idem; Abramson 2005)

Moreover, mediation is supposed to take special account of the relationship between the parties. So, the process would be aimed at the maintenance and improvement of that relation—a matter absolutely left aside by the courts.

In short, mediation has promised to resolve disputes by engaging the parties in a common search for solutions, which would produce innumerable benefits: parties' participation, self- determination and empowerment, reconstruction of the broken relation, flexibility, creative arrangements, saving time and money, and reducing stress, among others (Genn 1999).

4.2. Its presence in the Centro Judicial de Mediación *and the mediators' discourse*

Those promises of mediation also exist in and around the CJM. They are present in the imagery and discourse of the mediators as well as in some lawyers, although the former embrace them much strongly.

First of all, the law that established mandatory mediation in the Province of Córdoba (and provided for the promotion, diffusion and development of mediation as an alternative dispute resolution method)[14] is pierced by the aforementioned promises. The 'principles' voiced in the law (transcribed in the CJM's leaflet referred below) are an example:

> Article 4°: Principles and Guarantees. The mediation process must ensure: (a) Neutrality, (b) Confidentiality of proceedings, (c) Direct communication between the parties, (d) Satisfactory fulfillment of interests, (e) Informed consent.

As a way to enforce its promotion, the decree regulating the law stipulates the obligation to inform and explain to the parties these principles[15].

Further, the promises are highlighted in the leaflet available at the entrance of the CJM, which states:

> Mediation is an alternative way of resolving conflicts, with the help of an impartial third party, the mediator. Mediators are not judges nor arbitrators, they do not impose solutions, they seek to meet the needs of the parties in dispute, regulating the process of communication and leading them through some simple steps that, if the parties cooperate, it is possible to reach a solution (...) With the adoption of this development it is intended to improve access to justice in Córdoba. Indeed, the new rule expands the list of procedural avenues available, allowing individuals to have a new mechanism—quick and inexpensive—to resolve conflicts. (CJM, n.d. Unpublished pamphlet, Córdoba, taken 08/04/11)

[14] Law N° 8858, enacted in 2000.
[15] Decree N° 1773/00, regulation to article 4°

For its part, mediators clearly embrace the spirit of this law, and the promises are spread among their narratives. For instance, in the questionnaire circulated before the session started, all the mediators answered that the participation of the parties is very necessary and when asked about their role, they constantly refer to the importance of self-determination and empowerment. The following extracts exemplify this:

> [The parties] are the real protagonists of the mediation. They are expected to re-appropriate their problems and to solve them, not leaving them to a third person: the judge. (Julia, Q-M03-M)

> The parties take on a leading role in the sense that they have to work towards their own solution. It is expected that they can feel confident in the process. (Magdalena, Q-M04-M)

> Mediation is from another sphere, it is to assume the responsibility that each has had on how they will solve this problem that includes them; the issue—at least I work it like that—, if the person is not included in the problem, we are not talking here about the culprit, but about including themselves, the problem is his, or hers, and their decision, right?, is to solve this, [if not] no mediation is possible, then it certainly is much easier to [leave it to] the judge to resolve. Here we receive responsible individuals, who take responsibility... (Florencia, I-M04-M)

The centrality given to the parties' participation in these accounts is striking. They are responsible subjects expected to take charge of their problems during the mediation and so come to a solution. As in the last and first accounts, self-determination is usually presented as opposed to the judge's role of deciding for the parties.

At the same time, the importance of the mediator to facilitate communication among the parties is highlighted. Florencia, for instance, describes her role as a mediator as follows:

> My role is of active listening, opening communication channels between the parties. To facilitate the generation of options, the devil's advocate to help balance the expectations and lower to reality. To help to identify interests and needs. (Florencia, Q-M04-M)

The idea of needs and interests satisfied through mediation is also stressed by Magdalena, another mediator, who considers her role to

> act to assist the parties and, where appropriate, the lawyers of a party to reach an agreement that meets their needs and interests (Magdalena, Q-M03-M)

The idea, sometimes pointed out in the literature, that the mediation could improve societies by teaching citizens to participate in dialogue, understand each other, and change their behaviour (Baruch Bush and Folger, 1994) is also present in Florencias' and Magdalena's accounts:

> It is also important that the parties take responsibility for what had happened so they can make a change (Florencia, Q-M04-M)

> I also think this is a product of learning, I mean, what co-mediators say to each other, the way we act before the people produces learning; because people somehow copy and transmit ways of interaction, right? This respect, this listening, this not interrupting, this cordial treatment, right? ehm and respectful, this treatment of not judging people's behavior makes that somehow people internalize it, you know. At least we assume that happens [laughs]. That's what we expect and what we want [to happen], right? (Magdalena, I-M04-M)

Thus, the mediators—all educated in a similar framework and with similar literature—tend to reproduce the mediation's promises. Their discourse highlights the benefits of mediation and in this way they justify the mediation and their role in it. Over and above its fulfillment, their discourse works as an action, a strategy aimed at bolstering the mediation value.

4.3. The promises of mediation as the illusio *of the mediation field*

Bourdieu asserts that every field "generates and activates a specific way of interest, a peculiar *illusio*, that is condition of its own operation" (Gutiérrez 2002, p. 47; my translation). In his own words:

> The *illusio* is the very opposite of ataraxy: it is to be invested, taken in and by game. To be interested it is to accord a given social game that which happens in it matters, that its stakes are important (another word with the same root as interest) and worth pursuing. (Bourdieu and Wacquant 1992, p. 116)

When it comes to mediation, it is possible to say that the field is constructed, generated, maintained, and expanded around the promises aforementioned. They are the basis which justify its existence as they are the flag that allows its expansion. As pointed out above, it is the belief in its value and in the possibility to realize them in practice that permits the field to exist and the players to invest in the game.[16]

As the CJM is relatively new in Córdoba, the mediators still struggle for their view to be shared by lawyers. As necessary participants in mandatory mediations, lawyers are called to embrace the mediation's *illusio*. Clarisa puts it this way:

> There are lawyers very well predisposed to work in mediation and others are not. There are others who are directly angry to mediation, because it wastes their time, because it interrupts the working-day and who knows, but we have a little bit of everything right? Lawyers who collaborate a lot with mediation because it is… they are increasingly becoming aware that it is a good path, for the peace really, right? (Clarisa, I-M06-M)

Mediators, like Clarisa, usually resort to the concept of 'collaborative' lawyer to refer to those who have embraced more strongly the mediation's *illusio*. Florencia adds that attorneys should prepare themselves for mediation:

> Um yes I think there must be, eh you have to teach the attorney, the attorney has to learn (I am also a lawyer, right?), has to learn that the law [meaning going to the Court] is not the only means of resolving the conflict and to start eh let's say preparing to go to mediation; the lawyer do not know umm the lawyer is accustomed to litigate through the papers, writings, but not through the real presence of another, then umm [they have to] learn about different techniques of conflict resolution to advise well, because it is the only way, let's say, that a judge so decides, it is as childish, it's like the dad has to decide here. (Florencia, I-M04-M)

The last part of the narrative draws attention to a particular feature of the mediator's defense of the mediation and its *illusio*: it is presented in opposition to the legal field. This is apparent in the mediation literature[17], which constantly extol the virtues of the mediation contrasted to the legal system; comparisons with—and critics of—the legal system abound (Menkel-Meadow et al 2005, among many others).

In the special case of mediation, its value—*illusio*— is singularly presented in opposition to the legal field. But it does not end there: great effort goes to 'unveil' the legal field's *illusio*. Thus, the mediators' strategy intends to expose the *illusio* of the legal field as an irrational blind faith. For instance, Florencia stresses the 'delusion' of the judge's neutrality:

> The lawyer does not realize, the issue is that the lawyer does not see it yet, they cannot believe that a judge is not neutral. So when analyzing the sentences, that are very well founded, great, I'm not going to say [they are not] ... there is an

[16] This does not mean that other interests are not also sought by the agents, namely for instance, the economic return of mediation for mediators. This arose from my data as a matter of struggle among mediators (who seek better pay) and some lawyers (who consider mediation too expensive).
[17] The very name of *Alternative* Dispute Resolution highlights the inherent opposition of the movement to the legal system, at least in its beginning.

