CHAPTER ONE

Introduction

This book is an analytical study exploring through actors' understandings, perceptions and experiences the internal dynamics and realities of case processing in the legal system leading up to and including mediation. By looking at the jigsaw of views, I attempt to infer something about the system of mediation in which all actors have a part, but none knows the whole play. Specifically, the research addresses the question, "How do the diverse professional, lay, and gendered actors understand and experience case processing leading up to and including mediation in legal disputes?"[1] Thus, in terms of theoretical framework, in sharp contrast to many studies to date that have focused on structural features of litigation and mediation – some informed by a neo–systems theory perspective – this book focuses on recovering actors' understandings and meanings affecting their actions within the interface of social structure, here being mediation and related litigation processes.[2]

1 I use the term "mediation" as traditionally understood to mean "a nonbinding process in which an unaligned third party works with disputing parties and their lawyers towards resolving or mitigating their conflict in a mutually satisfactory settlement. Parties may consider a comprehensive mix of their needs, interests, and whatever else they deem relevant to the dispute" (Fuller 1971, pp. 305, 308; Folberg and Taylor 1984, p. 10).

2 Looking back ultimately to Max Weber and Alfred Schutz my approach here is an interpretive one, attending to the subjective meaning of human action. Both Schutz and Weber viewed the essential function of social science to be interpretive, to understand the subjective meaning of social action, with action (i.e., all human behavior being overt or passive to which individuals attach a subjective meaning) being defined through meaning and taking account of others' behaviors (Schutz 1967, pp. xxi, xxiii, xxviii; Weber 1922, p. 1). Yet, taking as central to my research the interstitial position of the "knowing social actor" whose action is informed by structure, I draw on the paradigm emerging in the works of Anthony Giddens and Pierre Bourdieu to inform my investigation. Giddens' structuration theory "recognizes human beings as knowledgeable agents, reflexively monitoring the flow of interaction with one another and routinely monitoring social and physical aspects of the contexts in which they move . . . maintaining a continuing 'theoretical understanding' of the grounds of their activity" (Giddens 1984, pp. 5, 30). In contrast to positivism, for Giddens social reality is the ongoing construction of, and by, knowledgeable actors whose recurrent interactions create, reproduce, and transform the social world (Mouzelis 1991, p. 19). Yet, "the constitution of agents and structures . . . represent a duality . . . as structure . . . organising human conduct . . . is not external to individuals. Structure is recursively organized sets of rules and resources . . . comprising the situated activities of human agents, reproduced across time and space" (Giddens 1984, p. 25). Not far from Giddens, Bourdieu's theory of practice stipulates that "each agent . . . is a producer and reproducer of objective meaning. Yet, only by constructing the objective structures is one able to pose the question of the mechanisms through which the relationship is

The findings can be conceptualized as a story about a drama and its actors (Turner 1974). It is a drama entailing different forms of communication, a drama of tactics and strategy as well as one representing highly meaningful and potentially life-altering experiences – depending on which of the actors describes it. Indeed, understandings of the drama's meaning and purpose are divergent. It is a drama of incongruous yet converging interests, perceptions, intrigues, and humanity. It is a drama about money and human lives. The drama offers various opportunities for its actors. Yet, the actors have differing needs and desires. Each performance focuses on resolving a dispute. But the actors do not share the same understanding of what that dispute is about. Nor are there shared comprehensions of how to resolve it. Actors who appear to be on the same side pursue disparate objectives. Who is aligned with whom? Some players have more power, frequently transforming the drama for all. Yet, the actors have very different comprehensions of what is taking place. Still, although it can be said that legal, lay, and gendered actors have disparate conceptions of the good, it appears that the drama is slowly uniting all of its actors to hold similar conceptions of the good.

