

The Initial Mediation Session: An Empirical Examination

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ABSTRACT

Traditionally, the first mediation session is a joint session with all mediation participants together, during which the mediator and the parties make opening statements and then begin to discuss the issues in dispute. This practice is reported to be in decline, with some mediations instead beginning in separate caucuses and the parties not being together at any time during the mediation. Mediators, lawyers, and frequent mediation users regularly debate what does and should happen during the initial mediation session. To date, however, there has been little empirical research evidence to inform these discussions.

This Article reports the findings of the first comprehensive study of the current use and nature of initial joint sessions and compares those practices to what typically occurred in traditional joint opening sessions as well as to current practices in initial caucuses. The findings, which are based on a survey of more than 1,000 mediators in civil and family cases across eight states, suggest that joint opening sessions are still held in a majority of civil and family cases. However, much of what occurs currently during joint opening sessions regarding party opening statements, what is discussed, and direct exchanges between the disputants, diverges from traditional practice. As a result,

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current joint opening sessions often are a shadow of their traditional selves. In addition, given the many differences in what takes place between initial joint sessions and initial caucuses, as well as between civil and family cases, blanket assertions about what “typically” occurs during the initial mediation session cannot be made.

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I. INTRODUCTION

Historically in mediation, the first formal session began with the mediator and all disputing parties together. In recent years, however, the use of these joint opening sessions, as well as joint sessions later in the mediation, is reported to be declining. Instead, the mediator meets separately in a private caucus with each party in turn during the first session and may never bring the parties together later in the mediation. Mediators have diverse views about the impact of less frequent joint opening sessions.¹ Only a few empirical studies in a subset of case types have examined whether initial mediation sessions

1. See, e.g., Jay Folberg, *The Shrinking Joint Session: Survey Results*, DISP. RESOL. MAG., Winter 2016, at 12, 14, 16 (reporting that, among the 205 private civil and commercial JAMs mediators surveyed across the United States, 22% thought the impact of the diminishing use of joint opening sessions was positive, 33% thought it was negative, and 45% said neither).

begin with the parties together or apart. Even fewer studies have examined what currently takes place during initial joint sessions, and none have looked at what happens in initial separate caucuses.

This Article reports the findings of a study that fills many gaps in our knowledge about the use and structure of initial mediation sessions—joint sessions as well as separate caucuses. The rest of Part I lays out the structure of traditional joint opening sessions, the goals they were thought to achieve, and recent reported changes in their structure and use. Part II describes the survey procedure, the mediators who responded to the survey, and the mediated disputes that form the basis of the mediators' responses. Part III presents the survey findings regarding the initial mediation session, including how frequently mediation begins in joint session versus in separate caucuses; what process and substantive issues are discussed; whether the parties or their lawyers make opening statements and interact with the mediator and the other side; and whether there are joint sessions later in the mediation. Part IV discusses the findings and their implications for mediation practice, and Part V summarizes the key conclusions.

A. *The Traditional Opening Mediation Session*

Historically, the standard practice for beginning the first formal mediation session was to have a joint session where the mediator and all disputing parties met together.² Opening statements by the mediator and the parties were considered to be central to this joint opening session and a fundamental part of the mediation process.³ The mediator's opening remarks typically included an explanation of the mediation process and its confidentiality, the mediator's impartiality and role, the parties' roles, and the ground rules for the mediation.⁴

2. See, e.g., SARAH R. COLE, CRAIG A. MCEWEN, NANCY H. ROGERS, JAMES R. COBEN & PETER H. THOMPSON, *MEDIATION: LAW, POLICY, AND PRACTICE* 35–37 (2015–16 ed. 2015); Folberg, *supra* note 1, at 12, 20; DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION* 141 (3d ed. 2018).

3. See, e.g., John T. Blankenship, *The Vitality of the Opening Statement in Mediation: A Jumping-Off Point to Consider the Process of Mediation*, 9 *APPALACHIAN J. L.* 165, 181 (2010) (noting that parties' opening statements were described as "the central part of the opening or joint session in virtually every training program, seminar, instruction manual, model or theory concerning mediation"); COLE ET AL., *supra* note 2, at 35–36; CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 154–62 (1986).

4. See, e.g., HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING AS A PROBLEM-SOLVER IN ANY COUNTRY OR CULTURE* 98 (2d ed. 2010); JAMES J. ALFINI, SHARON B. PRESS, JEAN R. STERNLIGHT & JOSEPH B. STULBERG, *MEDIATION THEORY AND PRACTICE* 113–14 (1st ed. 2001); FRENKEL & STARK, *supra* note 2, at 142–47;

The parties and/or their lawyers would then present their opening statements directly to the other side and the mediator.⁵

What took place in the initial joint session after the parties' opening statements was more varied. Typically, however, the mediator would ask questions and summarize what the parties said, and the parties would begin to discuss the issues and their interests to lay the groundwork for resolving the dispute.⁶ Whether and how long the joint session continued before the mediation moved into separate caucuses depended on how the mediation was proceeding⁷ and on the usual practice of the mediator and the mediation setting.⁸ Historically, however, mediation was "premised on the assumption that the entire process would be conducted in joint session; separate meetings with the parties would be the exception . . ."⁹

The joint opening session was thought to accomplish numerous things considered essential to the quality of the mediation process and its outcomes. The mediator's opening statement would help participants better understand the mediation process and the mediator's role, which would enhance their participation in the process.¹⁰ In addition, the mediator could develop trust and rapport with the parties during the joint opening session, helping to set the stage for the rest

DWIGHT GOLANN & JAY FOLBERG, *MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL* 147–51 (1st ed. 2006); MOORE, *supra* note 3, at 154–62 .

5. See, e.g., ABRAMSON, *supra* note 4, at 98; ALFINI ET AL., *supra* note 4, at 118–19; COLE ET AL., *supra* note 2, at 36; GOLANN & FOLBERG, *supra* note 4, at 147–48; MOORE, *supra* note 3, at 162–64.

6. See, e.g., COLE ET AL., *supra* note 2, at 36; GOLANN & FOLBERG, *supra* note 4, at 148, 151; MOORE, *supra* note 3, at 168–70.

7. See, e.g., ALFINI ET AL., *supra* note 4, at 131–32; COLE ET AL., *supra* note 2, at 37; Folberg, *supra* note 1, at 12; FRENKEL & STARK, *supra* note 2, at 175, 217–19; MOORE, *supra* note 3, at 263–65; Kelly Browe-Olson, *One Crucial Skill: Knowing How, When, and Why to Go into Caucus*, *DISP. RESOL. MAG.*, Winter 2016, at 32–34.

8. See, e.g., ABRAMSON, *supra* note 4, at 113–14; ALFINI ET AL., *supra* note 4, at 131; COLE ET AL., *supra* note 2, at 40–43; GOLANN & FOLBERG, *supra* note 4, at 97, 153; GARY FRIEDMAN & JACK HIMMELSTEIN, *CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING* xxxi–xxxvii (2006); David A. Hoffman, *Mediation and the Art of Shuttle Diplomacy*, 27 *NEGOT. J.* 263, 265–67 (2011).

9. Folberg, *supra* note 1, at 12; see also Lynne S. Bassis, *Face-to-Face Sessions Fade Away: Why Is Mediation's Joint Session Disappearing?*, *DISP. RESOL. MAG.*, Fall 2014, at 30; Blankenship, *supra* note 3, at 178–79; Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 *WASH. U. L.Q.* 787, 809 (2001).

10. See, e.g., ABRAMSON, *supra* note 4, at 98; ALFINI ET AL., *supra* note 4, at 113–17; Folberg, *supra* note 1, at 20; Eric Galton & Tracy Allen, *Don't Torch the Joint Session*, *DISP. RESOL. MAG.*, Fall 2014, at 26–27; GOLANN & FOLBERG, *supra* note 4, at 147; MOORE, *supra* note 3, at 155–60.

of the mediation.¹¹ The disputants could also observe the mediator treating both sides even-handedly and with respect, which could contribute to their viewing the process as fair and the mediator as impartial.¹² Moreover, the joint opening session would allow the mediator to model civil communication and set a tone of non-confrontational information sharing and problem solving, thereby fostering more constructive discussions throughout the mediation.¹³

The disputants' face-to-face communication was thought to confer a number of benefits, including helping to humanize the other party and breaking the spiral of hostility that is perpetuated when parties in conflict do not speak to each other,¹⁴ which could improve the parties' communication during mediation.¹⁵ Additionally, the mediator would be able to observe the parties' exchanges and interactional dynamics, which would help inform the conduct of the rest of the mediation.¹⁶ The disputants' direct communication through their respective opening statements was also thought to meet their needs to explain their views directly to the other party and to know that they have been heard by them, not just by the mediator.¹⁷ Research has found that disputants who feel they have been able to present their views and have received serious consideration are more likely to

11. See, e.g., ALFINI ET AL., *supra* note 4, at 113–14; Galton & Allen, *supra* note 10, at 27.

12. See, e.g., E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 108–09 (1988); FRIEDMAN & HIMMELSTEIN, *supra* note 8, at 193; Welsh, *supra* note 9, at 852; Roselle L. Wissler, *Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics*, 29 L. & SOC'Y REV. 323, 345–46 (1995).

13. See, e.g., ABRAMSON, *supra* note 4, at 249–50; Bassis, *supra* note 9, at 32; FRENKEL & STARK, *supra* note 2, at 144; GOLANN & FOLBERG, *supra* note 4, at 148; MOORE, *supra* note 3, at 170–71.

14. See, e.g., Bassis, *supra* note 9, at 32; FRENKEL & STARK, *supra* note 2, at 175; Theodore M. Newcomb, *Autistic Hostility and Social Reality*, 1 HUM. RELS. 69 (1947); Morton Deutsch, *Cooperation and Competition*, 23, 27–28, in *THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE* (M. Deutsch, P. T. Coleman & E. C. Marcus, eds., 2d ed. 2006); John W. Thibaut & John Coules, *The Role of Communication in the Reduction of Interpersonal Hostility*, 47 J. ABNORMAL AND SOC. PSYCH. 770, 772–73 (1952).

15. See, e.g., ABRAMSON, *supra* note 4, at 176, 249–50; Bassis, *supra* note 9, at 32.

16. See, e.g., William J. Caplan, *Mediation—Joint Session or No Joint Session? That is the Question*, ASS'N BUS. TRIAL LAW. REP., ORANGE COUNTY, Fall 2013, at 10; Galton & Allen, *supra* note 10, at 27.