> ideology behind, as we all have it. Then we have to lower um let's say we have to lower a bit this thing that everything has to go through the judge who cleans everything, purifies everything and leaves everything like pure white, no, it is not like that. And mediation is a field where everyone can find the measure, let's say, of its own justice, something which is fair to all, right? Not without also giving each one something up, I mean, the logic of the court is that one wins and another loses, the logic of negotiation or mediation is that both win or that both parties have to give up something, I mean, to accept losing, accepting failure at some point. (...) (Florencia, I-M04-M)

By doing this, the mediators' strategy is headed "to improve or reproduce their position in the field by reproducing or increasing the specific capital at stake" (Gutiérrez 2002, p. 49; my translation). However, as seen in the next chapter, the mediation's *illusio* can also be contested by the other players in the field.

4.4. Grasping mediators' position in the field: valuable capitals and trajectory

In the mediation field, as follows from its promises, the ability to facilitate the resolution of disputes by the parties themselves appears as the peculiar capital of the field. Silbey and Merry (1986, p. 7) sharply describe mediators' work as "the tension between the need to settle and the lack of power to do so".

During my fieldwork, informants usually resorted to the concept of collaborative (or cooperative) mediator, lawyer or party to refer to the possession of that particular capital. For instance, collaboration comes to be the most frequent answer when mediators were asked what they expect from lawyers.

Magadalena, for example, refers to "having internalized the mediation process" (I-M04-M) and Ana refers to a "conviction" that "predisposes him/her to mediate" (I-M02-M). But despite its constant use, as the following extract shows, 'collaborative' is an elusive concept more easily defined by its absence than its existence:

> Interviewer: What do you mean by 'collaborative lawyer'?.
>
> Sivlia: To participate in the negotiation. Assist in all that it takes for his legal advice to his client to be: first, to participate in mediation; second, to be collaborative throughout the negotiation. That is a collaborative lawyer. A non-collaborative lawyer is the one who tell you "I don't want to negotiate," or who tells his client: "it isn't convenient for you to stay sit at this table," or "do not do the offer you should do." That is a non-collaborative lawyer. (Silvia, I-M01-M)

For its part, mediators tend to emphasize their special education and continuous training; that is, their specific cultural capital that allow them to do what it takes to help settle a case.

However, collaboration is not the only valuable capital in the RAM's field; and perhaps not even the most valued. The importance given to legal capital comes to the foreground as soon as asked if mediators should or not be lawyers. Sebastián's account is striking in that sense, despite manifesting himself in favor of permitting non-lawyers mediators:

> Well, about that... you are putting one's finger on the sore spot and it depends on who you ask. I think it's an important issue. Lawyers ... there has been a big fight in this discipline which is the interdisciplinarity, because lawyers believe ourselves the owners of the conflicts and I think we do own judicial conflicts. (Sebastián, I-M02-M)

The importance given to the mediators' legal profession is usually justified by the technicalities of the legal conflicts:

> Well I have taken a position on that and I consider it essential that they are lawyers, because it always either at the beginning of the mediation, or at the end, or at the middle of mediation it will emerge a technical issue that also does to the parameters to consider. (Javier, I-M02-ICL)

Silvina also refers to these technicalities, but in her narrative also looms a necessity for mediators to win lawyers trust (that could be seen as a strategy to increase their social and symbolic capital):

> Interdisciplinary is very interesting, but we are talking towards, in favor of judicial mediation, legal knowledge is extremely important. Precisely because of this relationship that is established with lawyers, who we precisely need them to be collaborative ... a lawyer who sits at this table and begins to explain you about a case, a legal proceeding, in which judicial terms are used, legal terms let's say ... (...) and the mediator, with her good sense and sound judgement says "what do you mean doctor by counterclaim, because I do not interpret what you're saying ...?" because she says it from her own profession; the lawyer gets crazy! (Silvina, I-M01-M)

Hence, it is clear that the knowledge of the law and how legal things work (what could be called the legal capital) is highly valued in this concrete subfield of the mediation field. The (legal) trajectory of the mediators and the mandatory presence of lawyers favors a high valuation of the legal capital in the hierarchy of the different species of capital at stake (cf. Bourdieu and Wacquant 1992, p. 98; Welsh's research (2005) points to the same direction)

Given the importance attached to the legal capital in RAM's field, it comes to the foreground the weak autonomy of the latter compared to the legal field. Inasmuch as the legal capital is valued, the legal field is present, it exercises influence. As Bourdieu puts it:

> This is so because, at bottom, the value of a species of capital (e.g., knowledge of Greek or of integral calculus) hinges on the existence of a game, of a field in which this competency can be employed: a species of capital is what is efficacious in a given field, both as weapon and as a stake of struggle, that which allows its possessors to wield a power, an influence, and thus to exist, in the field under consideration, instead of being considered a negligible quantity (Bourdieu and Wacquant 1992, p. 98)

Thus, to conclude this chapter, I point out the double strategy adopted by the mediators. On the one hand they champion the mediation promises and the specific mediation capital (being a 'collaborative' mediator, lawyer or party). On the other hand, they extol the value of the legal capital in court-connected mediation. This draws attention to their need to invest in both species of capital so not to be considered a 'negligible quantity' in any of these fields.

5. The defendants, the insurance companies and their lawyers

Even though a field's *illusio* is presupposition and product of the field's functioning (Bourdieu and Wacquant 1992, p. 115), this does not mean that some agents who come in contact with the field cannot disagree with the importance given to the game or to its rules. This is what came to happen in some of the road accident mediations I observed, especially those declined by one of the parties.

The following sections show the resistance of the insurance companies and their lawyers to mediation. Consequently, it will come to the foreground the historical construction of the field, which structure is the result of the relations of forces among its positions in a given historical moment (Gutiérrez 2002, p. 32). Thus, the existence and boundaries of the field as well as its rules of the game are defined historically, as a consequence of the power struggles among the positions (Bourdieu and Wacquant 1992, p. 101).

5.1. When nothing *makes sense: the refusal as the mediation's illusio denial*

> *... people have, come with expectations, (...) all have expectations of settling and that this is resolved. But faced with an emphatic 'no' that is a limit right? Well, you cannot do anything else in mediation ... (Florencia, I-M04-M1)*

A large number of mediations end up with the declination by one of the parties. According to the quantitative data provided by the CJM (Table 7), they represented a 15% of the caseload in 2010. Though, this percentage is even higher in mandatory civil cases, 46% of which were declined; and according to the informants, it is still larger within road accident mediations (because many insurance companies decline).

Table 7. Not mediated civil mandatory cases
(CJM, 2010. Unpublished data, Córdoba, Argentina)

Civil Mandatory Cases	**N**	**Percentage of all cases initiated**	**Percentage of civil cases initiated**
Refusal	1167	15%	46%
Nonappearance	387	5%	15%
TOTAL	**1554**	**20%**	**61%**

As explained above, the possibility to refuse exists in order to safeguard the voluntary nature of mediation. Obliging the parties to attend even when they are not willing to participate in the mediation was a triumph achieved by the mediators when setting-up the field in Córdoba. Sebastián relate to the purpose of the measure and the resistance it generated:

> Look, this was done—and I am from the beginning— this was done in order that the parties know what mediation is, that they have that contact with the mediator, that they were explained what the process is about and that this new thing started spreading. When time passed and now all these years this decade back, if you ask me, there were many sessions, there was much resistance, there were some bad moments in it, but I think it's positive that people mandatorily kept coming to the mediation, I think it is positive. (Sebastián, I-M02-M)

Now, when asked about their experience in mediation—when there had been refusal—many of the interviewees remark that "nothing" had happened. Plaintiffs tend to express this more crudely, as Carlos:

> … I was called some days ago to go to mediation, for both parties to settle, you know? … but I had no answer. (…) In the end, nothing came of it, you saw it. (…) We got in and nothing else, we got out as we got in. (…) Honestly, with the intention I came, I left with one hand in front and one behind[18], I left disappointed. It was nothing… (…) we came in, we signed and I came back home (Carlos, I-M04-P)

However, given the significant number of cases being declined it is not possible to overlook these data or to believe it means nothing. On the contrary, this 'nothing' turns to make sense if understood as a strategy[19] of the insurance companies (and their lawyers[20]).