Professional versus lay roles have been examined for a number of reasons.[3] Professionals such as lawyers and mediators are distinct from lay plaintiffs and

established between the structures and the practices or the representations which accompany them." In going beyond the subject/object dichotomy, Bourdieu notes that "agents' habitus acts within them as the organizing principle of their actions, habitus being a system of structured structures acting as principles that organize practices" (Bourdieu 1990, pp. 18, 53). Thus, social practices are fundamental in understanding how social structures are produced and reproduced, as practices constitute structures whilst also being determined by structures (Bourdieu 1977, pp. 21, 72; 1990, pp. 18, 53). This approach accords with anthropologists' shift from analyzing laws as systems of rules or processes to instead utilizing paradigms that focus on actors' individual approaches, preferences, and decisions whilst operating within rule and normative structural systems (Merry and Silbey 1984, p. 159). The works of Garfinkel and Goffman also provided useful insight in relation to the final chapters (*six and seven*), which provide a more detached focus of my situated actors. Thus this research may also be viewed as an ethnomethodological study "setting out to make explicit the truth of primary experiences of the social world" (Bourdieu 1977, p. 3). I have "sought to treat practical activities, practical circumstances, and practical sociological reasoning from within actual settings as topics of empirical study," including "how" things are discussed. This is notwithstanding the fact that in contrast to Giddens and Bourdieu, Garfinkel takes the view that the objective reality of social facts is the ongoing accomplishment of the concerted activities of daily life (Garfinkel 1984, pp. vii–viii, 1). Likewise, predominantly in relation to the final chapters, Goffman's work had a role to play in informing the analysis on perceptions as well as actors' concerns with managing others' impressions, that is, how individuals interact utilizing self-presentation and performances during mediations' interactions. Finally, viewed as a fieldwork monograph from a sociological and anthropological perspective, this research draws on some of Clifford Geertz's insights in cultural hermeneutics in that I aimed throughout to provide "thick description," revealing the complexity of elements within litigation and mediation processes. As Geertz notes, "ethnography relates to the intellectual effort of establishing rapport, understanding your notes, interviews . . . thinking, reflecting . . . It is an elaborate adventure in 'thick description' . . . not just describing what happens on the surface . . . but providing richly and fully described accounts of what is going on . . . and setting down the meaning particular social actions have for the actors whose actions they are." Moreover, as "small facts speak to large issues," I aimed to "draw large conclusions from small, but very densely textured facts to support broad assertions . . . by engaging them with complex specifics" (Geertz 1973, pp. 6, 9, 23, 27–28).

3 Individuals play roles that tell them and others what to expect in their activities. Although the term "role" vacillates when examined carefully and individuals are simultaneously involved in several roles, it can be defined generally as "activities individuals would engage in were they to act solely

defendants in the context of litigation and mediation in various respects. Lawyers and mediators are committed to, and embrace, the professional roles that define them and what they do (Goffman 1961a, pp. 164, 171; Burns 1992, p. 133; Manning 1992, p. 112). Role expectations of these professionals act as both external constraints on them as well as resources that they can manipulate (Manning 1992, p. 177; Lemert and Branaman 1997, pp. 35–36). Moreover, professionals such as lawyers and mediators are "repeat players" in litigation and mediation and are in a position of advantage (Galanter 1974, pp. 97–98, 103, 114), working with clear ideas of what they are supposed to be doing during case processing. In contrast, lay non-corporate actors, such as the plaintiffs and defendants in the cases studied here, are predominantly unsophisticated in litigation and mediation and thus do not know in advance what they should or can be doing during the processing of their cases. Consequently, their understandings and actions, unlike those of legal actors, are generally not affected by prior knowledge of accepted norms or of "how things go" during litigation and mediation.

A second focus of this book involves a comparison of female and male professionals' and lay actors' understandings and experiences during case processing including mediation.[4] Scholars have posited that the influx of women lawyers into the legal profession may alter the nature of lawyering, including negotiations within the adversarial system to being more relational.[5] However, limited empirical data on how the diverse genders actually practice law and whether females contribute to an emphasis on needs versus rights (Menkel-Meadow 1994a, pp. 89, 91, 95). Moreover, no systematic empirical field studies have examined whether gender affects lawyers' approaches to case processing that includes mediation (Klein 2005, p. 792). Nor have gender-based differences in lawyers versus parties been explored (Stempel 2003, p. 312). This is notwithstanding the fact that "disputing may be influenced by the . . . genders of those involved" and that "gender-based differences may affect the dynamics of mediation sessions" (Goldberg et al. 1992, p. 139).