17. See, e.g., ABRAMSON, *supra* note 4, at 175–76, 250; Blankenship, *supra* note 3, at 175, 178; Caplan, *supra* note 16, at 10; Galton & Allen, *supra* note 10, at 26; Helaine Golann & Dwight Golann, *Why Is It Hard for Lawyers to Deal with Emotional Issues?*, DISP. RESOL. MAG., Winter 2003, at 26; Hoffman, *supra* note 8, at 304.

think the mediation process is fair and procedurally just.¹⁸ And being able to tell their story (or hear their lawyer tell it for them) in the more dignified setting of the joint opening session would contribute to disputants' feeling that they had their "day in court."¹⁹

The disputants' opening statements and subsequent discussions during the joint opening session could also provide a clearer understanding of their perspectives and a more complete picture of the issues and impediments to resolution.²⁰ Additional benefits of these opening statements and discussions include the parties having control over the content of their message and having direct knowledge of what the other party and the mediator said.²¹ Hearing the other side's opening statement could also provide a better sense of the strength of their arguments and a preview of their trial strategy, while making the uncertainty and discomfort of continuing in litigation more real.²²

B. *Reported Changes in the Initial Mediation Session*

Over the past decade or two, anecdotal reports and informal surveys suggest that the use of joint opening sessions (and joint sessions generally) is declining. Instead, an increasing number of mediations are said to begin in separate caucuses, with the mediator meeting privately with each party in turn to discuss the dispute.²³ The few studies that have examined the use of joint opening sessions

18. See, e.g., LIND & TYLER, *supra* note 12, at 101–06; Welsh, *supra* note 9, at 817, 853–55; Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URB. L.J. 419, 451–52 (2010); Wissler, *supra* note 12, at 345–46.

19. See, e.g., Caplan, *supra* note 16, at 10; Welsh, *supra* note 9, at 853–55.

20. See ABRAMSON, *supra* note 4, at 175–76, 249–50; SECTION OF DISP. RESOL., AM. BAR ASS'N, TASK FORCE ON IMPROVING MEDIATION QUALITY (2008) [hereinafter MEDIATION QUALITY] at 4, 12, 34 (discussing the views of over 300 mediators, lawyers, and insurance company and corporate representatives throughout the United States who had "significant experience" in the private mediation of "large commercial and other civil cases in which all parties are represented by counsel . . ."); Bassis, *supra* note 9, at 32; Blankenship, *supra* note 3, at 174; Caplan, *supra* note 16, at 3, 9; FRENKEL & STARK, *supra* note 2, at 164–65; FRIEDMAN & HIMMELSTEIN, *supra* note 8, at 187–89; Galton & Allen, *supra* note 10, at 26–27; GOLANN & FOLBERG, *supra* note 4, at 147–48; Welsh, *supra* note 9, at 852.

21. See, e.g., ABRAMSON, *supra* note 4, at 176–77; Bassis, *supra* note 9, at 32; Blankenship, *supra* note 3, at 175–76; FRIEDMAN & HIMMELSTEIN, *supra* note 8, at 190–93.

22. ABRAMSON, *supra* note 4, at 250; Caplan, *supra* note 16, at 3, 9; Galton & Allen, *supra* note 10, at 26–27; MEDIATION QUALITY, *supra* note 20, at 34.

23. See, e.g., Bassis, *supra* note 9, at 30; Debra Berman & James Alfini, *Lawyer Colonization of Family Mediation: Consequences and Implications*, 95 MARQ. L. REV. 887, 921–22 (2012); Galton & Allen, *supra* note 10, at 25. There is little discussion of

report varying findings. Over a decade ago, two studies of court-connected mediation in medical malpractice and other large civil cases found that almost every initial mediation session began jointly.²⁴ More recent studies in the context of private mediation, however, reported fewer joint opening sessions. Two surveys of private mediators specializing in commercial and civil disputes found that around half of the mediators regularly use joint opening sessions.²⁵

Even when joint opening sessions are held, their structure may be changing. Some mediators may be abbreviating their explanation about the mediation process or doing away with their opening statement entirely, instead simply making a pro-forma introduction of those present and giving a few general remarks before moving into separate caucuses.²⁶ Party opening statements, as well as party discussions of the dispute, also are said to have become less common.²⁷ The only study that examined mediators' opening statements found that mediators usually described the mediation process during the joint opening session.²⁸ The use of party opening statements varied

how the structure or components of initial separate caucuses differ from those of initial joint sessions, other than that the parties are apart rather than being together.

24. Elizabeth Ellen Gordon, *Attorneys' Negotiation Strategies in Mediation: Business as Usual?*, 17 *MEDIATION Q.* 377, 377–78, 382, 389 (2000) (reporting observations of 31 court-connected mediations of “large-dollar-amount nondomestic civil suits” in North Carolina); Ralph Peebles, Catherine Harris & Thomas Metzloff, *Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases*, 2007 *J. DISP. RESOL.* 101, 103–04, 109 (2007) (reporting observations of 46 mostly court-ordered medical malpractice mediations in North Carolina).

25. Folberg, *supra* note 1, at 13–15 (reporting that 45% of the mediators surveyed said they regularly began the mediation in joint session at the time of the survey, compared to 80% saying they did so when they started their mediation practice, which was six or more years prior for a majority of the mediators); Thomas J. Stipanowich, *Insights on Mediator Practices and Perceptions*, *DISP. RESOL. MAG.*, Winter 2016, at 4, 5 (reporting that 55% of the 94 surveyed members of the International Academy of Mediators who mediate in the United States said they never or only sometimes begin the first session in caucus). Both studies found regional differences in the use of joint opening sessions. *See* Folberg, *supra* note 1, at 15–16 (finding that mediators in the Southwest and Northwest regions were less likely to regularly use an initial joint session than were mediators in the East/Central region); Stipanowich, *supra* note 25, at 7 (finding that mediators who practiced in California were less likely to regularly begin mediation in joint session than were mediators who practiced elsewhere in the United States).

26. *See, e.g.*, Folberg, *supra* note 1, at 17, 19; FRENKEL & STARK, *supra* note 2, at 141–42.

27. *See, e.g.*, Blankenship, *supra* note 3, at 165–66 (based on the survey responses of 47 Tennessee “lawyers and ADR neutrals with significant experience” in the mediation of construction and commercial disputes). *But see* *MEDIATION QUALITY*, *supra* note 20, at 13 (reporting that mediators and lawyers said that party opening statements were expected in most jurisdictions).

28. Peebles et al., *supra* note 24, at 110.

widely across several studies, from around half to virtually all mediations.²⁹ One of these studies reported that the lawyers rather than the disputants made the opening statements.³⁰ In addition, this same study found that, other than making opening statements, there was little discussion of the dispute during the joint opening session. Specifically, the mediator did not ask questions about the dispute and the lawyers did not ask questions of the other side in most cases, and the disputants themselves seldom spoke “more than a little” during the joint opening session.³¹

Relatedly, mediators’ purposes for holding a joint opening session appear to be changing. In one survey, the purpose that showed the largest decline over time—by 20%—was allowing the parties to be heard by the other side.³² Discussing the mediator’s neutrality, the mediation process, confidentiality, ground rules, the mediator’s qualifications, legal theories, the facts of the case, and the procedural status of the litigation also declined as reasons for having a joint opening session, but to a smaller degree (by 5% to 11%).³³ Three reasons for beginning in joint session, however, showed little or no change: exploring the parties’ needs and interests, determining the negotiation or settlement status of the case, and beginning negotiations.³⁴

29. Bobbi McAdoo, *Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLIN L. REV. 401, 403, 411–12, 435 (2001–02) (finding that 49% of the 748 surveyed Minnesota civil litigators said that the mediator frequently or always asked both sides to make opening statements during court-connected mediations); Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473, 479, 481, 588 (2002) (finding that 85% of the 232 surveyed Missouri civil litigators said that their court-connected mediations usually or always involved party opening statements); Peebles et al., *supra* note 24, at 109 (reporting that party opening statements were made in all observed joint sessions for which information was available).

30. Peebles et al., *supra* note 24, at 110.

31. *Id.* at 109–11.

32. Folberg, *supra* note 1, at 13–15. Mediators indicated for which purposes they usually use an initial joint session, both at the time of the survey and, retrospectively, when they had started mediating (which was more than six years earlier for a majority of the respondents). *Id.* For each purpose, we calculated the difference between the percentages at the two times. Data for “providing opportunity to assess parties and attorneys” were not reported for both times. *Id.*

33. *Id.* Explaining confidentiality and the mediation process (along with making introductions and discussing administrative matters) were the only two purposes that a majority of mediators cited as reasons for using a joint opening session at both times.

34. *Id.* Mediators in the Southwest and Northwest regions were less likely to cite “substantive” purposes for holding a joint opening session at the time of the survey than were those in the East/Central region. *Id.* at 15.

Finally, the decline in joint opening sessions is said to be taking place in the broader context of a decline in joint sessions at any time during the mediation.³⁵ Study findings are mixed, with different studies looking at later joint sessions in different ways. Two studies in which almost all of the observed mediations began in joint sessions reported virtually no joint sessions later in the mediation.³⁶ One study reported that, for the subset of mediators who do not begin in joint session, 20% said they often or regularly have a subsequent joint session and 27% said they do so sometimes, while 52% said they rarely or almost never have a later joint session.³⁷ Several studies that looked at whether there was a joint session at any time during mediation found that there was a joint session, broadly speaking, between one-third and three-fourths of the time.³⁸

35. See, e.g., Bassis, *supra* note 9, at 30; Berman & Alfini, *supra* note 23, at 921–22; COLE ET AL., *supra* note 2, at 42–43; Galton & Allen, *supra* note 10, at 25.

36. Gordon, *supra* note 24, at 382 (reporting that parties usually went into separate rooms after the joint opening session and the mediations “typically involved extensive caucusing”); Peebles et al., *supra* note 24, at 109 (reporting that every case went into separate caucuses, apparently for the rest of the mediation, after the joint opening session).