[18] This is a Spanish idiom (*con una mano atrás y otra adelante)* that means to be left almost with nothing, naked, ending up with nothing.
[19] By strategy, as exposed before, Bourdieu "designate[s] the objectively oriented lines of action which social agents continually construct in and through practice" (Bourdieu and Wacquant 1992, p. 129).
[20] To analyze the relationship between the insurance companies and their lawyers would require a whole other chapter. While mediators' accounts continuously refer to a strict one-way relationship—'attorneys are simply following instructions from the companies'—, the insurance companies' lawyers' narratives

As the following transcripts from an insurance company's lawyer show, behind the mere declination there is a denial of mediation promises.

> ... look, the cases which I really use, in with I use the mediation are very few (...) because if I'm already negotiating it, going to mediation to negotiate does not make sense. But I'll tell you why it doesn't make sense, because beside just imagine, you are already talking to someone about negotiating ... 30, 40, 50, you start agreeing on numbers, let's not talk about responsibility, let's talk about numbers ... And suddenly you go into mediation and you start to talk to two people who do not know: what the case is about, don't know what tort law is ... All right, it's very good sometimes to be interdisciplinary, there to be psychologist next to the lawyer, because she can interpret the plaintiff and can lower her claim, and can give a new perspective of all of this. But many times, I'm honest, I speak with the lawyer and I get along much better, we get through … Generally clients will do what the lawyer says, first, how many customers will say yes in a mediation because the mediator convinced them and because the attorney...? Usually the mediator will never go over the lawyer, and the lawyer in this area in which he has great influence over his client, it is very difficult that the mediator bend the client's will not to the lawyer, you know what I mean? (Diego, I-M06-ICL)

First Diego refers to mediation as something at his disposal, which in itself suggests a weak commitment with the game: investments are measured and the specific capital of the field is mistrusted (he does not believe in the ability of the mediators to help the parties to settle).

Immediately afterwards, whilst stressing his previous argument, he directs his attack at the alleged rapidity and cost benefits of the process as well as at the supposed advantages for the parties:

> Ehh, then as I say, look, generally we've been negotiating something and to sit in front of two people who have no idea what the lawsuit is about, often do not know much of tort law. I truly understand that, particularly that it is a waste of time. I'm completely honest, we generate more expenses, often dizzy more the clients, ehh mediators do… throw you some opinions sometimes… Watch it, as in everything, good and bad lawyers, good and bad courts, good and bad mediators, but it has happened to me, so I don't take chances... I mean, we try to handle it... (Diego, I-M06-ICL)

Thus, by 'handling it', the insurance companies and their lawyers renounce to completely embrace the mediation *illusio* and undermine the significance of the field. Thereby, the mediation ends up being a mere errand to be run:

> Well, particularly this mediation I took it as an errand, because unfortunately I had no hope that it can be modified or mediation [could change] something[21]. But generally, ehh not ever happened to me, (and I've been an insurance company's lawyer for five years) that, or maybe two of three hundred cases I handle, that a mediator really changed the fate of a case. It really hasn't happened to me, it hasn't happened to me. I don't know if I haven't been lucky or maybe it was not the right time, person and client... because many edges have to converge. But I think that usually when I have settled in mediation it was because I had the money or because I said well we are now in mediation, let's settle here. But there have been no cases in which I said 'we are very far from settling, let's go to mediation and see if we can get to an agreement' and after working and working we reached a solution. It has happened, but the minority of cases. (Diego, I-M06-ICL)

Meanwhile, this is contested by the mediators, who—after stressing the fact that 'the mediation didn't get to start' and so safeguarding the promises from the hidden

suggests a much more negotiated relationship, even having lawyers complete freedom of decision on certain issues.

[21] His lack of belief ('I had no hope') in mediation is consistent with his refusal to embrace the mediation's promises. From his point of view *on* the field—understood as "the view taken from a point *in* the field" (Bourdieu and Wacquant 1992, p. 101), that is to say: the perceptions and understandings from a certain position in the field—participation in mediation is nonsense.

onslaught—insist on valuing the mediation session positively even when it had been declined:

> I always explain to people, even if the other party desists, I explain why, how, what may have happened... I draw them a different picture on how mediation could have been. (Magdalena, I-M04-M)

> Many times [they] say "[we have] no instructions, no instructions [from the company]." We go downstairs and we see them chatting out there. Because often they don't want to pay the fees, but well! The little seed is, is sown. (Silvia, I-M01-M)

> No, no, I think it's worth, because at least lawyers come into some extra contact of the one they might have in court, the plaintiff also sees that there is some interest, I guess, from the defendant of trying to see, to settle, o at the time who is right or not, I mean, I think it also has its benefits to attend the mediation, even if only to decline. Not only to get out of the fine that is imposed to anyone who do not attend mediation, but because it is seen, for me, as a certain willingness on the part of the other party to try to close the gap. (Clarisa, I-M06-M)

> I value ... actually, the mediation process didn't start eh but people let's say... value the contact, that there are people willing to listen, that explains them, to know each other, because right there is where people have the opportunity to meet, say, a more humane treatment, right? because of the human contact... (Florencia, I-M04-M1)

Mediators tend to assume the denial as habitual, probably as a result of the history of the field and their lower volume and distribution of capital against the insurance companies:

> ehhmm, habitual, let's say it's usual for us right? that many insurance companies (I won't say all) come and decline mediation, then lawyers speak outside and ask, for example, to the company lawyer 'Are you going to mediate? Do you have instructions?' 'I do, I don't', well'... when they say they don't, we go inside, write the record and the parties sign. (Florencia, I-M04-M)

However, there is a call for resistance to that habitualness within plaintiff's lawyers. As mediators, they also tend to understand the withdrawal as a decision taken solely by the company (of which the attorney is a mere representative), but they point to the mediators as the potential challengers of the companies' denial and their consequent refusal to invest in the game.

Fernando stresses the importance of knowing the reasons why they decline:

> And I think that the mediators could've, if you are looking for a change, could have pushed harder on the company to see which are more or less the reasons of the refusal. I was wondering if it's a general question, say they declined in all cases, a policy, or only in this case; to give a little more explanation because if not it is a mere formality ... well, so companies take it that way. If you are pushed there at that time you may have another kind of response, you know? But the issue is so light, they say 'well, we decline', 'we pay the fees' and that's all. Then it is quite easy for them to do that too. Then, maybe if something could have been different is that, that mediators press a little more for the reasons of the declination. (Fernando, I-M04-PL)

More extreme is the demand of Pedro, who believes that mediators should exert a 'convincing power':

> Mediators were too fast, 'If you do not want to mediate, ready, the next'. I understand they have to be fast, because they have many cases, but I have a deeper interest.

> Mediators should try to keep [people] in mediation, to take what the participants say. For example, I said I was willing to make available the witnesses to the company lawyer; they should've taken from it and from there try to push to mediate. (...)

> [Mediation] didn't add a thing, that's what happens in 99% of mediations, the mediators do little, at least here, they haven't all the capacity, or I don't know if capacity, technical skills perhaps, convincing power... a lot is needed for mediation to work here. (Pedro, I-M06-PL)

The final sentence seems to be an assessment of the capitals possessed by the mediators. For him, neither their 'capacity', 'technique' (cultural capital) nor their 'convincing power' (symbolic capital) is enough to make the mediation get started and work. This is in certain way acknowledged by Florencia, who recognizes her learnt acceptance of what seems to be a losing battle:

> There are limits, that is, one with... over time… at the beginning when one starts seems, well, that, let's say, [you ask yourself] if there's anything we should have asked, if we should have inquired more, or have said [to the lawyer] 'well, why isn't it possible…?' Well, all those interventions, when companies, because here it's not about human persons, they are companies that are in Buenos Aires, not even here, and when they bring a decision, well, trying to force it is not positive because there is a taken decision of not to mediate, because even this company does not accept mediation, it desists in all cases; then one also knows, knows the companies and the lawyers ... (Florence, I-M04-M)

Thus, refusal (and non-attendance in a stronger way) is a means by which the insurance companies and their lawyers contest/challenge the value of mediation. They refuse to "invest in the game", they deny that "the game is worth playing, that it is worth the candle" (Bourdieu and Wacquant 1992, p. 98).

But, as declining and non-attending are extreme ways of challenging the mediation field, the defendant's (insured's) non-attendance is a way to challenge the rules of the game.