In locating my arguments within the literature debates, it became clear that notwithstanding mediation's popularity, exponential expansion, and institutionalization connecting it to formal justice systems in many jurisdictions in North America, the United Kingdom, Europe, Australia, and worldwide (including a number of civil law jurisdictions)[6] and despite voluminous rhetoric and theoretical discourse, there is a dearth of in-depth empirical knowledge (versus survey data) representing any aggregate view of how litigation-linked dispute resolution works in practice; how it is deployed by lawyers and disputants in terms of their

in terms of the normative demands upon those in their positions" (Goffman 1961b, pp. 87, 90–91, 106–10, 132–33, 139, 152; 1974; Manning 1992, pp. 127, 176).

4 Other independent variables such as socioeconomic status or ethnicity were not examined for various reasons, including the relatively small numbers in each actor group. Segmentation of the data on the basis of these other independent variables would result in group numbers too small for meaningful analysis.

5 Menkel-Meadow (1985, pp. 50–58), Stempel (2003, pp. 311–12), and Klein (2005, p. 777).

6 Nolan-Haley (1996, p. 100), Palmer and Roberts (1998, p. 148), Alexander (2002, pp. 272–73, 275), and McAdoo and Hinshaw (2002, p. 475).

understandings, perceptions, and goals (as well as their complex interconnections), lawyers' impact; and generally what occurs during the multileveled interactions in mediation processes.[7] Indeed, the social science literature contains only scattered evidence of what it means and feels to undergo mediation (Lande 2000, p. 330).

In particular, although valuable work has been undertaken such as Sarat and Felstiner's research entailing observations of U.S. divorce lawyers and their clients,[8] overall little in-depth empirical knowledge exists from litigants themselves on their dispute perceptions (Guthrie 2001, p. 165), their agendas for litigation and mediation (Relis 2002, pp. 151–52; Jones 2003, p. 284; Sternlight 2003, pp. 298–99), and their evaluations of ADR (Guthrie 2002, p. 129). Yet, "listening to disputants' voices should be particularly important in . . . democrac*ies* that proclaim the value and dignity of the individual and in a field that names disputants' self-determination as its fundamental underlying principle. . . . " Listening to disputants' voices "is essential for the maintenance of the legitimacy of the public institutions that embrace mediation" (Welsh 2004a, pp. 578, 605–6). In providing these data, the findings here challenge dominant understandings of how litigation-track mediation works in practice.

The overall shift in focus from adjudication to settlement has been observed in Western legal systems over the last thirty years or so. For instance, Habermas notes the move in the last thirty years of the twentieth century from a mode of command to a mode of inducement, with actors now transacting their legal positions within negotiating modes of decision making, reflecting a shift from "the system" to the "lifeworld" (Habermas 1981, p. 371; Roberts 2002, p. 33). This shift has been discussed and theorized within the literature on civil justice as well as the literature on ADR. In terms of the phenomenon of trials having become more distant prospects (Glasser and Roberts 1993, p. 277), Galanter remarks, "It is accepted that most cases that enter the civil justice system are resolved short of adjudication via a single process of maneuvering and bargaining 'in the shadow of the law' (Mnookin and Kornhauser 1979, p. 959) and not within two separate tracks of adjudication and negotiation. . . . This has been referred to as 'litigotiation.'" (Galanter and Cahill 1994, pp. 1341–42). Thus, "the diverse modes of decision-making of adjudication and settlement . . . entailing contrasting values . . . have come to share the framework provided by civil procedure as the primary arena for lawyers' attempts to settle" (Roberts 2000, pp. 739, 742–43).