37. Folberg, *supra* note 1, at 15.

38. Eric Galton, Lela Love & Jerry Weiss, *The Decline of Dialogue: The Rise of Caucus-Only Mediation and the Disappearance of the Joint Session*, 39 ALTERNATIVES 89, 97–98 (2021) (reporting that, of the 129 surveyed private civil and commercial members of the International Academy of Mediators, 30% said they never keep the parties in caucus throughout the mediation and 46% said they sometimes do, while 25% said they usually or always keep the parties in caucus throughout the mediation); JOHN LANDE, ANALYSIS OF DATA FROM NEW HAMPSHIRE MEDIATION TRAININGS 1–3, 6–7 (2017), <https://securervercdn.net/45.40.149.159/gb8.254.myftpupload.com/wp-content/uploads/Analysis-NH-training-data.pdf> [<https://perma.cc/87ZT-3KCS>] (last accessed Nov. 4, 2021) (reporting that 68% of the mediators and 52% of the lawyers out of a total of 87 individuals surveyed said there was a substantial joint session about non-process issues at some time during mediation in more than half of their recent cases, which were primarily civil and family cases); Stanley A. Leasure, *Arkansas Mediators: A Search for Mediation Success*, 51 ARK. LAW. 34, 34–35, 41 (reporting that 70% of the 49 surveyed certified Arkansas mediators, who primarily mediate domestic relations and/or civil cases, said they have a joint session at some time in mediation in more than three-fourths of their cases); McAdoo & Hinshaw, *supra* note 29, at 588 (reporting that 16% of the surveyed civil litigators said that mediators rarely or never use caucuses almost exclusively in their mediations and 23% said mediators sometimes do, while 62% of the lawyers said that mediators usually or always use caucuses almost exclusively in their mediations); Stipanowich, *supra* note 25, at 6 (finding that 29% of the mediators said they never keep the parties in caucus during the entire mediation, while 25% said they always or usually do); Dwight Gollann, *If You Build It, Will They Come? An Empirical Study of the Voluntary Use of Mediation and Its Implications*, 22 CARDOZO J. OF CONFLICT RESOL. 181, 182, 185, 194–95 (2021) (finding that, based on lawyers’ reports, there was a substantive joint session in 70% of the 37 privately-mediated tort, contract, and complex business cases drawn from a Boston-area Superior Court docket).

C. *The Present Study*

Mediators, lawyers, and frequent mediation users regularly discuss what is happening with joint opening sessions and debate the resulting implications for the mediation process and its outcomes. To date, there are more assertions about what does and should happen during the initial mediation session than there is empirical evidence to inform the discussion.³⁹ Only a handful of studies have looked at whether the initial mediation session begins jointly or in separate caucuses, and they report varied findings. Even fewer studies have examined what takes place during initial joint sessions, and none have examined what takes place during initial separate caucuses when they are held instead of initial joint sessions.⁴⁰ Moreover, these studies have largely involved private mediation in civil and commercial cases, and the picture might be different in other mediation settings and case types.⁴¹ This Article reports the findings of a study that begins to fill the gaps in our knowledge about the initial mediation session by taking a more systematic and comprehensive look at how frequently joint opening sessions are held and what happens in both initial joint sessions and initial separate caucuses.

II. SURVEY PROCEDURE AND RESPONDENTS

We selected mediators from eight states across four regions of the United States for this survey.⁴² In each state, we obtained the names and email addresses of civil and family mediators whose contact information was publicly available online, primarily from the mediator rosters of state and federal court mediation programs, the

39. Folberg, *supra* note 1, at 12 (“[T]here is little empirical evidence to inform us about what happens behind closed mediation doors.”); Stipanowich, *supra* note 25, at 6 (“Our understanding of what mediators do—and how, when, and why they do it—rests heavily on anecdote . . .”).

40. See Folberg, *supra* note 1, at 18 (noting that the survey did not ask “more detailed questions regarding the specifics of how joint sessions are conducted and how mediators accomplish similar purposes when they do not have a joint session”).

41. See MEDIATION QUALITY, *supra* note 20, at 18–19 (stating that research needs to expand to case types other than civil and commercial because there are many differences among different mediation contexts, as well as “severe limitations” in trying to extrapolate findings from one to another); Folberg, *supra* note 1, at 18 (noting that the mediators in this survey are “not necessarily representative of the general population of mediators”).

42. California and Utah in the West; Michigan and Illinois in the Midwest; Florida and North Carolina in the Southeast; and Maryland and New York in the Northeast.

National Academy of Distinguished Neutrals, and the American Arbitration Association.⁴³ We sent a personalized email invitation to each mediator identified by this approach, asking them to participate in an online survey and providing them a unique code to access the survey. When the mediators logged in, they were first asked two screening questions to limit participation to those who had mediated (1) a non-appellate level civil or family dispute (other than small claims or probate) involving only two named parties (2) within the United States in the prior four months.⁴⁴

Of the 5,510 mediators whose email invitation was not returned as undeliverable and who met the survey eligibility criteria, 1,065 mediators participated in the survey, for a response rate of 19.3%. This response rate is within the bounds of what can be expected for the present survey given a number of factors, including the survey's web-based format, length, and complexity, as well as the lack of a connection between the researchers and the respondents.⁴⁵ Moreover, this figure is conservative because an unknown number of emails that were not returned as undeliverable might not have reached their

43. In Maryland and Utah, we obtained additional mediators' names from rosters of statewide professional conflict resolution organizations. Given the small number of mediators in Utah relative to the other states, we also included names from the roster of a statewide private ADR provider. Many mediators were on more than one roster in each state; we cross-checked the lists and eliminated duplicates. We included all mediators identified in each state, up to a randomly selected maximum of 1,000 per state.

44. Experience was limited to the prior four months so that respondents would be more likely to remember the mediation and report it accurately. See FLOYD J. FOWLER, JR., *SURVEY RESEARCH METHODS* 93–94 (2d ed. 1988); CLAIRE SELTZ, LAWRENCE S. WRIGHTSMAN, & STUART W. COOK, *RESEARCH METHODS IN SOCIAL RELATIONS* 156, 159 (4th ed. 1981).

45. See, e.g., *Response Rates – An Overview*, AM. ASS'N FOR PUB. OP. RSCH. (AAPOR), <https://www.aapor.org/Education-Resources/For-Researchers/Poll-Survey-FAQ/Response-Rates-An-Overview.aspx> [<https://perma.cc/J656-H9XD>] (last accessed Nov. 4, 2021); Weimiao Fan & Zheng Yan, *Factors Affecting Response Rates of the Web Survey: A Systematic Review*, 26 *COMPUTS. HUM. BEHAV.* 132, 133–34, 136 (2010); Mirta Galesic & Michael Bosnjak, *Effects of Questionnaire Length on Participation and Indicators of Response Quality in a Web Survey*, 73 *PUB. OP. Q.* 349, 358 (2009); Bennett Porter, *Tips and Tricks to Improve Survey Response Rate*, SURVEY MONKEY, <https://www.surveymonkey.com/curiosity/improve-survey-response-rate/> [<https://perma.cc/YBW5-NFXL>] (last accessed Nov. 4, 2021); Tse-Hua Shih & Kitao Fan, *Comparing Response Rates in E-mail and Paper Surveys: A Meta-Analysis*, 4 *EDUC. RSCH. REV.* 26, 36–37 (2009). Moreover, the response rate is not necessarily an indicator of the quality of the survey findings. See AAPOR, *supra* note 45; Colleen Cook, Fred Heath & Russel L. Thompson, *A Meta-Analysis of Response Rates in Web- or Internet-Based Surveys*, 60 *EDUC. & PSYCH. MEASUREMENT* 821 (2000).

intended recipients⁴⁶ due to outdated email addresses, spam filters, or other reasons.⁴⁷

We conducted tests of statistical significance to determine whether an observed difference between two or more groups (e.g., between civil and family cases) is a “true” difference (or whether an observed relationship between two measures is a “true” relationship) and does not merely reflect chance variation (or association).⁴⁸ Thus, throughout the Article, any “differences” or “relationships” reported are statistically significant differences or relationships, while “no differences” or “no relationships” indicate there were no statistically significant differences or relationships.

Two-thirds of the mediators who responded to the survey most frequently mediate civil cases (67%), while one-third most frequently mediate family cases (33%). Three-fourths of the mediators had been mediating for more than eight years and typically mediate more than two cases per month.⁴⁹ A majority of both civil and family mediators

46. See also Donna Shestowsky, *How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study*, 49 U.C. DAVIS L. REV. 793, 807 n.55 (2016) (explaining that the 10% response rate in that study was conservative for a similar reason: due to uncertainty about address accuracy, one could not tell whether a non-response to the mailed survey was because the survey did not reach the intended recipient or because that person chose not to participate).

47. Spot-checking revealed that some mediators had changed firms; others had moved out of the relevant state or were no longer actively mediating; and some had died. Others might not have responded out of fear that the survey invitation was a phishing attempt; several mediators contacted us to confirm the authenticity of the survey request, but others with similar concerns might simply have deleted the invitation.

48. The conventional level of probability for determining the statistical significance of findings is the .05 level (*i.e.*, $p < .05$). See RICHARD P. RUNYON & AUDREY HABER, *FUNDAMENTALS OF BEHAVIORAL STATISTICS*, 230, 278–80, 363–67 (5th ed. 1984). Findings of $p > .05$ and $p < .10$ are considered “marginally significant”—the difference is not statistically significant but worth mentioning in exploratory research—and those are noted as such. See Anton Olsson-Collentine, Marcel A. L. M. van Assen & Chris H. J. Hartgerink, *The Prevalence of Marginally Significant Results in Psychology Over Time*, 30 PSYCHOL. SCI. 576 (2019). Cramer’s *V* provides a measure of the strength of the effect for chi-square (X^2) analyses. As a guide to interpreting the size of effects, .10 is considered a small effect; .30, a medium effect; and .50, a large effect. See, e.g., Charles Zaiontz, *Effect Size for Chi-square Test*, <https://www.real-statistics.com/chi-square-and-f-distributions/effect-size-chi-square/> [<https://perma.cc/K7VQ-AVS9>] (last accessed Nov. 4, 2021).

49. The civil mediators had mediated, on average, three years longer than the family mediators (means of 16 years vs. 13 years; $t(944) = -3.58$, $p < .001$). The civil mediators mediate, on average, one fewer case per month than the family mediators (means of 5 vs. 6 cases per month, $t(940) = 3.28$, $p < .01$).

(88% and 68%, respectively) had only a law background, and a minority had only a non-law background (3% and 21%, respectively).⁵⁰ Over two-thirds of the mediators who usually mediate civil cases (68%) and almost half of those who usually mediate family cases (47%) have served regularly as a neutral in one or more non-mediator roles where they make a formal decision, recommendation, or evaluation to resolve disputes.⁵¹

When responding to most of the questions in the survey, the mediators were asked to focus on their most recently concluded mediation that involved a civil or family dispute with only two named parties. Focusing on a single recent case provides more precise and accurate information.⁵²

Approximately two-thirds of the mediators' most recent mediations⁵³ were civil cases (68%)⁵⁴ and one-third were family cases (32%).⁵⁵ One or both parties did not have legal counsel in relatively few civil cases (11%) but in over one-third of family cases (37%).⁵⁶ A majority of the parties in both civil and family cases had no prior mediation experience (63% to 75%), with the exception of responding parties in civil cases (34%).⁵⁷

50. The civil mediators were more likely than the family mediators to have only a law background and were less likely to have only a non-law background ($\chi^2(2) = 82.10$, $p < .001$, $V = .29$). Eight percent of the civil mediators and 11% of the family mediators had both law and non-law backgrounds. The most common non-law backgrounds included mental health fields, business, construction or engineering, accounting, and conflict resolution.