5.2. The defendant-insured (non)attendance

As described in Chapter 3, the mediation law provides that the parties must attend to the Center when the case is referred to mandatory mediation[22]. It expressly states that natural persons cannot appear by proxy: they must attend personally (though necessarily accompanied by their attorney). This is clearly aimed at enabling direct communication between the parties, voiced as one of the mediation's principles. However,

> a field is not the product of a deliberate act of creation, and it follow rules or, better, regularities, that are not explicit and codified. (Bourdieu and Wacquant 1992, p. 98)

In spite of the clarity of the law (and the centrality of the principle on which it relies) the mediation practice in RAM is not in compliance with the norm. The most striking failure to comply is given by the non-attendance of the defendants when they have an insurance company. Actually, in none of the RAM involving an insurance company that I observed the insured (defendant) attended the mediation. Even more striking is that it was never an issue brought by either the mediators nor the plaintiffs or their lawyer as something problematic; on the contrary, it is assumed as natural.

Nonetheless, mediators in their narratives continue valuing the physical encounter of the parties and the direct communication between them. For instance, Magdalena (an experienced mediator), when asked about what happened in the mediation, describes:

> Well, yes yes actually all the parties came. Insurance companies usually do not bring the parties, they are represented by counsel. (Magdalena, I-M04-M)

In her first assertion she declares that 'all the parties' were there, assuming no absence. Immediately following, she refers to the defendant and its non-

[22] Article 18°, Law 8858.

attendance, but only as a passing reference and understanding it as a natural faculty of the company.[23]

Meanwhile, Sebastián—who asserts 'to have been since the beginning'—, rolls back the years and denotes the contested nature of the issue:

> Look, in general, [it] often happens that [the respondent doesn't attend]. At first we were very strict in that defendants should attend come what may, and on one hand it makes—or would make—the defendants really know what kind of company they have, right? (Sebastián, I-M02-M)

So, even though the mediators were 'very strict' as regards the insured presence, the insurance companies' lawyers were victorious in the battle. Nowadays, mediators appear as powerless against the companies (and their lawyers), as Ana's account shows:

> Ana: Look, this is a very important issue in mediation. We always want the defendant to come. Especially in the cases when there are quite serious injuries. But, well, the companies—allowing power of attorney—avoid bringing the defendant. For me, it would have been very good that the defendant had come.
>
> Interviewer: But if the company does not bring him... is there anything you can do?
>
> Ana: No, no no. Even if one asks that he comes, right? It remains at the level of the company. Sometimes there are cases where there are very serious injuries, where I would… because the party needs it, needs to see him; and the party wants them to tell him they're sorry and everything, and still they haven't wanted to bring him. (Ana, I-M02-M)

As Ana, some mediators remain upholding the importance of the defendant's presence. That is because different ways of understanding disputes and mediation are at stake in this confrontation. While insurance companies' lawyers understand the conflict as a pure economic issue, mediators stress the emotional or moral aspects of the dispute.

Thus, when asked about the insured, the company's lawyers tend to stress the pointlessness of their presence, especially because the final decision regarding a settlement is made by the company[24].

> Because in fact that the insured goes to mediation does not change anything, because who ultimately decides whether settling or not is not the insured, it's the company. That's way when they say 'you didn't bring the insured', yes I didn't bring him because bringing the insured does not affect me as company in the possibility to negotiate. I will negotiate if the company deems it appropriate, not if the insured says to negotiate it, you know what I mean? (Diego, I-M06-ICL)

Mediators, for their part, stress the importance of giving to the parties the chance to talk to each other, to assume responsibility, to forgive or apologize, and the like.

> People do not want intermediaries. People want to talk to whom they had the problem with. Because ultimately the insurance company for what it is for, let's say, standing up in a matter of responsibility. But many times, especially when there is serious injury, which is what I tell you that the party wants, because sometimes beyond the economic issue what interested people is that the person comes and says 'sorry', 'I'm sorry'. (...) Because I also think it is a ... is a right and a duty of the defendant to come and hear what is that is being said, not leaving

[23] This same mediator participated in a family mediation also observed. In this case the former husband (defendant) did not attend personally but by proxy. Surprisingly, in this case the issue came up as problematic, and it took quite some time of the session. The ex-wife, her lawyer and the mediators reproached to the husband's lawyer his absence, having the lawyer to explain the circumstances justifying his client's non-attendance (an important business trip). As I said, it was these very same mediators who participated (the same day) in a RAM and never referred to the absence of the defendant and his representation by the insurance company's lawyer; which shows the particularity of RAM as a subfield and the negotiated nature of the rules governing it.

[24] Relis (2009) refers to very similar arguments expressed by insurance lawyers in medical malpractice cases.

> everything in an insurance company who does not know ultimately how you can settle or what. It's like a rest and there is an evasion of responsibility for the facts. (Ana, I-M02-M)

However, some mediators also share the view of the companies' lawyers; so they assume the issue as a faculty of the insurance company and its lawyer and also highlight the needlessness of the defendant presence to get to a settlement (which is being clearly understood as a pure economic issue). Silvia and Silvina hold this view[25]:

> Interviewer: I've been observing road accident mediation and the defendant never attended. Is that usually the case? That they never attend…
>
> Silvina: Yeah, it's what I explained before. The company does not allow it.
>
> Silvia: Because the company assumes the defense of the defendant and then prefers not to expose him.
>
> Interviewer: And does that have some influence on the mediation or something?
>
> Silvia: Not at all. (I-M01-M)

Notwithstanding, the presence of defendants is considered important by some plaintiff lawyers for making the insured aware of how their company is handling the problem. Ultimately, a certain hope that the insured could influence the company's decision seems to loom both in Pedro's and Fernando's accounts:

> It would have been good if the defendant attended, they should've had to know how to handle it, so to find the human side of the mediation. The respondent has only spoken with the company. If he saw the parties, he would see how reality is like, what the accident produced, and thus could sit with the people of the company to settle the matter. (Pedro, I-M06-PL)
>
> Interviewer: Do you think it would've been helpful if the defendant was in person?
>
> Fernando: Yes, I think so. (...) The defendants, which are the insured in these cases, could see the operation of the company and see why the conflict continues. It's different if their clients is there and the company offers five thousand pesos and I do not accept and at least they say 'well, the accident was not that big, five thousand pesos is okay', for them to also assess the company they are paying. Because otherwise the companies act in any way from an economic point of view when in the middle there are human conflicts, you know. So if the company does not consider that, it has to assume the cost of his client knowing how the company works and, where appropriate, be a negative publicity for the future, and let's see; because that would push it to change things. It's not the same, as I tell you, that the client goes and sees that his company did everything to resolve the conflict than to see that the company did nothing to resolve the conflict, as it was in this case. Then, I do think it would be helpful (Fernando, I-M04-PL)

Plaintiffs' views, in turn, are much more diverse. While some of them would prefer the defendant to be there, others would not and recognize in the insurance company the disputant that is to be responsible. Two plaintiffs, Federico and Carlos, think so:

> No, in this issue I don't really think [the defendant had to have gone]. I see very legally and maybe, I can't depersonalize it from my characteristic of being an attorney, but I don't think so. And don't think so because in the end if [someone] pays 1, 5, 10, 100 or a million [pesos], it would pay it the insurance company. Then the power of attorney was… this is a purely economic issue, and besides here there wasn't... many times here there are situations in which there's a need for an apology from the…, you know? The plaintiff needs the defendant to apologize, sometimes there are more emotional issues. The apologies from Pérez [the insured] were given to me at the time when I crashed, so between Perez and I there's no

[25] The different perspective taken by different mediators could respond to their own trajectory and current position in the legal field. For instance, while Silvia is a practicing lawyer, Ana works exclusively as a mediator and teacher.