In terms of the institutionalization of this shift, Roberts notes that "right across the common law world, what appear to be large-scale changes in state management of civil disputes have become visible over at least two decades. At the heart of these changes lies a growing recognition of 'settlement' as an approved, privileged objective of civil justice. The courts present themselves not just as agencies offering

7 Stempel (2000a, p. 389), McEwen and Wissler (2002, pp. 131, 142), Hensler (2003, pp. 192, 195), Jones (2003, pp. 290–91), Stempel (2003, p. 353), and Welsh (2004, pp. 575, 597).
8 Sarat and Felstiner (1986, pp. 116–17; 1988, pp. 739–42, 766–67; 1995, p. 406).

judgment but as sponsors of negotiated agreement . . . with mediation, a third route, now recognized alongside lawyer negotiations and judicial determination" (Roberts 2000, pp. 739, 744). The judicial promotion of settlement, together with the growth of ADR (and particularly mediation) in North America and Europe, have been remarked upon by various academics (Edwards 1986, p. 668; Twining 1993, p. 380; Galanter and Cahill 1994, pp. 1342–43). Moreover, the disparate institutionalized processes for dispute handling now inherent in settlement have been conceptualized by those such as Frank Sander in his vision of the "multi-door courthouse" (Sander 1976, p. 111), Hart and Sacks in explaining the need for cooperation in social interactions in the civil justice system (Hart and Sacks 1994, p. 1), and Lon Fuller in theorizing mediation.[9]

Yet, in juxtaposing the understandings, needs, objectives, and experiences of legal, lay, and gendered actors (plaintiffs, defendants, lawyers, and mediators) on all sides of actual litigated and mediated cases, the findings here illuminate important paradoxes inherent in legal policy initiatives related to the resolution of civil disputes. In providing a unique look into the diversity of prevalent realities, I demonstrate through lawyers' and parties' own discourse that both the formal and informal justice systems are not serving many of disputants' intrinsic, often overriding, needs, and I challenge the notion that disputants and their representatives broadly understand and want the same things during case processing. In fact, the chapter's findings indicate repeatedly that notwithstanding legal benefits, utilizing attorneys to assist disputants in resolving disputes is laden with difficulties, as epistemologically each actor group essentially occupies different, though parallel, worlds.

Although this research utilizes one particular dispute type for methodological consistency, namely, medical injury cases, the matters explored here relate to generic issues inherent in the legal processing of cases leading up to and including mediation. Thus, the findings are arguably pertinent to the bulk of human-oriented litigated and mediated disputes. As such, this work should be of interest to scholars and students of law, law and society, critical feminist studies, sociology, law and psychology, and medico-legal studies. It should likewise be of interest to practicing lawyers, mediators, and to the medical profession, as the data presented here offer elusive insight into disputants', lawyers', and mediators' approaches and strategies. However, more importantly, I hope that the findings act to reorient readers to certain disturbing realities inherent within the legal system and legal practice, and cause them to ask, How can we engage in a system of change?

1.1 Book structure

The chapters examine actors' views and experiences during the processing of their cases in a chronological order as far as possible, given the overlapping nature of

9 Fuller (1971, pp. 325–26; 1978, p. 356) and Menkel-Meadow (2000, pp. 1, 4, 14–15, 26).

some of the events described. Chapters two and three provide background and context to the cases studied. Shedding light on lawyers' and plaintiffs' comprehensions of what these cases and their mediations were about, chapter two examines the disparate understandings of why plaintiffs sued and what they sought from litigation in the first place. These comprehensions provide a critical backdrop to actors' perspectives and behavior during case processing and mediation. Specifically, I look at differences in understandings between all three legal actor groups (physician defense lawyers, hospital defense lawyers, and plaintiff lawyers) compared with plaintiffs' own explications of why they sued and what they sought from the civil justice system. Finally, the chapter examines disparities in discourse within all actor groups on the basis of gender. Chapter three provides further contextual information by comparing legal actors' and lay disputants' understandings and attitudes toward court-mandated versus voluntary mediations, as the dataset provides examples of both. Defense and plaintiff lawyers' attitudes and expectations for mandatory mediations are examined, together with their reasoning for their particular views. This is followed by a look at disputants' attitudes and expectations in the same cases. Finally, the chapter's findings are analyzed, resulting in some unexpected conclusions.