51. These roles included judge, arbitrator, case or neutral evaluator, and a role that involved making recommendations to the court about the children in family cases. The civil mediators were less likely than the family mediators to have *not* served regularly in any role where they make a formal decision, recommendation, or evaluation (32% vs. 53%; $\chi^2(1) = 37.03$, $p < .001$, $V = .20$).

52. See, e.g., SELLTIZ ET AL., *supra* note 44, at 158–59; DONNA STIENSTRA, RULES OF THUMB FOR DESIGNING AND ADMINISTERING MAILED QUESTIONNAIRES 3–4 (2000).

53. For almost all of the mediators, the general type of case (civil or family) they most recently mediated was the same as the type they usually mediate.

54. The four substantive areas accounting for most of the civil cases were tort (30%), contract (27%), employment (21%), and property/real estate (10%).

55. Over half of the family cases involved two or more types of divorce-related issues (58%); roughly equal proportions of the remaining family cases involved only custody/visitation issues (22%) or only financial issues (19%).

56. One or both parties were less likely to *not* have counsel, and both parties were more likely to have counsel (89% vs. 63%), in civil cases than in family cases ($\chi^2(2) = 101.18$, $p < .001$, $V = .31$).

57. Both complainants and respondents had more prior mediation experience in civil cases than in family cases (complainants: $\chi^2(3) = 24.96$, $p < .001$, $V = .16$; respondents: $\chi^2(3) = 182.63$, $p < .001$, $V = .44$).

In both civil and family cases, the two most common referral sources were court mediation programs/judges (42% and 39%, respectively) and the lawyers (43% and 30%, respectively); few civil cases, but almost one-fourth of family cases, were referred from the parties; and fewer than 10% of civil and family cases were referred from a professional mediation organization or a private mediation provider or firm.⁵⁸ In almost three-fourths of the civil cases (73%) and almost half of the family cases (47%), there were no time limits or pressures on the mediation.⁵⁹

The proportion of cases mediated in each state was as follows: California (20%), Florida (16%), New York (16%), North Carolina (12%), Maryland (11%), Michigan (10%), Illinois (8%), Utah (6%), and several other, mostly adjoining states (2%). Two states (New York and California) accounted for almost half of the civil mediations, and three states (Florida, Illinois, and Maryland) accounted for just over half of the family mediations.⁶⁰

III. WHAT TOOK PLACE DURING THE INITIAL MEDIATION SESSION

A. *How the Initial Mediation Session Began*

In a majority of both civil and family cases, the first formal mediation session started jointly, with both parties and their lawyers (if applicable) together in person or by phone (see Table 1). In a minority of cases, the first session started with each side in separate caucuses. Only a few initial sessions started with opposing counsel together but opposing parties apart. Civil cases were more likely than family cases

58. Civil cases were more likely than family cases to be referred from federal courts/judges or the lawyers, and were less likely to be referred from state courts/judges or the parties ($\chi^2(4) = 170.62$, $p < .001$, $V = .41$). Some civil and family cases "directly referred" from the parties or the lawyers might nonetheless have been in a court-connected mediation program because, in some programs, the parties or their lawyers choose and directly contact the mediator. *See, e.g.*, C.D. CAL., GEN. ORDER 11-10 §7.1(a)-(b); UTAH R. JUD. ADMIN. 4-510.05(4)(E); MICH. CT. R. 2.411(B)(1) (civil), 3.216(E) (family); N.C. R. MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPER. CT. CIVIL ACTIONS Rule 2.A.

59. These included time limits set by the mediator, the parties, or the mediation program, as well as possible pressures because the mediator served pro bono or for a reduced fee for a set number of hours. Mediators in civil cases were more likely than those in family cases to report no time limits or pressures ($\chi^2(2) = 59.47$, $p < .001$, $V = .25$).

60. The relative proportion of civil and family mediators within a state largely reflected the proportion of civil and family mediators whose contact information was available in each state.

to begin with both parties together and were less likely to begin with each side apart.⁶¹

TABLE 1. HOW THE INITIAL MEDIATION SESSION BEGAN

	Civil Cases	Family Cases
Both parties together (in person/by phone)	71%	64%
Each side apart	26%	33%
Opposing parties apart but lawyers together	3%	3%
Other	0.2%	0%
<i>Total Ns</i>	664	324

Throughout this Article, we use these two main categories—both parties were together or each side was apart—to indicate initial joint sessions and initial caucuses, respectively, in analyses of the ways in which the two opening structures differ.⁶²

B. What Mediators Discussed Regarding the Mediation Process

We asked the mediators to indicate whether they engaged in ten different actions regarding the mediation process itself during the initial mediation session (see Tables 2 and 3).⁶³ From those individual items, we created three scales that consisted of conceptually similar process actions to see how many actions within each of these three sets⁶⁴ the mediators engaged in, separately for initial joint sessions and initial caucuses.

1. Civil Cases. In both initial joint sessions and initial caucuses, almost all of the mediators explained the mediation process and the

61. $\chi^2(2) = 5.36, p < .05, V = .08$.

62. The “parties apart/lawyers together” category does not have enough cases to use in subsequent analyses as a separate category. And the cases in this category cannot be combined with those in the two main categories because they do not fit clearly into either—they are an initial joint session from the perspective of the lawyers, but not from the perspective of the parties. Thus, the cases in this category are not used in any further analyses in this Article.

63. Very few mediators in both civil and family cases, and in both initial joint sessions and initial caucuses, engaged in actions about the mediation process other than those listed or did not engage in any of the listed actions (see Tables 2 and 3).

64. Set 1: Explained the process, their approach, confidentiality, and ground rules. Set 2: Assessed participants’ ability to communicate civilly and capacity to mediate. Set 3: Explored how to proceed after the mediator’s remarks, if the parties would be okay being together, how to structure the rest of the mediation, and coached on communications (with different subsets of these items for joint sessions and for caucuses; see *infra* notes 73, 74, 83, and 84).

mediator's role as well as mediation confidentiality, and a majority explained the ground rules for the mediation and their approach (see Table 2). In both initial joint sessions and initial caucuses, most of the mediators (91% and 82%, respectively) explained three or four of these items; few of the mediators did not explain any of them (1% and 2% respectively).⁶⁵ Mediators were more likely to explain the ground rules, the mediation process, and confidentiality,⁶⁶ and explained more items in this set,⁶⁷ when mediation started in joint session than in separate caucuses.

TABLE 2. WHAT MEDIATORS DISCUSSED REGARDING THE MEDIATION PROCESS IN CIVIL CASES

	Joint	Caucus
Explained the mediation process & mediator's role	96%	90%
Explained my approach	78%	78%
Explained the ground rules	89%	73%
Explained mediation confidentiality	95%	90%
Assessed participants' ability to communicate civilly	61%	61%
Assessed parties' capacity to mediate	43%	44%
Explored options for how to proceed after the mediator's remarks	54%	--
Explored if the parties would be okay together	--	43%
Explored options for structuring the rest of the mediation	48%	51%
Coached participants on non-adversarial communications	--	19%
Other	2%	1%
None of the above	0.2%	1%
<i>Total Ns</i>	463	166

65. Cronbach's alpha for the scale that consists of these four items was .52 (joint) and .61 (caucus); the inter-item correlations ranged from .16 to .38 (joint) and .11 to .43 (caucus). Cronbach's alpha, which ranges from .00 to 1.00, measures the internal consistency of a scale and reflects the inter-item correlations and the number of items in the scale. See EDWARD G. CARMINES AND RICHARD A. ZELLER, RELIABILITY AND VALIDITY ASSESSMENT 44-46 (1979).

66. Ground rules: $\chi^2(1) = 23.62$, $p < .001$, $V = .19$; process: $\chi^2(1) = 9.67$, $p < .01$, $V = .12$; confidentiality: $\chi^2(1) = 5.13$, $p < .05$, $V = .09$. There was no difference between initial joint sessions and initial caucuses in whether mediators explained their approach, $p = .97$.

67. $t(627) = 3.59$, $p < .001$.

In both initial joint sessions and initial caucuses, a majority of the mediators in civil cases assessed the parties' and their lawyers' ability to communicate civilly, but fewer than half assessed the parties' capacity to mediate (e.g., cognitive ability, violence, coercive control, harassment, or other intimidation) (see Table 2). In both initial joint sessions and initial caucuses, fewer than half of the mediators assessed the participants on both dimensions (40% and 39%, respectively); almost as many did not assess the participants on either dimension (36% and 34%, respectively).⁶⁸ There were no differences between initial joint sessions and initial caucuses in whether mediators assessed the participants on either individual dimension⁶⁹ or in the number of these dimensions the mediators assessed.⁷⁰

Broadly speaking, around half of the mediators in civil cases explored options for how the opening session might proceed after the mediator's opening remarks, whether the parties would be okay being together in the same room, and options for how the rest of the mediation might be structured. Approximately one-fifth of the mediators coached the parties and/or their lawyers on non-adversarial communications during initial caucuses to prepare for subsequent joint sessions (see Table 2).⁷¹ There was no difference between initial joint sessions and initial caucuses in whether mediators explored options for structuring the rest of the mediation.⁷² Two different scales were created with different subsets of these items, one for cases that began in joint session⁷³ and the other for cases that began in initial caucuses.⁷⁴ During initial joint sessions, 41% of the mediators explored how to structure both the opening session and the

68. Joint: Cronbach's alpha = .72; inter-item correlation = .57. Caucus: Cronbach's alpha = .68; inter-item correlation = .51.

69. p 's = .82, .95.

70. p = .93.

71. Exploring options for how the session would proceed after the mediators' opening remarks was asked only in cases with an initial joint session. Exploring whether the parties would be okay being together in the same room and coaching on non-adversarial communications were asked only in cases with initial caucuses.

72. p = .50. Differences between initial joint sessions and initial caucuses on the other items and on the overall scales could not be assessed because these items were not asked at both times.

73. The scale for initial joint sessions included exploring how to structure the opening session after the mediator's remarks and how to structure the rest of the mediation. Cronbach's alpha = .76; inter-item correlation = .62.

74. The scale for initial caucuses included three actions: exploring whether the parties would be okay together in the same room, exploring how to structure the rest of the mediation after the opening session, and coaching the participants on non-adversarial communications. Cronbach's alpha = .52; inter-item correlations ranged from .20 to .29.

rest of the mediation; a similar percentage (40%) explored neither. During initial caucuses, 32% of the mediators engaged in two or three of the actions; the same proportion did not engage in any of them.