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> problem. Well then, the truth is that in this particular issue it had not helped at all. (Federico, I-M02-P)
>
> It was… it was the same for me because I didn't have to solve any problem with her, you know? Because that's why she had the insurance company, in any case if I should have ... if there had been something [it would have been] with the insurance's lawyer, not with her. I honestly don't [think the insured should have attended]. It is neither good nor bad. If I don't even know her, I swear that since I had the accident I don't know her face. (Carlos, I-M04-P)

As regards the insured, it was not possible to interview any of them[26]. However, based on their lawyers' narratives, it is possible to conclude that they are not encouraged to attend. Diego's description of his relationship with the insured suggests this:

> E: And do you usually tell the insured? Do you call him before the mediation?
>
> AC: Look, the insured receives the notification, because the CJM… one of the only written notifications that arrive at the insured's domicile is the one of mediation. And I and my insured receive it. Many times they call me and [say] 'hey, do I have to go or not?' And I explain them that sincerely they don't have to go, it makes no sense.
>
> E: And if they don't call you… you don't call them either...
>
> AC: No, no, I don't even call them, except in very big cases… (Diego, I-M06-ICL)

Javier also leaves it to their clients' choice; but he highlights that their main interest would be to control their companies' performance (and not so much getting together with the plaintiff):

> The insured almost never comes. Almost never, sometimes the insured has the opportunity to appear at the process with his own lawyer. In these moments he comes. Or in the case it's necessary we may come. The insured also wants, our client also wants to be reassured that the company is doing well. Then there are those pro-active clients that want to monitor. It's not the same saying to the client, "stay calm, stay in your home that we take care". There are people who stay calm and people who don't. Some people come, monitor, go, come, observe, listen, "well, the company made an offer, is trying"; [so they] reassure. It depends on the client. (Javier, I-M02-ICL)

Overall, the parties' physical presence—highly valued by the mediation's rhetoric and legally demanded—gives in to the faculty alleged by the insurance company's lawyers, which are not contested neither by the mediators nor by the other party. Thereby, the power of the insurance company's lawyers comes to take precedence over the personal encounter and direct communication between the parties. According to Pedro, this is what turns the RAM into a pure economic question:

> The defendant has never appeared personally, only on what he signed. So the issue is translated into a purely economic question, which is resolved only by the insurance. (Pedro, I-M06-PL)

As a result, the RAM—in the absence of the defendant—turns out to be very similar to the negotiation among lawyers that is so common in the legal field. The extent to which lawyers' represent the insured is understood with the extension it has in the legal field: they speak for their clients, whose presence is unnecessary. However, that was not the case with the plaintiffs and their lawyers, whose presence is still required. The different position of each other in the broader legal (and social and economic) field resulted in a different position within the mediation field.

Sebastián's narrative (at the beginning of this section) suggests—as every field—the mediation field in the CJM was historically constructed. The current setting of

[26] Given the fact that it was not possible to contact the insured personally (due to their nonattendance), the attempt was made to contact them through the CJM or their lawyers but none of them agreed to give the defendants' name and telephone number.

the field is the current state of the positions and struggles in a given historical moment. The character of repeat players (Galanter 1974) of the insurance companies and their attorneys together with the weak legitimacy of mediators compared to the historical position of lawyers led to lose the battle of the physical presence of the parties, even with the text of the law in their favor.

Thus, the insurance companies' (and their lawyers') refusal to bring the insured into mediation constitutes an attempt to change the rules of the game, to alter the value given to direct communication between the parties, to define the road accident cases as primary an economic issue. In this way, insurance companies got into the mediation field but not to embrace and to steadily reproduce its logic, but for changing its rules; since

> players can play to increase or to conserve their capital, their number of tokens, in conformity with the tacit rules of the game and the prerequisites of the reproduction of the game and its stakes; but they can also get in to transform, partially or completely, the immanent rules of the game (Bourdieu and Wacquant 1992, p. 99).

Summing up this chapter, its two sections have highlighted the historical construction of the field of RAM by exposing the field as "the locus of relations of force—and not only of meaning—and of struggles aimed at transforming it, and therefore of endless change" (Bourdieu and Wacquant 1992, p. 103).

Hence, the description made here of the RAM is just the current state of the field, a given state of the relations of force that exist in it. So this state of the field is both the historical result of previous relations of forces as much as it engenders possible subsequent conflicts.

6. The plaintiffs and their lawyers

6.1. Lawyers and parties in the civil process

The legal field is very rigid as regards the modes and scope of participation of lawyers and parties in the legal process. It is not just about written rules (which of course exist) but also about the importance given to their observance. However, this is not usually a matter of concern either for lawyers or clients—at least as far as road accident cases are concerned—because the law requires legal counsel in almost every procedural act. Furthermore, it is usual for clients to give their lawyers power of attorney.

As expressed by Fernando, a plaintiff's lawyer, this means that attorneys lead the procedure without their clients knowing how their case goes:

> ...because often people… you work and people don't even notice because you got the power of attorney of the people, so you do all the formalities and all ... (Fernando, I-M04-PL)

This is also acknowledged by his client, who points out the handful of times he talked to his lawyer:

> I mean, the lawyer called me to tell me the company had made that offer, then called to tell me that the judge had changed and then call me to tell me that was the first mediation hearing. … No, no, no, I've rarely seen my lawyer. (Carlos, I-M04-P)

It is worth noting that neither the client nor the lawyer understands this as negative; there is no claim that the relation should be more fluid or that the client should participate more actively. On the contrary, it illustrates how that relation comes to be tiresome at times. Thereby, Carlos expresses his desire of putting an end to the case so to avoid having to go to the lawyer again:

> That is what I expected, to end now with this issue, because it's been two years and I'm tired of going to the lawyer (laughs) though I haven't gone much.... (Carlos, I-M04-A)

Thus, summing up, in the legal field the modes and scope of participation of lawyers and parties is rigidly determined. Further, it is lawyers who assume the direction of the process with almost no participation of their clients.

In this context, as both lawyers and clients are notified of the sessions' date, mediation provides a (forced) opportunity to develop this relationship. Lawyers are forced to talk to their clients who, in turn, find an opportunity to ask how their cases are going. This will usually begin a communication that provides a glimpse of how that interaction works. In the following sections I will focus on two features which I find the most striking and appropriate for the purpose of this research.

6.2. Lawyers in mediation: shaping clients' expectations and behaviour

Mediation provides an opportunity for the parties to actively participate in the resolution of their cases (Nola-Haley 1998). However, the parties do not freely decide the extent of their participation. It is the very context in which an interaction takes place that shapes the 'world of the possible', that is, the available directions and agent can take in that same context. The lawyer-client relationship constituted in the legal field exerts a great deal of influence in the parties' expectations and behaviors.

The narratives of Fernando and Carlos exemplify the way in which lawyers shape their clients expectations, usually lowering them.

> And beforehand, I knew that the company would decline the mediation because they are companies that do not walk, let's say, have no interest in conciliation and they usually called hard or bad companies for lawyers who litigate in this... so I more or less expected what the outcome would be, but I'm prejudiced, I talk to my client and say "look, these are the options: or they don't attend, which would be the worst of all, or they attend and decline the mediation, which would be the second worst option of all, or they sit down and negotiate. (Fernando, I-M04-PL)

In this narrative the lawyer understands himself as the specialist—and then he presents to his client as such—: he knows about insurance companies and he can tell that the one acting in this case is not prompted to settle. It is this knowledge—not had by the client—that allows him to shape the client's expectations.

At the same time, this is understood by the client in those terms. Opportunely, when the insurance company declined the mediation, the previous warnings of the lawyers become meaningful, confirming the qualification of the professional and the ignorance of the client. Let's take a look at Carlos' narrative:

> ... with respect to the lawyer I think it's working well, I don't think… I don't think he's doing bad... I mean, they are meeting the steps that the law must follow, right? I never thought it would take so long, it's my first experience, maybe if I was lucky it had been any other insurance I would have had a quicker response. (...) But no, I think that the issue of attorney's pretty okay, he's moving well, I have nothing to say, they are meeting the points that must be followed. He told me just before, when I had the problem, that it would take long because of the company, but that was the first thing he told me, that I should not build up my hopes, he was going to fight, to fight it, to fight it, but that it was... it would be slow because of the insurance issue ... (Carlos, I-M04-A)

The emphasis given by Carlos to the fact that they are 'meeting the steps to be taken' is not to be overlooked. It is this understanding that bases his assessment of his lawyer's performance; which, described in this way, turns to be lawful and proper (he is doing what it is to be done). At the same time, this lawfulness allows him to place the responsibility for the length of the process in the head of a third, be that the insurance company or the law.

In this way, lawyers tend to set forth the options of the possible. By doing so they help along for there to be (in plaintiffs) "an adjustment between the individual's hopes, aspirations, goals and expectations, on the one hand, and the objective situation in which they find themselves by virtue of their place in the social order, on the other" (Jenkins 2006, p. 13).