Moving forward to pre-mediation decisions, chapter four analyzes the issue of defendants' attendance at mediation. Attitudes toward this issue shed important light on the diverse meanings ascribed to mediation and conflict resolution, more generally by the actors involved. First, focusing on lawyers' discourse, the chapter explores the mechanics of how attendance decisions are made, together with an examination of lawyers' past experiences with defendants present at mediations. This is followed by an analysis of each legal actor group's views and reasoning behind their views, comparing them with those of mediators. The second part of chapter four compares plaintiffs' and defendants' understandings and reasoning on the same issue of defendants' attendance in cases that mediated both with and without defendants present. The findings illustrate starkly diverse meanings ascribed to case mediation by lay disputants as compared with legal actors. Lastly, gender influences on actors' views are examined for both professionals and disputants, adding further support to the gender findings seen in chapter two.

A final pre-mediation issue is explored in chapter five, which offers a comparative analysis of mediation actors' specific objectives for the process. First, I examine each legal actor group's mediation aims, subsequently highlighting gender divisions within their discourse. This is followed by an exploration of both plaintiffs' and defendants' mediation objectives, also examining differences in males' and females' articulated aims. Finally, the chapter looks at actors' comprehensions and attitudes toward mediation's confidentiality as a way of possibly explaining some of the findings on what legal and lay actors planned to do in order to resolve these disputes.

Actual mediation experiences are then examined in chapters six and seven. Chapter six compares actors' perceptions of "what went on" during mediations.

Chapter seven then focuses on views of mediators and the styles they employed. Chapter six commences with an overview of the unspoken contextual elements occurring throughout mediations, including confrontations between legal actors as well as more subliminal issues between lawyers and litigants, such as the representations or posturing inherent within mediations. The first section ends with an examination of "surface findings" relating to issues not unlike those found in other mediation research, such as actors' perceptions of the fairness of the process and satisfaction with mediation experiences and results. However, the remaining sections of the chapter delve deeper, examining legal actors' versus lay disputants' favored and disfavored elements during their mediations. This radically alters the picture of "what goes on." Finally, the chapter explores gender disparities in the discourse of both legal actors and parties, coming to further conclusions supportive of earlier gender findings in the research.

Chapter seven first examines a number of contextual realities and surface findings relating to judges, lawyer and non-lawyer-mediators, and mediation styles. This is followed by an exploration of attorneys' views on the importance of mediators' backgrounds and the techniques they employ, including lawyers' preferences for evaluative, rights-based mediation. Lawyers' reasoning behind their views is also analyzed, offering further evidence of the different meaning of case processing and mediation for legal actors as compared with parties. Next, the data relating to facilitative style preferences (predominantly deriving from mediators and litigants) are examined. In the final section, two gender findings are discussed, one relating to how mediators' conduct was interpreted by plaintiffs of different sexes, and the other relating to mediators' own genders. The gender findings provide final support to the gender themes present throughout the book.

In terms of how mediators are used and described in the chapter, it is pertinent to note that for many actors – both lawyers and disputants – the mediator "was" the mediation experience, often being perceived as the core element within mediations. Yet, although most were pleased with their mediators, discourse analysis indicated that legal and lay actors viewed mediators through entirely different lenses, marking a pronounced disparity in mediator wants and how mediators were perceived and judged. This affected not only subjective perceptions but also objective realities during mediation processes. Mediators' representations to both litigants and lawyers are also examined, highlighting the competitive realities between mediators in terms of settlement rates, client bases, the number of cases they mediated, and the unspoken awareness of the possibility of mediators precipitating future work from lawyers involved in these mediations. The chapter also elaborates on the issues of mediators representing a new information source for litigants and thus a new interest, potentially affecting lawyer–client relationships. Unspoken power struggles between mediators and attorneys are also evidenced. Yet, lawyers' willingness to devolve power to mediators ultimately affected much of what went on during mediations – something that also directly affected litigants' experiences and case results.