2. Family Cases. In both initial joint sessions and initial caucuses, almost all of the mediators explained the mediation process and the mediator's role as well as mediation confidentiality, and a majority explained the ground rules for the mediation and their approach (see Table 3). In both initial joint sessions and initial caucuses, most of the mediators (88% and 91%, respectively) explained three or four of these items; few of the mediators did not explain any of them (3% and 5%, respectively).⁷⁵ There were no differences between initial joint sessions and initial caucuses in whether mediators explained any of these four individual items⁷⁶ or in the number of these items they explained.⁷⁷

TABLE 3. WHAT MEDIATORS DISCUSSED REGARDING THE MEDIATION PROCESS IN FAMILY CASES

	Joint	Caucus
Explained the mediation process & mediator's role	95%	95%
Explained my approach	76%	68%
Explained the ground rules	82%	86%
Explained mediation confidentiality	95%	95%
Assessed participants' ability to communicate civilly	62%	64%
Assessed parties' capacity to mediate	62%	75%
Explored options for how to proceed after the mediator's remarks	54%	--
Explored if the parties would be okay together	--	53%
Explored options for structuring the rest of the mediation	49%	46%
Coached participants on non-adversarial communications	--	21%
Other	2%	3%
None of the above	0.5%	1%
<i>Total Ns</i>	<i>189</i>	<i>104</i>

75. Joint: Cronbach's alpha = .62; inter-item correlations ranged from .26 to .61. Caucus: Cronbach's alpha = .69; inter-item correlations ranged from .25 to 1.00.

76. p 's ranged from .14 to .99.

77. $p = .76$.

In both initial joint sessions and initial caucuses, a majority of the mediators in family cases assessed the parties' and their lawyers' ability to communicate civilly and assessed the parties' capacity to mediate (e.g., cognitive ability, violence, coercive control, harassment, or other intimidation) (see Table 3). In both initial joint sessions and initial caucuses, just over half of the mediators assessed the parties on both dimensions (53% and 56%, respectively); a minority (29% and 17%, respectively) did not assess participants on either dimension.⁷⁸ Mediators were less likely to assess the parties' capacity to mediate during initial joint sessions than during initial caucuses; there was no difference in whether they assessed the participants' civility.⁷⁹ There also was no difference between initial joint sessions and initial caucuses in the number of these dimensions the mediators assessed.⁸⁰

Around half of the mediators in family cases explored options for how the opening session might proceed after the mediator's opening remarks, whether the parties would be okay being together in the same room, and options for how the rest of the mediation might be structured. Approximately one-fifth of the mediators coached the parties and/or their lawyers on non-adversarial communications during initial caucuses to prepare for subsequent joint sessions (see Table 3).⁸¹ There was no difference between initial joint sessions and initial caucuses in whether mediators explored options for structuring the rest of the mediation.⁸² Two different scales were created with different subsets of these items, one for cases that began in joint session⁸³ and the other for cases that began in initial caucuses.⁸⁴ During initial

78. Joint: Cronbach's alpha = .76; inter-item correlation = .61. Caucus: Cronbach's alpha = .56; inter-item correlation = .39.

79. Capacity: $\chi^2(1) = 4.78$, $p < .05$, $V = .13$; civility: $p = .79$.

80. $p = .17$.

81. Exploring options for how the session would proceed after the mediators' opening remarks was asked only in cases with an initial joint session. Exploring whether the parties would be okay being together in the same room and coaching on non-adversarial communications were asked only in cases with initial caucuses.

82. $p = .62$. Differences between initial joint sessions and initial caucuses on the other items and on the overall scales could not be assessed because these items were not asked at both times.

83. The scale for initial joint sessions included exploring how to structure the opening session after the mediator's remarks and how to structure the rest of the mediation. Cronbach's alpha = .70; inter-item correlation = .54.

84. The scale for initial caucuses included the three actions of exploring whether the parties would be okay being together in the same room, exploring how to structure the rest of the mediation after the opening session, and coaching the participants on non-adversarial communications. Cronbach's alpha = .61; inter-item correlations ranged from .19 to .42.

joint sessions, 40% of the mediators explored how to structure both the opening session and the rest of the mediation; a similar percentage (36%) explored neither. During initial caucuses, 42% of the mediators engaged in two or three of the actions; 35% did not engage in any of them.

3. Comparing Civil and Family Cases. There were few differences between civil and family cases in what mediators did regarding the mediation process (compare Tables 2 and 3). In cases that had an initial joint session, mediators in civil cases were less likely than those in family cases to assess the parties' capacity to mediate (43% vs. 62%), but they were more likely to explain the ground rules (89% vs. 82%).⁸⁵ In cases that had initial caucuses, mediators in civil cases were less likely than those in family cases to assess the parties' capacity to mediate (44% vs. 75%) and to explain the ground rules (73% vs. 86%), but they were marginally more likely to explain their approach (78% vs. 68%).⁸⁶

C. *What Mediators Discussed Regarding the Substance of the Dispute*

We asked the mediators to indicate whether they discussed certain aspects of the substance of the dispute during the initial mediation session.⁸⁷ From those individual items, we created three scales that consisted of conceptually similar substantive items to see how many items within each of these three sets the mediators had discussed,⁸⁸ separately for initial joint sessions and initial caucuses.

1. Civil Cases. During initial joint sessions, a majority of the mediators explored which issues needed to be addressed, around half explored the parties' interests and goals for the mediation, and around one-third developed the agenda (see Table 4). During initial caucuses, a majority of the mediators explored which issues needed to be addressed and the parties' interests and goals for the mediation; around one-third developed the agenda. During initial joint sessions,

85. Capacity: $\chi^2(1) = 20.33$, $p < .001$, $V = .18$; ground rules: $\chi^2(1) = 6.16$, $p < .05$, $V = .10$. There were no differences in the other actions, p 's ranged from .43 to .96.

86. Capacity: $\chi^2(1) = 24.97$, $p < .001$, $V = .30$; ground rules: $\chi^2(1) = 5.95$, $p < .05$, $V = .15$; approach: $\chi^2(1) = 3.39$, $p = .07$, $V = .11$. There were no differences in the other actions, p 's ranged from .11 to .67.

87. Few mediators in both civil and family cases, and in both initial joint sessions and initial caucuses, discussed something else about the substance of the dispute or did not discuss any of the listed items (see Tables 4 and 5).

88. Set 1: Discussed issues, interests, goals, and agenda. Set 2: Explored procedural status, negotiation status, and legal theories and facts. Set 3: Explored obstacles to settlement, settlement proposals, and costs and risks of litigation.

42% of the mediators discussed three or four of these items; 20% did not discuss any of them.⁸⁹ During initial caucuses, 61% of the mediators discussed three or four of these items; only 7% did not discuss any of them.⁹⁰ Mediators were less likely to explore the issues and the parties' interests and goals,⁹¹ and explored fewer items in this set,⁹² during initial joint sessions than during initial caucuses.

TABLE 4. WHAT MEDIATORS DISCUSSED REGARDING THE SUBSTANCE OF THE DISPUTE IN CIVIL CASES

	Joint	Caucus
Explored which issues needed to be addressed	66%	84%
Developed the agenda	35%	30%
Explored parties' interests	48%	72%
Explored parties' goals for the mediation	49%	76%
Explored procedural/litigation status	59%	75%
Explored parties' legal theories and facts	51%	84%
Explored status of settlement negotiations	58%	84%
Explored obstacles to settlement	33%	70%
Explored new substantive settlement proposals	22%	46%
Explored costs/risks of litigation	44%	54%
Other	1%	4%
None of the above	9%	2%
<i>Total Ns</i>	454	166

During initial joint sessions, over half of the mediators in civil cases explored the procedural or litigation status of the case, the parties' legal theories and surrounding facts, and the status of settlement negotiations and what substantive offers or proposals had been exchanged (see Table 4). During initial caucuses, a majority of the mediators explored each of these items. During initial joint sessions, 57% of the mediators discussed two or three of these items; 23% did not discuss any of them.⁹³ During initial caucuses, 86% of the

89. Cronbach's alpha = .69; inter-item correlations ranged from .20 to .60.

90. Cronbach's alpha = .63; inter-item correlations ranged from .24 to .44.

91. Issues: $\chi^2(1) = 19.26, p < .001, V = .18$; interests: $\chi^2(1) = 28.37, p < .001, V = .21$; goals: $\chi^2(1) = 34.89, p < .001, V = .24$. There was no difference between initial joint sessions and initial caucuses in whether the mediators developed the agenda, $p = .20$.

92. $t(618) = -5.17, p < .001$.

93. Cronbach's alpha = .68; inter-item correlations ranged from .39 to .44.

mediators discussed two or three of these items; only 4% did not discuss any of them.⁹⁴ Mediators were less likely to discuss each of these items,⁹⁵ and discussed fewer items in this set,⁹⁶ during initial joint sessions than during initial caucuses.

During initial joint sessions, a minority of the mediators in civil cases explored the obstacles to settlement (informational, interpersonal, or substantive), new substantive settlement proposals for the parties to consider, or the costs and risks of litigation (see Table 4). During initial caucuses, a majority of the mediators explored the obstacles to settlement, and around half explored new substantive settlement proposals or the costs and risks of litigation. During initial joint sessions, 30% of the mediators discussed two or three of these items; almost half (44%) did not discuss any of them.⁹⁷ During initial caucuses, 60% of the mediators discussed two or three of these items; 18% did not discuss any of them.⁹⁸ Mediators were less likely to discuss each of these items,⁹⁹ and discussed fewer items in this set,¹⁰⁰ during initial joint sessions than during initial caucuses.

2. Family Cases. During both initial joint sessions and initial caucuses, almost all mediators explored which issues needed to be addressed, a majority explored the parties' interests and their goals for the mediation, and around half developed the agenda (see Table 5). During both initial joint sessions and initial caucuses, almost three-fourths of the mediators (71% and 74%, respectively) discussed three or four of these items; only 4% in both groups did not discuss any of them.¹⁰¹ Mediators were marginally more likely to develop the agenda during initial joint sessions than during initial caucuses, but there were no differences in whether the mediators explored the other individual items¹⁰² or in how many items in this set the mediators explored.¹⁰³

94. Cronbach's alpha = .62; inter-item correlations ranged from .21 to .31.

95. Procedural status: $\chi^2(1) = 12.50$, $p < .001$, $V = .14$; theories: $\chi^2(1) = 53.87$, $p < .001$, $V = .30$; negotiation status: $\chi^2(1) = 38.35$, $p < .001$, $V = .25$.

96. $t(618) = -7.63$, $p < .001$.

97. Cronbach's alpha = .63; inter-item correlations ranged from .32 to .46.

98. Cronbach's alpha = .58; inter-item correlations ranged from .25 to .42.

99. Obstacles: $\chi^2(1) = 71.28$, $p < .001$, $V = .34$; proposals: $\chi^2(1) = 36.90$, $p < .001$, $V = .24$; costs/risks: $\chi^2(1) = 5.27$, $p < .05$, $V = .09$.