For their part, mediators assume that this previous 'explanation' has taken place. Some of them refer to this as a proper quality of a collaborative lawyer, because it prevents their clients from being highly disappointed after the process. Magdalena puts it this way:

> Lawyers when they are very collaborative and bring their clients, they have previously told them what this is about, what they will find, and when this doesn't happen, people kind of, well, get disappointed a bit; but well, this is like this, this is strictly voluntary.
>
> ...people come with a certain expectation, sometimes the lawyer knows that an insurance company will not settle and then they come more or less prepared, but when they don't... (Magdalena, I-M04-M)

However, expectations are not the only thing shaped by lawyers. Attorneys tend to instruct their clients on how to act during the mediation session[27]. This usually happens in the same CJM, before the session starts:

> Yes, before entering mediation I explain to my clients how is the mediation process and tell them that they usually make them speak, it is possible that they are said to talk, remember how it was the accident, and... basically what were the physical injuries they had. Generally in mediations there are injuries or moderately important accidents, so I tell them well, to remember if they are asked, what areas are those affected by the accident, which treatment they continued to have, emphasizing all the physical and spiritual pain they suffered as a result of the accident.
>
> Yes, those two things. The facts and the accident and then the rest is the legal part to be left in my hands or wait and see what the company says. Then another of the points I stress is also that when there's an offer from the company, don't express at the table for or against it. We'll see that after, in a private meeting and see which way to go. You see according to what arises in mediation, that they keep talking to me in private sessions to see how to address the next stage. So they do not hurry nor do expressions of displeasure, nor surprise, nor liking. Because maybe you can increase the offer in the case they are already convinced with what the company offers, or if they consider a mockery what they offer, then to handle it with respect and in any case close the mediation and continue with the trial. (Fernando, I-M04-PL)

This account shows how Fernando defines the area of concern of his clients by differentiating the world of the 'legal' from the non legal. It is the latter which is incumbent upon the client while the former belongs to the lawyer. In this way he tends to delimit the behavior of his client, who is supposed to intervene as it relates to the facts of the accident and particularly to the injuries.

In turn, this is accepted with no claims by Carlos, his client, whose narrative is conspicuously similar to the one of his lawyer:

> Interviewer: So, you were saying you couldn't say anything in mediation. Was that okay or would you have liked you could say something that you couldn't…?
>
> Carlos: You know, before entering our lawyer, my lawyer, told me that it wasn't any kind of confrontation, then I went prepared that I should not talk or anything. I went with a sum in mind directly, I transmitted to my lawyer and so he said everything, as my representative, I left all the legal thing to him, I directly went not to say anything, I went to listen. (Carlos, I-M04-P)

[27] In the questionnaire conducted before the session, when asked what they think their lawyers expected from them during the mediation, most plaintiffs answered 'to follow their instructions'. In turn, lawyers tend to affirm that their clients expect from them 'to explain their client's position' and 'to talk for them'.

Thus, the client's understanding of what the mediation is—not a confrontation—is defined in the interaction with his lawyer. Thus, after the explanation given by his lawyer, the client has set an array of possible expectations and available behaviors[28]; ultimately defining his role in the mediation process.

Pedro's narrative also refers to a previous communication to his client in order to enlighten him on how he should act.

> Interviewer: ¿What can you tell me about the plaintiff's participation, your client?
>
> Pedro: Most activity is from one [the lawyer] and we must tell that to the people; I saw the plaintiff quiet and in compliance with the parameters that one had given.
>
> Interviewer: Which are those?
>
> Pedro: Be quiet, do not go with everything, 'bitching' (Pedro, I-M06-PL)

Surprisingly, José—his client—affirms that he

> would've like to have been more prepared by my lawyer (José, I-M06-P)

Meanwhile, mediators tend to perceive the lawyer-client relationship as an area outside their purview. Inés, for instance, raised this as a crucial issue to substantiate the need for mediators to be lawyers:

> … only lawyers respect and understand the lawyer-client relationship. I've seen non-lawyers mediators interfere so badly in that relationship… (Inés, F-talk in the hall-M)

Ana's view is not as extreme as Inés', but she still shows a great respect for the lawyer-client relationship; even when that relationship may be interfering with the client self-determination. She illustrates it with an example:

> I, for example in today's mediation that you were not there, I got the feeling that despite the lawyer came and said, "No, no no. This, that". When counsel for the defendant said he didn't want to settle, I saw the party's face as he did want to be [in mediation]. But the lawyer would not let him. He did not allow him to intervene, he didn't allow anything, then ... because the lawyer did not want to be in mediation, then directed a lot. And in the face of how the situation was, as how things had gone given this confusion that had been with the defendant's attorney and all that, it was not possible for me to make an intervention and tell people "well, but, what do you want?". Because most certainly the lawyer would have retorted and say "no". And I didn't see him [the client] with enough force so that I could throw—because sometimes one throw, it is like throwing, you know?—I throw a hook and well, he might grab it, but he, I saw him very doubtful, but a very strong presence of the party's lawyer. (Ana, I-M02-M)

Then, the mediators' intervention—which is said to be aimed at counterbalancing power imbalances[29]—is reduced, at most, to 'throwing a hook'[30] when it comes to lawyer-client relationships. Hence, lawyers and clients are 'free' to decide the nature of their relationship—and my data suggest that it is lawyers who carry the baton in deciding so—while mediators respect that.

It becomes clear, again, the similarity between mediators' and lawyers' mindset, *standard philosophical map* (Riskin 2005) or better, *habitus* (Bourdieu and Wacquant 1992, p. 130). Both having the beginning of their professional development in the legal field, they both have the same schemes to understand the lawyer-client relationship. In the case of mediators, those schemes "transpose" to the new field, and their practices "are produced in and by the encounter between the *habitus* and its dispositions, on the one hand, and the constraints, demands and

[28] This should be taken into account in research projects aimed at measuring levels of satisfaction with the mediation process, because it could get to influence the clients' subsequent assessment.
[29] This appears in my informants' narratives, but it is clearly put forward by Astor (2007).
[30] To 'throw a hook' *(tirar un gancho)* is an expression meaning to give help to somebody but it is up to the other to take it or not. So, hook stands for a clue, a word or, in this case, an opportunity to express her/himself.

opportunities of the social field (…) within the actor is moving, on the other" (Jenkins 2006, p. 48), resulting in a strong respect for that relationship.

6.3. Mediation, transparency, and symbolic capital

As I have already pointed out, the lawyer-client relationship is not very fluid within the civil legal system. Mediation, in that context, is a one of the few—if not the only—occasion in which lawyer and client are sitting together in front of the other party. This not only means that the communication between parties (or between their lawyers) is possible but also that the clients have the chance to see their lawyers in action. This is not a small thing in a relation that is filled with suspiciousness and distrust[31].

Fernando clearly highlights the benefits of having his clients watching the companies' refusal to settle:

> There is one positive thing which is that my client is present at the time the insurance lawyer expresses her unwillingness to conciliate, so in that sense, the experience serves as the client realizes that the lawyer has not kept the money deliberately, or that he has arranged somewhere else... let's say, as it is a mediation center where there are mediators the issue is invested with more or less formality... the clients generally leave calm, because they understand why there isn't a solution to the conflict, right? (...) And the client realizes that the defendant is hard, that he doesn't want a solution to the issue. So it's not, that it is not that you are putting a spoke in the wheel or that you are not transmitting economic offers to you client but that it is the situation which is that way. (Fernando, I-M04-PL)

In the same line is the narrative of Florencia, who frames the issue within a general problem of mistrust against lawyers:

> Um, the important is that they often get to know each other there, say it is an opportunity to know in yesterday's case for women, eh and for specially for the woman's lawyer was very important because he said that it makes it transparent, this thing that it was not a question that the attorney told his client "no no we cannot settle" and that's it, but that the clients actually see what is happening. For me it has to do with the loss of prestige of the figure, say, the role of the lawyer in society; that there is a suspicion, and that I see it all the time ... Yesterday in another case also ehmm clients distrust their lawyers and then, that is ... eh mediation helps clients see and hear their lawyers defend their interests or that kind of issues. (...) Many times the clients' complaints ehm well is a heavy burden that lawyers have to bear... and this helps lawyer to take a breath and continue with the proceedings, that is, perhaps to renew confidence. (Florencia, I-M04-M)

The final assertion suggests the mediator feels certain empathy with the lawyer, about who would be unfairly under suspicion.