Lastly, chapter eight, the conclusion chapter, summarizes the key findings, making the argument about the differentially experienced parallel worlds of those involved in case processing and mediation of legal disputes.[10]

1.2 Findings and recurrent themes

The data presented here shed new light on how lawyers and disputants think and speak about the meaning of their cases as well as their expectations and aims on how to resolve them. The findings, which will be elaborated on throughout the book, support three recurrent themes that organize each chapter, linking them and maintaining a sense of continuity throughout the book. The first theme relates to the parallel worlds of understanding and meaning inhabited by legal actors versus lay disputants, reflecting materially divergent interpretations and functions ascribed to case processing and dispute resolution. As such, the parallel worlds' findings reveal inherent problems with the core workings of the civil justice system. I suspected sharp divides. But how disparate were lawyers' and parties' understandings? How do lawyers think? Are there different modes of reasoning distinctive of the law or is legal reasoning just like reasoning in any other sphere of human activity? I use the term "parallel worlds" on two levels: First, the parallel worlds' thesis is used to support my argument that legal versus lay actors largely have "dissimilar and separate" understandings, expectations, objectives, and experiences during case processing and mediation. At the same time, highlighting unlikely conceptual alignments, the parallel worlds' theme underscores the "similarity" of comprehensions, goals, and behavior of legal actors (irrespective of their allegiances) on the one hand, and plaintiffs and defendants, on the other. This is manifested in the marked discontinuity of interests, language, and agenda of legal versus extralegal actors involved in these cases. Thus, notwithstanding being comprised of members on opposite sides of the dispute continuum, each "new" conceptual group – that is, (1) lawyers on the offense and defense, and (2) disputing plaintiffs and defendants – wants similar things. However, these "new" groups do not want the same things, nor do they speak the same language. Thus, I argue that actors involved in case processing create competing meanings.[11] As such, the parallel worlds' findings challenge dominant understandings of how dispute resolution linked to the law works in

10 Versions of chapters two and four have been published in the *Pittsburgh Law Review* (Relis 2007), the *Harvard Negotiation Law Review* (Relis 2007a), and the *Sociology of Law JASL Series* (Relis 2004).

11 My conceptualization of "parallel worlds" differs from the "parallel seminars" described by Carol Leibman in mediating a dispute between Columbia University and some of its students over the inclusion of "ethnic studies" in the curriculum. There, Liebman describes mediation as a process that normally involves a series of "parallel seminars" in which each sides' participants as well as mediators learn and teach others (including mediators) about their realities, goals, interests, and priorities (Liebman 2000, pp. 157, 163–64, 176).

practice and circumscribe the unfettered praise of mediation,[12] opportunities for empowerment, and disputant self-determination.[13] More generally, the parallel worlds' thesis implicitly argues that the concept of law must be broadened to include litigants' extralegal needs and objectives and that conceptions of the meaning of civil justice must evolve.[14]

The second theme, present in most chapters, has been termed lawyers' "reconceptualization." This notion pertains to the role of mediation experience in transforming legal discourse reflecting lawyers' understandings of their cases and their roles within them. Is there evidence of change in how legal actors speak of their roles and their cases subsequent to mediation? How do lawyer-mediators' understandings of cases compare with their lawyer-practitioner counterparts? Finally, the third theme that runs throughout the book relates to the different gendered understandings of disputes and their resolution within both legal actors' groups and disputants' groups. The gender theme represents a further type of parallelism, as the findings provide evidence to suggest that women lawyers and female disputants comprehend and experience the processing of their cases differently from their male counterparts. Feminist legal theory makes the claim that even at its most neutral, there are gender relations that always affect the way law works (Gilligan 1982, pp. 25–29). Indeed, gender provided a crucial lens for comparing visions of disputes and understandings of resolution. But how did gender affect the way conflict and mediation were perceived and experienced? The following three sections elaborate on the findings supporting each of the three themes and discuss their contributions to the literature debates.