100. $t(618) = -7.63$, $p < .001$.

101. Joint: Cronbach's alpha = .64; inter-item correlations ranged from .24 to .51. Caucus: Cronbach's alpha = .57; inter-item correlations ranged from .08 to .45.

102. Agenda: $\chi^2(1) = 3.15$, $p = .08$, $V = .10$; other items, p 's ranged from .16 to .91.

103. $p = .98$.

TABLE 5. WHAT MEDIATORS DISCUSSED REGARDING THE SUBSTANCE OF THE DISPUTE IN FAMILY CASES

	Joint	Caucus
Explored which issues needed to be addressed	91%	91%
Developed the agenda	57%	46%
Explored parties' interests	73%	77%
Explored parties' goals for the mediation	76%	83%
Explored procedural/litigation status	50%	72%
Explored parties' legal theories and facts	22%	55%
Explored status of settlement negotiations	50%	76%
Explored obstacles to settlement	46%	73%
Explored new substantive settlement proposals	43%	58%
Explored the costs/risks of litigation	28%	60%
Other	3%	3%
None of the above	3%	2%
<i>Total Ns</i>	186	100

During initial joint sessions, half of the mediators in family cases explored the procedural or litigation status of the dispute and the status of negotiations, while fewer than one-fourth explored the parties' legal theories and facts (see Table 5). During initial caucuses, a majority of the mediators explored the procedural or negotiation status of the dispute, and over half explored the parties' legal theories and facts. During initial joint sessions, 39% of the mediators discussed two or three of these items; a similar percentage (34%) did not discuss any of them.¹⁰⁴ During initial caucuses, 73% of the mediators discussed two or three of these items; only 12% did not discuss any of them.¹⁰⁵ Mediators were less likely to discuss each of these three items,¹⁰⁶ and discussed fewer items in this set,¹⁰⁷ during initial joint sessions than during initial caucuses.

During initial joint sessions, fewer than half of the mediators in family cases explored the informational, interpersonal, or substantive obstacles to settlement and new substantive settlement proposals, while over one-fourth explored the costs and risks of litigation

104. Cronbach's alpha = .66; inter-item correlations ranged from .38 to .43.

105. Cronbach's alpha = .60; inter-item correlations ranged from .24 to .43.

106. Procedural status: $\chi^2(1) = 12.30, p < .001, V = .21$; theories: $\chi^2(1) = 31.68, p < .001, V = .33$; negotiations: $\chi^2(1) = 18.90, p < .001, V = .26$.

107. $t(284) = -6.07, p < .001$.

(see Table 5). During initial caucuses, a majority of the mediators explored the obstacles to settlement, new settlement proposals, and litigation costs and risks. During initial joint sessions, 39% of the mediators discussed two or three of these items; a similar percentage (37%) did not discuss any of them.¹⁰⁸ During initial caucuses, 65% of the mediators discussed two or three of these items; only 10% did not discuss any of them.¹⁰⁹ Mediators were less likely to discuss each of these three items,¹¹⁰ and discussed fewer items in this set,¹¹¹ in initial joint sessions than in initial caucuses.

3. Comparing Civil and Family Cases. When the first mediation session began jointly, there were differences between civil cases and family cases on each of the substantive items discussed (compare Tables 4 and 5). Mediators in civil cases were less likely than those in family cases to develop the agenda (35% vs. 57%), to explore which issues needed to be addressed (66% vs. 91%), and to explore the parties' interests (48% vs. 73%), goals (49% vs. 76%), the obstacles to settlement (33% vs. 46%), and new substantive settlement proposals (22% vs. 43%).¹¹² But mediators in civil cases were more likely than those in family cases to explore the parties' legal theories and facts (51% vs. 22%), litigation costs and risks (44% vs. 28%), the procedural status of the case (59% vs. 50%) and, marginally, the status of negotiations (58% vs. 50%) during initial joint sessions.¹¹³

When the first mediation session began in separate caucuses, there were fewer differences between what mediators in civil and family cases discussed regarding the substance of the dispute. Mediators in civil cases were less likely than those in family cases to develop the agenda (30% vs. 46%) and, marginally, to explore new substantive settlement proposals (46% vs. 58%) (compare Tables 4 and 5).¹¹⁴ But mediators in civil cases were more likely than those in family cases to explore the parties' legal theories and facts (84% vs.

108. Cronbach's alpha = .61; inter-item correlations ranged from .23 to .49.

109. Cronbach's alpha = .48; inter-item correlations ranged from .10 to .35.

110. Obstacles: $\chi^2(1) = 19.60$, $p < .001$, $V = .26$; proposals: $\chi^2(1) = 5.85$, $p < .05$, $V = .14$; costs/risks: $\chi^2(1) = 27.01$, $p < .001$, $V = .31$.

111. $t(284) = -5.62$, $p < .001$.

112. Agenda: $\chi^2(1) = 26.24$, $p < .001$, $V = .20$; issues: $\chi^2(1) = 42.77$, $p < .001$, $V = .26$; interests: $\chi^2(1) = 33.07$, $p < .001$, $V = .23$; goals: $\chi^2(1) = 37.72$, $p < .001$, $V = .24$; obstacles: $\chi^2(1) = 9.78$, $p < .01$, $V = .12$; proposals: $\chi^2(1) = 30.17$, $p < .001$, $V = .22$.

113. Theories: $\chi^2(1) = 45.55$, $p < .001$, $V = .27$; costs/risks: $\chi^2(1) = 13.00$, $p < .001$, $V = .14$; procedural status: $\chi^2(1) = 4.08$, $p < .05$, $V = .08$; negotiation status: $\chi^2(1) = 3.44$, $p = .06$, $V = .07$.

114. Agenda: $\chi^2(1) = 7.38$, $p < .01$, $V = .17$; proposals: $\chi^2(1) = 3.37$, $p = .07$, $V = .11$.

55%) and, marginally, the negotiation status of the case (84% vs. 76%) during initial caucuses.¹¹⁵

D. *The Actions and Interactions of the Mediation Participants*

In this section, we examine what the mediation participants—the parties (i.e., the disputants themselves), the lawyers, and the insurance company representatives—did during the initial mediation session. These include actions such as whether the participants made an opening statement, responded to the other side, or discussed substantive settlement proposals. We separately report the findings for civil cases and for family cases, and then conduct comparisons between these two groups of cases. For each case type, we first report the parties' actions, followed by the lawyers' actions. Next, we compare the actions of the parties and lawyers in the same case, as well as the actions of parties in cases where neither had counsel versus where both had counsel. Finally, we report the actions of insurance company representatives, who appeared only in civil cases.

1. *Parties' and Lawyers' Actions in Civil Cases.* Looking first at the actions of the parties (i.e., the disputants themselves) in civil cases that began in initial joint sessions, one or both parties made an opening statement or added details or context to another's opening presentation in fewer than half of the cases (see Table 6). In a majority of the cases, one or both parties responded to questions or statements from the mediator. One or both parties asked questions of or responded to questions or statements from the other side in fewer than half of the cases, and they exchanged substantive settlement offers or proposals with the other side in one-fifth of the cases. The parties did not engage in any of these actions in fewer than one-fifth of the cases.¹¹⁶

In civil cases that began in initial caucuses, one or both parties made an opening statement or added to another's opening presentation in fewer than one-fifth of the cases (see Table 6). One or both parties responded to the mediator in virtually all cases. In over half of the cases, one or both parties asked questions of or responded to the other side through the mediator or discussed settlement proposals with the mediator.¹¹⁷ Relatively few parties did not engage in any

115. Theories: $\chi^2(1) = 26.10$, $p < .001$, $V = .31$; negotiations: $\chi^2(1) = 2.84$, $p = .09$, $V = .10$. There were no differences in the other items, p 's ranged from .12 to .91.

116. The initial joint session in these cases might have consisted solely of an exchange of introductions or the mediator's opening statement.

117. These questions were worded slightly differently for initial caucuses than for initial joint sessions.

of the above actions. Comparing their actions in initial joint sessions versus initial caucuses, parties were more likely to make an opening statement or add to another's opening presentation in initial joint sessions than in initial caucuses.¹¹⁸ But parties were less likely to respond to the mediator and the other side and to discuss settlement proposals in initial joint sessions than in initial caucuses.¹¹⁹

TABLE 6. WHAT PARTIES AND LAWYERS DID IN CIVIL CASES

	<i>Parties</i>		<i>Lawyers</i>	
	Joint	Caucus	Joint	Caucus
Made an opening statement or presentation	41%	12%	71%	24%
Added to another's opening presentation	41%	18%	40%	20%
Responded to the mediator	68%	91%	71%	88%
Asked/responded to the other side	41%	--	40%	--
Asked/responded to the other side through the mediator	--	56%	--	65%
Exchanged settlement offers with the other side	20%	--	19%	--
Discussed settlement proposals with the mediator	--	61%	--	74%
Other	1%	1%	0%	0%
None of the above	16%	3%	12%	2%
<i>Total Ns</i>	<i>315</i>	<i>139</i>	<i>341</i>	<i>138</i>

Looking at the lawyers' actions in civil cases that began in initial joint sessions, one or both lawyers made an opening statement or presentation in a majority of the cases and added to another's opening presentation in fewer than half of the cases (see Table 6). In a majority of the cases, one or both lawyers responded to questions or statements from the mediator. One or both lawyers asked questions of, or responded to questions or statements from the other side, in fewer than half of the cases, and they exchanged substantive settlement offers or proposals with the other side in approximately one-fifth of the cases. Relatively few lawyers did not engage in any of these actions.

118. Opening: $\chi^2(1) = 37.15$, $p < .001$, $V = .29$; added: $\chi^2(1) = 22.14$, $p < .001$, $V = .22$.

119. Respond to mediator: $\chi^2(1) = 28.92$, $p < .001$, $V = .25$; respond to other: $\chi^2(1) = 9.32$, $p < .01$, $V = .14$; proposals: $\chi^2(1) = 75.75$, $p < .001$, $V = .41$.