Similarly, Magdalena refers to the distrust of lawyers as a general problem. Further, she refers to it as 'myth' which also suggests that the potential suspicions of their client would be undeserved:

> People see how lawyers operate um? also because it is this myth that's been going around in the collective unconscious that lawyers settle behind their clients' back, that we give people less money that for what they settle. This allows a little to clarify this issue, um? then you can see, you can see how the lawyer works, you can see that there are mediators, that here there isn't an interest of the mediators on behalf of one or the other, you explain them, then… (Magdalena, I-M04-M)

[31] My data, in this respect and despite the foregone section, suggests consistency with Sarat and Felstiner (1995, p. 152) assertion: "Only on rare occasions then does the interaction between lawyers and clients in any field resemble the straightforward provision of technical services to a generally complacent, dependent, and weak laity. That interaction is, more often, complex, shifting, frequently conflicted, and negotiated"

Companies' lawyers also empathize with their colleagues, and so they stress the significance of clients ratifying their lawyers' option, although they also bring attention to the importance for clients to realize 'where they are standing'[32]:

> This is a moment that makes the individual who has filed the lawsuit to know all the parties and what is happening and what is being offered, and thereby his lawyer is not his only interlocutor. In other words, it serves the lawyer and serves the client. The lawyer can say: "Look, the offer I told you the company had made, here it is the company's lawyer and he is confirming it" So ... and in turn serves the client to see, take more confidence with their attorney and that he was saying things as they were, to learn the position if there is a concurrence of guilt, on what basis will the insurance company transmits an offer. Then he has a perspective from the insurance company, has a perspective from the mediators that have the most impartial stance, and has a perspective from the side of his lawyer, that obviously is biased in his favor. (Javier, I-M02-ICL)

Diego is even more emphatic about the need for clients to listen to other side of the story:

> And it's also very important that [the plaintiff] is there because sometimes the lawyers do not tell the plaintiffs or omit to tell the truth or hide something... then it's often [helpful] to sit them down and tell them 'look'. It has happened to me that I had been negotiating a case, ehhh numbers, and we have come to mediation and I've said 'well I've made an offer', 'no, you haven't offer me anything'. Then it is a good opportunity to say 'Well look, I offered you such money, if your lawyer hasn't transmitted to you or told you differently, told you more or less, that's your problem'. It is good because it is a moment where the plaintiff can know where he is standing, the transparency of the process and everything, he hears a different version from his lawyer's. (Diego, I-M06-ICL)

Hence, mediation appears as a space of 'transparency', where clients can regain trust in their lawyers and have a better sense of 'where they are standing'. By doing so, as seen in the following section, lawyers attempt to increase their symbolic capital.

6.4. Grasping the plaintiffs' positions in the field

The centrality of the parties in the mediation rhetoric is commonplace. The parties are said to be the raison d'être of the mediation, what would imply an active participation in the process. In this context, lawyers are called to have a secondary role, to stay in the background supporting and checking their clients' participation without restricting it[33].

However, it is important to bear in mind that RAM are mandatory and they are part of the civil legal proceedings in Córdoba. As a plaintiff puts it, they are one more 'step' that has to be accomplished to get to a decision. This may indicate that the position of parties and lawyers in the legal field spreads its consequences beyond the Court building up to even the CJM.

In the legal field[34], the legal knowledge—a special kind of cultural capital understood both as knowledge of the law and knowledge of the how things are done in the Court—is a very valuable type of capital. Lawyers and judges possess it but parties do not. This defines—along with their possession or dispossession of other species of capitals—their position in the field. As Bourdieu (1987, p. 828-829) puts it:

> The difference between the vulgar vision of the person who is about to come under the jurisdiction of the court, that is to say, the client, and the professional vision of

[32] It is a very common Argentinean expression (*donde está parado)* which means to know which your situation is.
[33] A call for lawyers' change of paradigm is commonplace in the mediation literature (see Riskin 2005; Nola-Haley 1998; Abramson 2005; among others). For two opposed empirical assessments of this on divorce mediation and civil mediation, see McEwen & Rogers 2005 and Welsh 2005 respectively.
[34] For analysis of the legal field see Bourdieu 1987.

> the expert witness, the judge, the lawyer, and other juridical actors, is far from accidental. Rather, it is essential to a power relation upon which two systems of presuppositions, two systems of expressive intention—two world-views— are grounded. This difference, which is the basis for excluding the nonspecialist, results from the establishment of a system of injunctions through the structure of the field and of the system of principles of vision and of division which are written into its fundamental law, into its constitution. At the heart of this system is the assumption of a special overall attitude, visible particularly in relation to language.

In the legal field, the particular legal vocabulary assumes a crucial role excluding the parties from the valuable capital; the alleged specificity and technicality of the legal words defines lawyers as haves and laypeople as have-nots at the same time that sets the basis of a relationship of dependency that is at the same time condition and raison d'être of the field.

As seen in sections 6.a and 6.b, my data suggests that this kind of relationship exists and it spreads its influence to the mediation process in the CJM[35]. The fact that the parties remain in the background, having a passive participation and not resisting to it, could be understood as the consequence of "the logic of adjustment of dispositions to position" (Bourdieu and Wacquant 1992, p. 81), that is to say: the agents can only see what is seen from their positions; it is their own *habitus* that defines the world of the possible.

Hence, the symbolic violence[36] wielded by lawyers over clients based upon their possession of legal capital (and the parallel clients' dispossession) extends to mediation enabling lawyers to shape their clients' expectations and behaviour.

Furthermore, by means of the alleged mediation's 'transparency', lawyers have a chance to increase their symbolic capital[37]. This, in turn, has the potentiality of bolstering the efficiency of the symbolic violence appointed above.

Then, to understand the conduct of the plaintiffs as players in the mediation game, it has to be considered both their possession (or dispossession) of the valuable capitals (being the legal capital one of those) and their acquired dispositions throughout their trajectory. As Bourdieu puts it:

> To be more precise, the strategies of a "player" and everything that defines his "game" are a function not only of the volume and structure of his capital *at the moment under consideration* and of the game chances (…) they guarantee him, but also of the *evolution over time* of the volume and structure of his capital, that is, of his social trajectory and of the dispositions (*habitus*) constituted in the prolonged relation to a definite distribution of objective chances (Bourdieu and Wacquant 1992, p. 99, emphasis in the original)

[35] However, lawyer-client relationship is a complex issue; clients are not all the same: some of them actually have knowledge of the legal system (as insurance companies do) and the possession of other kinds of capitals (such as economic or social capital) may be significant enough to define a different relationship.

[36] "Symbolic violence, to put it as tersely and simply as possible, is the violence which is exercise upon a social agent with his or her complicity. (…) To say it more rigorously: social agents are knowing agents who, even when they are subjected to determinism, contribute to producing the efficacy of what determines them insofar as they structure what determines them. And it is almost always in the "fit" between determinants and the categories of perception that constitute them as such that the effect of domination arises. (…) I call misrecognition the fact of recognizing a violence which is wielded precisely inasmuch as one does not perceive it as such". (Bourdieu and Wacquant 1992, p. 167).

[37] Gutiérrez (2002, p. 40-41, my translation) defines it as "a species of capital that adds prestige, legitimacy, authority, recognition to the other species of capitals, principles of distinction and differentiation that come into play in relation to other agents of the field, that would be added to the position occupied by the possession of the specific capital at stake in that field". Bourdieu, in turn, defines it as "the form that one or another of these species [economic, cultural, and social capital] takes when it is grasped through categories of perception that *recognize* its specific logic or, if you prefer, misrecognize the arbitrariness of its possession and accumulation" (Bourdieu and Wacquant 1992, p. 119).