Parallel worlds' theme findings

Much of the data support the parallel worlds' theme, highlighting the discontinuity between the legal world of lawyers and the extralegal world of disputants during case processing. First, while attorneys' conduct in case processing is premised on basic understandings of what those who commenced these suits want, chapter two reveals fundamental misconceptions or incomplete understandings by lawyers about plaintiffs' aims – something that goes to the core practice of law and approaches to the resolution of disputes. Overall, legal actors, regardless of whom they represented, understood that plaintiffs sued solely or predominantly for money. Yet, highlighting

12 For example, Meschievitz (1991, p. 198), Reeves (1994, p. 17), Brown and Simanowitz (1995, p. 153), Christiansen (1997, p. 72), Dauer and Marcus (1997, p. 199), Polywka (1997, p. 81), Gitchell and Plattner (1999, p. 459), and Saravia (1999, p. 139).

13 Goldberg et al. (1992, pp. 154–55), Baruch Bush and Folger (1994, pp. 2–3, 81), Baruch Bush (1997, pp. 29–30), Kovach (2001, pp. 935, 939, 942–43, 952), and Welsh (2001b, pp. 15–18).

14 This argument draws on Menkel-Meadow's call for a re-examination of the legal and adversarial system's attributes, objectives, and methods utilized in attaining those objectives. She additionally advocates a "cultural change" for legal actors "as human disputes have not only legal implications, but often a host of other concerns e.g. emotional, interpersonal and moral" (Menkel-Meadow 1996b, pp. 5, 7, 42).

the first facet of the parallel worlds' thesis, plaintiffs' discourse rarely correlated with lawyers' understandings of this basic premise. Indeed, notwithstanding lawyers conditioning plaintiffs on "legal system realities," plaintiffs vehemently stressed they sued not for money, but for a whole host of extralegal aims of principle. Yet, these issues remained invisible to most lawyers throughout case processing. Next, in chapter three comparing voluntary with mandatory court-linked mediations, I reveal gross disparities in expectations, attitudes, and intentions between lay disputants and legal actors – often resulting in dissonant situations. Lawyers had low expectations and negative attitudes toward mandatory mediations, while plaintiffs and defendants present at the same mediations expressed the same needs, intentions, positive attitudes, and high expectations for both mandatory and voluntary mediations.

Similarly, the findings in chapter four on defendants' attendance at mediation reveal materially divergent perceptions of the function of mediation as well as different meanings ascribed to the process by lay disputants versus legal actors, each having different needs. For lawyers on the whole, mediation was a vehicle for monetary settlement or case abandonment, where strategy, negotiation, and money talk played out. Yet, far from a forum of tactical strategies, for disputants mediation was a place to treat human needs and preserve human dignity. It was a place for both verbal and nonverbal communication, information sharing, human interchange, and most importantly "feeling better about their situations." These understandings were evident in the discourse of both plaintiffs and defendants, all being in favor of defendants' attendance at mediation, with no mention being made of monetary settlement or the obvious fact that any settlement monies would not come from physicians themselves. However, unbeknownst to most plaintiffs, enraged at defendants' regular mediation absences and often believing that defendants did not want to face them, the findings indicate that lawyers on both sides were regularly agreeing "not to invite" defendants to mediation. To lawyers, defendants' presence was "unnecessary" or "risky" to their tactical agendas for the process. Although the issue of mediation attendance has not been examined in depth in the literature, the present findings on the consistent absences of defendants at mediation support other similar findings for various case types (Meschievitz 1990, p. 17; Metzloff et al. 1997, p. 124; Gatter 2004, pp. 204–6).

Likewise, in chapter five, legal actors' versus lay disputants' descriptions of their mediation aims evince significantly diverse, often conflicting, objectives and agendas – with each group often being unaware of the other's intentions. Moreover, these disparities generally included clients and their own lawyers. Both plaintiffs and defendants focus almost entirely on emotional, psychological, and extralegal objectives for mediation (e.g., obtaining understanding, apology, and acceptance). Yet, these issues were absent from most lawyers' discourse, which was replete with tactics, strategy, and pecuniary aspirations for mediation. Lack of trust in the confidentiality of the process also pervaded the talk of most lawyers, suggesting that this was a material factor circumscribing what legal actors were