In civil cases that began in initial caucuses, one or both lawyers made an opening statement or added to another's opening presentation in fewer than one-fourth of the cases (see Table 6). Lawyers in most cases responded to the mediator. In a majority of the cases, one or both lawyers asked questions of or responded to the other side through the mediator or discussed settlement proposals with the mediator. Few lawyers did not engage in any of these actions. Comparing their actions in initial joint sessions versus initial caucuses, lawyers were more likely to make an opening statement or add to another's opening presentation in initial joint sessions than in initial caucuses.¹²⁰ But lawyers were less likely to respond to the mediator and the other side and to discuss settlement proposals in initial joint sessions than in initial caucuses.¹²¹

Next, we compared the actions of parties and lawyers in the same case.¹²² In both initial joint sessions and initial caucuses, parties were less likely than lawyers in the same case to make an opening statement and to respond to or ask questions of the other side or discuss settlement proposals (directly or through the mediator).¹²³ There was no difference between parties and lawyers in the same case in whether they added to another's opening presentation in either initial joint sessions or initial caucuses.¹²⁴ The only action that showed a different pattern in initial joint sessions versus in initial caucuses was responding to the mediator: parties were less likely than lawyers in the same case to respond to the mediator during initial joint sessions, but parties were more likely than lawyers in the same case to respond to the mediator during initial caucuses.¹²⁵

Given the immediately preceding findings, the parties might have less opportunity to participate in the initial mediation session if

120. Opening: $\chi^2(1) = 90.98$, $p < .001$, $V = .44$; added: $\chi^2(1) = 18.24$, $p < .001$, $V = .20$.

121. Respond to mediator: $\chi^2(1) = 14.64$, $p < .001$, $V = .18$; respond to other: $\chi^2(1) = 25.64$, $p < .001$, $V = .23$; proposals: $\chi^2(1) = 131.42$, $p < .001$, $V = .52$.

122. Because the questions asked whether one or both parties and whether one or both lawyers engaged in each of these actions, we could not compare the actions of each party directly to that of their respective counsel. Instead, these comparisons were conducted at the level of the case. The percentages here do not match the percentages in the prior table or text because these percentages refer only to the subset of cases where the parties had counsel, while the prior percentages include all cases.

123. Joint: opening, 25% vs. 63% ($t(205) = -9.95$, $p < .001$); respond to other (37% vs. 46%) ($t(205) = -2.76$, $p < .01$); proposals, 14% vs. 21% ($t(205) = -3.06$, $p < .01$). Caucus: opening, 10% vs. 21% ($t(114) = -3.11$, $p < .01$); respond to other, 56% vs. 67% ($t(114) = -3.52$, $p < .01$); proposals, 61% vs. 74% ($t(114) = -4.14$, $p < .001$).

124. p's of .45 and .11, respectively.

125. Joint: 62% vs. 68%, $t(205) = -2.00$, $p < .05$. Caucus: 92% vs. 87%, $t(114) = 2.16$, $p < .05$.

their lawyers talked instead of or in addition to the parties themselves.¹²⁶ Accordingly, we conducted additional analyses to compare parties' actions during initial joint sessions in cases where neither party had counsel versus where both parties had counsel.¹²⁷ Indeed, parties were more likely to engage in each of these actions during initial joint sessions in cases where neither party was represented than in cases where both were represented. Parties were more likely to make an opening statement (83% vs. 33%), add to another's opening (67% vs. 37%), respond to questions or statements from the mediator (90% vs. 63%), ask questions of or respond to the other side (70% vs. 34%), and exchange substantive settlement proposals with the other side (57% vs. 14%) in cases where neither party was represented than in cases where both were represented.¹²⁸

2. Parties' and Lawyers' Actions in Family Cases. Looking first at the actions of the parties (i.e., the disputants themselves) in family cases that began in initial joint sessions, one or both parties made an opening statement or added details or context to another's opening presentation in fewer than half of the cases (see Table 7). In most cases, one or both parties responded to questions or statements from the mediator. One or both parties asked questions of or responded to questions or statements from the other side in a majority of the cases, but exchanged substantive settlement offers or proposals with the other side in fewer than half of the cases. Few parties did not engage in any of these actions.

In family cases that began in initial caucuses, one or both parties made an opening statement or added to another's opening presentation in around one-third of the cases (see Table 7). One or both parties responded to questions or statements from the mediator in most cases. In a majority of the cases, one or both parties asked questions of or responded to the other side through the mediator and discussed settlement proposals with the mediator. Few parties did not engage

126. Other studies have found that represented parties talk less than unrepresented parties during mediation sessions. *E.g.*, Wissler, *supra* note 18, at 444-46.

127. These analyses compared cases where neither party versus both parties had counsel, and excluded cases where only one party had counsel, to be able to more clearly assess the effect of counsel. We could not conduct comparable analyses of parties' actions in initial caucuses because there were too few cases in which neither party had counsel.

128. Opening: $\chi^2(1) = 28.71$, $p < .001$, $V = .32$; added: $\chi^2(1) = 9.87$, $p < .01$, $V = .18$; respond to mediator: $\chi^2(1) = 8.69$, $p < .01$, $V = .17$; respond to other: $\chi^2(1) = 14.96$, $p < .001$, $V = .23$; proposals: $\chi^2(1) = 31.42$, $p < .001$, $V = .33$.

in any of these actions. There were only two differences between initial joint sessions and initial caucuses: parties were less likely to discuss substantive settlement proposals in initial joint sessions than in initial caucuses, but they were marginally more likely to add to another’s opening presentation.¹²⁹

TABLE 7. WHAT PARTIES AND LAWYERS DID IN FAMILY CASES

	<i>Parties</i>		<i>Lawyers</i>	
	Joint	Caucus	Joint	Caucus
Made an opening statement or presentation	45%	34%	37%	55%
Added to another’s opening presentation	42%	29%	29%	35%
Responded to the mediator	85%	90%	71%	92%
Asked/responded to the other side	73%	--	53%	--
Asked/responded to the other side through the mediator	--	72%	--	68%
Exchanged settlement offers with the other side	47%	--	26%	--
Discussed settlement proposals with the mediator	--	79%	--	84%
Other	1%	0%	0%	0%
None of the above	6%	1%	11%	0%
<i>Total Ns</i>	<i>176</i>	<i>82</i>	<i>37</i>	<i>74</i>

Looking at the lawyers’ actions in family cases that began in initial joint sessions, one or both lawyers made an opening statement or added to another’s opening presentation in a minority of the cases (see Table 7). In a majority of the cases, one or both lawyers responded to questions or statements from the mediator. One or both lawyers asked questions of or responded to questions or statements from the other side in over half of the cases and exchanged substantive settlement offers or proposals with the other side in approximately one-fourth of the cases. Relatively few lawyers did not engage in any of these actions.

In family cases that began in initial caucuses, one or both lawyers made an opening statement in over half of the cases and added to another’s opening presentation in around one-third of the cases (see Table 7). One or both lawyers responded to the mediator in most

129. Proposals: $\chi^2(1) = 24.37, p < .001, V = .31$; added: $\chi^2(1) = 3.55, p = .06, V = .12$. There were no differences in the other actions, p’s ranged from .10 to .90.

cases. In a majority of the cases, one or both lawyers asked questions of or responded to the other side through the mediator and discussed settlement proposals with the mediator. Every lawyer engaged in one or more of these actions. There were three differences between initial joint sessions and initial caucuses: lawyers were less likely to respond to the mediator, to discuss substantive settlement proposals and, marginally, to make an opening presentation in initial joint sessions than in initial caucuses.¹³⁰

Next, we compared the actions of parties and lawyers in the same case.¹³¹ During initial joint sessions, parties and lawyers in the same case did not differ on any of these actions.¹³² During initial caucuses, there was only one difference: parties were less likely than lawyers in the same case to make an opening statement.¹³³

We conducted additional analyses to compare parties' actions during initial joint sessions in cases where neither party had counsel versus where both parties had counsel.¹³⁴ Parties were more likely to make an opening statement (57% vs. 35%) and exchange substantive settlement proposals (57% vs. 40%) in cases where neither party had counsel than in cases where both had counsel.¹³⁵

3. Comparing Civil and Family Cases. Looking first at the parties' actions, there were several differences between civil and family cases. During initial joint sessions, parties in civil cases were less likely than parties in family cases to respond to the mediator (68% vs. 85%) or the other side (41% vs. 73%) and to exchange settlement proposals (20% vs. 47%) (compare Tables 6 and 7).¹³⁶ There were no differences between civil and family cases in whether parties made an opening statement or added to another's opening presentation during initial joint sessions.¹³⁷ During initial caucuses, parties in civil cases were less likely than parties in family cases to make an opening statement (12% vs. 34%), respond to the other side through the mediator (56% vs. 72%), discuss settlement proposals with the mediator

130. Respond to mediator: $\chi^2(1) = 8.47$, $p < .01$, $V = .28$; proposals: $\chi^2(1) = 36.12$, $p < .001$, $V = .57$; opening: $\chi^2(1) = 3.46$, $p = .06$, $V = .18$. There were no differences in the other actions, p 's ranged from .22 to .63.

131. See *supra* note 122.

132. p 's ranged from .16 to .77.

133. Opening statement: 34% vs. 54% ($t(60) = -3.01$, $p < .01$); other actions, p 's ranged from .20 to .71.

134. See *supra* note 127.

135. Opening: $\chi^2(1) = 6.66$, $p < .05$, $V = .21$; proposals: $\chi^2(1) = 4.09$, $p < .05$, $V = .17$. There were no differences in the other actions, p 's ranged from .10 to .65.

136. Respond to mediator: $\chi^2(1) = 16.93$, $p < .001$, $V = .19$; respond to other: $\chi^2(1) = 46.60$, $p < .001$, $V = .31$; proposals: $\chi^2(1) = 39.44$, $p < .001$, $V = .28$.

137. p 's of .44 and .86, respectively.

(61% vs. 79%) and, marginally, add to another's opening statement (18% vs. 29%).¹³⁸ There was no difference between civil and family cases in whether parties responded to the mediator during initial caucuses.¹³⁹

It is possible that parties in civil cases were less likely than parties in family cases to engage in these actions during the initial mediation session because parties in civil cases were more likely than parties in family cases to have legal counsel, and parties with counsel were less likely than those who did not have counsel to engage in each action during initial joint sessions in civil cases.¹⁴⁰ Accordingly, we repeated the prior analyses that examined differences between civil and family cases, this time separately for cases where both parties had counsel and cases where neither party had counsel. When looking at cases where both parties had counsel, largely the same patterns as in the preceding paragraph appeared in both initial joint sessions and initial caucuses.¹⁴¹ But when looking at cases where neither party had counsel, the pattern changed. In initial joint sessions where neither party had counsel, parties in civil cases were more likely than parties in family cases to make an opening statement (83% vs. 57%) and add to another's opening presentation (67% vs. 43%); there were no other differences.¹⁴² Taken together, these findings suggest that the differences between civil and family cases in parties' actions during initial joint sessions are related to some extent to differences between the two groups of cases in whether the parties had counsel.

Looking next at the lawyers' actions, there were only a few differences between civil and family cases. During initial joint sessions, the only difference was that lawyers in civil cases were more likely than lawyers in family cases to make an opening statement (71% vs. 37%)

138. Opening statement: $\chi^2(1) = 15.28$, $p < .001$, $V = .26$; respond to other: $\chi^2(1) = 5.49$, $p < .05$, $V = .16$; proposals: $\chi^2(1) = 7.76$, $p < .01$, $V = .19$; added: $\chi^2(1) = 3.80$, $p = .051$, $V = .13$.