7. Conclusion

Having displayed most of the findings, it is time to try to make sense of them as a whole. The chapters of this thesis show the specific nature of road accident mediations in Córdoba's CJM. The findings suggest that Road Accident Mediation fits Bourdieu's description of a field:

> As a space of potential and active forces, the field is also a *field of struggles* aimed at preserving or transforming the configurations of these forces. Furthermore, the field as a structure of objective relations between positions of force undergirds and guides the strategies whereby the occupants of these positions seek, individually or collectively, to safeguard or improve their position and to impose the principle of hierarchization most favorable to their own products The strategies of agents depend on their position in the field, that is, in the distribution of the specific capital, and on the percepcion that they have of the field depending on the point of view they take *on* the field as a view taken from a point *in* the field (Bourdieu and Wacquant 1992, p.101, emphasis in the original)

Throughout each chapter, I have tried to grasp the diverse agents' strategies. As regards mediators, their double game consisting of championing the mediation promises and defending the value of the legal capital in mediation was highlighted. By doing so, they increase in value the mediation specific species of capital as they guard the value of the legal capital, which they also possess due to their trajectory in the legal field.

Another striking feature of mediators' narratives is that when they are asked in general terms about mediation (for instance: what is your role in mediation? what would mediation help for? and the like), they tend to respond in terms of the promises: self-determination, empowerment, celerity, low cost, so on. But when asked about specific cases or types of cases (such as road accident mediation and the presence of the defendant, see chapter 5) they change their discourse and somehow forget the promises, relativizing them. Then, mediators use the mediation promises' discourse to justify their work and mediation itself. However, the 'particularities' of case or type of case seem to be able to dilute the mediation promises in order to achieve other aims or as a result of other agents' pressures.

This adds to the literature on mediators and mediation style by stressing the fact that, once at the table, they will not only respond to certain alleged mediation aims imposed from above (be the mediation promoters or the law) or to the pressures for efficiency imposed by the system (Silbey and Merry 1986, Welsh 2005) but also to the mediators' own trajectory and interests and the pressures coming from the parties. For instance, when extolling the need for legal knowledge among mediators, they were, on the one hand securing preeminence of lawyer-mediators in court-related mediation by making mediation fit their own legal formation and so "to control entry into the occupation and to enhance its status and perquisites" (Abel 1982, p. 303). On the other hand, they shaped the mediation style which would primarily be focused on a legal assessment of the claim and the corresponding money damages; which, in turn, favour prominent lawyers' participation to the detriment of disputants.

> Thus, even as most mediators and many courts continue to name party self-determination as the "fundamental principle" underlying court-connected mediation, the party-centered empowerment concepts that anchored the original vision of self-determination are being replaced with concepts that are more reflective of the norms and traditional practices of lawyers and judges (Welsh 2005, p. 320)

Insurance companies (and their attorneys), for their part, invest their accumulated capital (both in the legal as in the economic field) to challenge mediation's *illusio* and to shape their game rules. They respond to their own interest and rely on their own capitals.

Then, it is not mediators who solely decide how and what mediation will be about. The importance of insurance companies' lawyers shaping the game rules by

omitting bringing the insured highlights the contested nature of the mediation style. In defendants' absence it will necessarily depart even further from a transformative mediation (Baruch Bush and Folger 1994) or a therapeutic approach (Silbey and Merry 1986).

Besides, the victory of insurance companies and their lawyers over the insured mandatory attendance confirms that "repeat players can play for rules as well as immediate gains" and suggests another way in which haves come out ahead (Galanter 1974, p. 100). The diverse position occupied by the parties in the social and economic field cannot be disregarded. Even when both plaintiffs' lawyers and insureds' lawyers deem unnecessary the presence of their clients in the mediation session, only the latter have succeeded in changing the rules to fit their interests. This clearly cannot be understood as a matter related to the personality or formation of the companies' lawyers but as a result of the structure and volume of capital accumulated by the insurance companies, which undoubtedly exceeds plaintiffs' capital.

In turn, the high level of nonattendance or refusals of the insurance company suggest the accuracy of Galanter's assertion, though in the opposite sense, that "repeat players are more likely to be able to invest the matching resources necessary to secure the penetration of rules favorable to them" (1974, p. 103). Avoiding mediation to take place, insurance companies prevent the mediation law to "penetrate", that is, to reach all cases referred by the Court. In that way, insurance companies turn mediation in a forum available to them as a tool that can be used or discarded depending on the case or their financial needs, mediating only when it is "more effective in gaining its ends" (Abel 1982, p. 297).

Finally, plaintiffs and their lawyers face in mediation an opportunity to 'put into practice' *habitus* previously acquired by their position in the legal field. The findings of this research highlight the significance of lawyers' trajectory and acquired *habitus*, which could be paralleled to the legal education and adversarial paradigm continuously stressed by the authors who called for change in lawyers' role at mediation (for example Riskin 2005; Nola-Haley 1998; Abramson 2005). It also points out the constraints imposed on disputants by their *habitus* which "as a structuring and structured structure, engages in practices and in thoughts practical schemata of perception issued out of the embodiment (…) of social structures" (Bourdieu and Wacquant 1992, p. 139). This is not always noticed in the literature, as disputants are simply expected to want what mediation says to offer and only rarely inquire into their preferred role (but see Relis 2009).

As a result of their *habitus*, lawyers tend to invest in mediation their symbolic capital to reinforce the efficiency of their symbolic dominance over clients. Making this dynamic explicit shows another feature of the relation between formal and informal justice; adding to the already denounced ambivalence of the latter (Abel 1982). My findings suggest a concrete way in which informal and formal justice, rather than oppose, contribute to each other. Findings on plaintiffs and their lawyers suggest that mediation provides a space for enhancing the lawyer preeminence in lawyer-client relationship, which is typical of formal justice. They point out to the particular way in which the legal profession strives to legitimate itself by resorting to the spaces created by informal justice: lawyers take advantage of the alleged transparency of mediation to show their proficiency and necessity to their clients sitting next to them.

Then, the already commonplace assertion that "during both formal and informal justice processes (…) litigants are throughout dominated by lawyers and dependent on their expertise and paternalistic constructions of what is best" (Relis 2009, p. 240) is not only confirmed, but also gets a 'how' and a 'why'. The concepts of *habitus* and position allow understanding this process without considering it a mere consequence of the legal structure or lawyers' intention, but a result of a the

"ontological complicity" between *habitus* and field (Bourdieu and Wacquant 1992, p. 128).

The mere economic aims referred by most plaintiffs in my data constitute a clarion call against generalizations in the field of mediation. For instance, it has been shown that the existence of disputants' hidden agendas or aims clearly diverge from their lawyers' in the realm of divorce (Sarat and Felstiner 1995) and medical malpractice (Relis 2009). However, my data suggest that plaintiffs are mainly in pursuit of money damages as much as their lawyers. Even when some of their expectations and behaviours have been shown to be shaped by their lawyers, that is not enough to disregard those aims as their own.

The peculiarity of each kind of dispute (and institution) is strengthened by the fact that RAMs have come to have their own rules as regards parties' attendance. This leads us again to the usefulness of the concept of field, which is historically and relatively autonomously constructed though constantly influenced by others contiguous fields.

Thus, the very existence of the RAM as a particular field as well as its relative autonomy becomes apparent. RAM, as a relative autonomous field, is constantly criss-crossed by the "effect of field" exercised by other fields (Bourdieu and Wacquant 1992, p. 100). This ultimately shapes the rules of the game and impacts on the value given to the diverse species of capital at stake. Thereby, the legal field exerts great influence on road accident mediations in the CJM–even though there is a strong discourse of differentiation from the Court and its rules. Ironically, both fields contest each other while taking advantage of each other's *illusio*: the law proclaims modernization, celerity, and improvement when incorporating mediation programs, while mediation owes its vast majority of cases to the legal system.

Each of the tensions presented in this research are understood as "both the product of previous struggles to maintain or to transform this structure, and the principle, via the contradictions, the tensions, and the relations of force which constitute it, of subsequent transformations" (Bourdieu and Wacquant 1992, p. 91). So, this thesis stresses the significance of a historical perspective as it opens the door for future research to elucidate other inherited struggles which are played out in the field today, as well as the future transformations that will necessarily come.

The practices of mediators, lawyers, and parties are not to be studied alone, as if they had no relation to each other. On the contrary, each participant brings with him/her a history, a strategy, and an accumulated capital that is put in action against the others' histories, strategies, and capitals. Each mediation is more than just one mediation, it is a struggle in the continuous battle to define what mediation is, what the rules are, and ultimately if it is worthwhile.

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