139. $p = .78$.

140. See *supra* notes 56 and 128 and accompanying text.

141. See *supra* notes 136–139 and accompanying text. Joint: respond to mediator: 63% civil vs. 83% family ($\chi^2(1) = 11.98$, $p < .01$, $V = .19$); respond to other: 34% vs. 66% ($\chi^2(1) = 27.65$, $p < .001$, $V = .28$); proposals: 14% vs. 40% ($\chi^2(1) = 25.56$, $p < .001$, $V = .27$). There were no differences in the other actions, p 's ranged from .71 to .77. Caucus: opening statement: 12% vs. 33% ($\chi^2(1) = 12.05$, $p < .01$, $V = .25$); respond to other: 56% vs. 73% ($\chi^2(1) = 5.51$, $p < .05$, $V = .17$); proposals: 62% vs. 80% ($\chi^2(1) = 6.10$, $p < .05$, $V = .18$). There were no differences in the other actions, p 's ranged from .33 to .55.

142. Opening statement: $\chi^2(1) = 6.30$, $p < .05$, $V = .26$; added: $\chi^2(1) = 4.36$, $p < .05$, $V = .22$; other actions, p 's ranged from .10 to .74. We could not conduct comparable analyses in cases that had initial caucuses because there were too few cases in which neither party had counsel.

(compare Tables 6 and 7).¹⁴³ During initial caucuses, there were differences in only two actions: lawyers in civil cases were less likely than lawyers in family cases to make an opening statement (24% vs. 55%) and to add to another's opening presentation (20% vs. 35%).¹⁴⁴

4. Insurance Representatives' Actions. Insurance company representatives, who were involved only in civil cases, made an opening statement or added to another's opening presentation in fewer than one-fifth of the cases in both initial joint sessions and initial caucuses (see Table 8). In both initial joint sessions and initial caucuses, insurance representatives responded to questions or statements from the mediator in a majority of the cases. In fewer than half of the cases, insurance representatives asked or responded to questions or statements from the other side, directly in joint session or through the mediator in caucus.¹⁴⁵ Insurance representatives discussed substantive settlement proposals directly with the other side in fewer than one-fifth of the cases during initial joint sessions, but they discussed settlement proposals with the mediator in most cases during initial caucuses—the only action that differed between initial joint sessions and initial caucuses.¹⁴⁶ Insurance representatives did not engage in any of the above actions in over one-fourth of the cases during initial joint sessions, but in none of the cases during initial caucuses.

143. Opening statement: $\chi^2(1) = 18.83$, $p < .001$, $V = .21$; other actions, p 's ranged from .12 to .99.

144. Opening statement: $\chi^2(1) = 21.02$, $p < .001$, $V = .32$; added: $\chi^2(1) = 6.23$, $p < .05$, $V = .17$; other actions, p 's ranged from .10 to .73.

145. The question wording differed slightly for initial joint sessions and initial caucuses.

146. Proposals: $\chi^2(1) = 42.54$, $p < .001$, $V = .70$; other actions, p 's ranged from .13 to .75.

TABLE 8. WHAT INSURANCE REPRESENTATIVES DID IN CIVIL CASES

	Joint	Caucus
Made an opening statement or presentation	16%	5%
Added to another's opening presentation	16%	14%
Responded to the mediator	60%	73%
Asked/responded to the other side	30%	--
Asked/responded to other side through the mediator	--	46%
Exchanged settlement offers with other side	16%	--
Discussed settlement proposals with the mediator	--	86%
Other	0%	0%
None of the above	28%	0%
<i>Total Ns</i>	<i>50</i>	<i>37</i>

E. *The Use of Joint Sessions Later in the Mediation*

The mediators were asked whether, after the initial mediation session (and regardless of whether that involved a joint session or separate caucuses), there were any joint sessions later in the mediation, in person or by phone. In almost one-third of civil cases and over half of family cases, there was a later joint session where both parties (i.e., the disputants themselves) were together (see Table 9). In approximately one-fifth of both civil and family cases, the mediator later met jointly with opposing counsel but not with the parties. There were no later joint sessions of any kind in almost half of civil cases and one-fourth of family cases.¹⁴⁷ When combining the two categories where the parties themselves were not together later in the mediation (i.e., no joint sessions or only the lawyers were together), the parties were not together later in the mediation in the majority of civil cases (68%) and in almost half of family cases (43%).¹⁴⁸

147. Mediators in civil cases were less likely than those in family cases to meet jointly with the parties later in the mediation and were more likely to not have any later joint sessions ($\chi^2(3) = 173.16, p < .001, V = .43$). The "other" category was excluded from these analyses. Some of the few mediators who chose "other" said they met jointly with both parties and their lawyers as well as met jointly with both lawyers without their clients.

148. The parties were more likely to *not* be together later in the mediation in civil cases than in family cases ($\chi^2(1) = 60.38, p < .001, V = .25$).

TABLE 9. USE OF JOINT SESSIONS LATER IN THE MEDIATION

	Civil Cases	Family Cases
Mediator met jointly with both parties later in the mediation	30%	57%
Mediator met jointly with lawyers for both sides later in the mediation but not parties	21%	18%
There were no joint sessions later in the mediation	47%	25%
Other	2%	1%
<i>Total Ns</i>	653	307

Using a different measure that takes into consideration both the opening session and subsequent sessions, the parties were together for at least some of the mediation in a majority of both civil and family cases, but they were never together in around one-fourth of the cases (see Table 10).¹⁴⁹ The parties were together during both the initial session and for some time later in the mediation in over one-fourth of civil cases and over half of family cases.¹⁵⁰ The parties were together only during the initial session in almost half of civil cases and relatively few family cases; they were together only later in the mediation in few civil and family cases.¹⁵¹

149. Parties in civil cases were marginally less likely than those in family cases to never be together ($\chi^2(1) = 3.48, p = .06, V = .06$).

150. Mediators in a smaller proportion of cases (6% of civil cases and 40% of family cases) said that the entire mediation was spent in joint session.

151. When using this measure with all four categories, there were differences between civil and family cases ($\chi^2(3) = 107.42, p < .001, V = .34$), primarily because parties in civil cases were more likely than parties in family cases to be together only during the opening session and were less likely to be together during both the opening session and later in the mediation.

TABLE 10. INITIAL AND LATER JOINT AND CAUCUS SESSIONS COMBINED

	Civil Cases	Family Cases
Joint opening and later joint session	28%	54%
Joint opening, no later joint session	46%	12%
Caucus opening and later joint session	3%	5%
Caucus opening, no later joint session	23%	29%
<i>Total Ns</i>	619	296

In both civil and family cases, the parties were more likely to be together later in the mediation if they were together during the initial mediation session (38% and 82%, respectively) than if they were initially in separate caucuses (12% and 14%, respectively).¹⁵²

IV. DISCUSSION AND IMPLICATIONS OF THE FINDINGS¹⁵³

The present study examined the current use and nature of joint opening sessions and compared those practices to what typically occurred during traditional joint opening sessions¹⁵⁴ as well as to current practices in initial caucuses. We found that in a majority of civil and family cases, the initial mediation session began with both parties together. Thus, although the joint opening session is not as ubiquitous as it has been historically, its use has far from disappeared, as some commentators have claimed.¹⁵⁵

During initial joint sessions and initial caucuses, almost all of the mediators in both civil and family cases explained the mediation process and mediation confidentiality to the parties, and a majority explained their approach and the ground rules for the mediation. In civil cases, mediators were more likely to explain three of these four items during initial joint sessions than during initial caucuses. In family cases, there was no difference between initial joint sessions and initial caucuses in whether the mediators explained any of these

152. Civil: $\chi^2(1) = 37.63, p < .001, V = .25$; family: $\chi^2(1) = 125.48, p < .001, V = .65$.

153. The summary in this section of what took place during the initial mediation session is a simplified overview of the main findings and does not fully reflect their nuances, such as the differences between initial joint sessions and initial caucuses and between civil versus family cases. For more details, see *supra* Parts III.B.–D.

154. See *supra* Part I.A.

155. See *supra* note 23 and accompanying text. To compare the rate of joint opening sessions in the present study to that of other studies, see *supra* notes 24–25 and accompanying text.

four items. Overall, regardless of how the first session began, most mediators carry out the educational function of a traditional opening statement.

By contrast, parties' opening statements are not as central to the initial mediation session as they once were. During initial joint sessions, the disputants themselves made an opening statement in fewer than half of both civil and family cases. The parties' lawyers made an opening statement in a majority of civil cases, but in only a minority of family cases. During initial caucuses, in civil cases the parties and the lawyers made an opening statement in fewer than one-fourth of the cases; even less frequently than during initial joint sessions. In family cases, there was no difference between initial joint sessions and initial caucuses in whether the parties made an opening statement; the lawyers, however, were more likely to make an opening statement in initial caucuses, doing so in over half of the cases. In both initial joint sessions and initial caucuses, the parties in civil cases were less likely to make opening statements than were the lawyers in the same case. In family cases, the parties were less likely than the lawyers in the same case to make an opening statement during initial caucuses, but there was no difference during initial joint sessions.

Thus, during initial joint sessions, there is less chance for each side to explain its positions and perspective directly to the other party and to hear the other's views unfiltered by the mediator, especially as expressed by the disputants themselves, than would have been the case historically. In addition, during both initial joint sessions and initial caucuses, the absence of party or lawyer opening statements deprives the mediator of information about the dispute and the parties' views that mediators do not necessarily have prior to the first mediation session.¹⁵⁶ As a result, the potential to achieve many of the benefits ascribed to parties' direct communication via opening statements in traditional initial joint sessions—both informational benefits as well as the psychological benefits of explaining their views to and being heard by the other party and feeling they had their day in court¹⁵⁷—is reduced.

In traditional initial joint sessions, discussions between the mediator and the parties to clarify and elaborate on the parties' opening statements would often take place before moving into separate

156. See Roselle L. Wissler & Art Hinshaw, *What Happens Before the First Mediation Session? An Empirical Study of Pre-Session Communications*, 23 *CARDOZO J. OF CONFLICT RESOL.* (forthcoming 2022) (manuscript at 4–8, 11–12).

157. See *supra* Part I.A.

caucuses. As was typical historically, in the present study a majority of parties and lawyers in both civil and family cases responded to questions or statements from the mediator during initial joint sessions; they generally were even more likely to do so during initial caucuses. In civil cases, the parties were less likely than the lawyers in the same case to respond to the mediator during initial joint sessions; that pattern was reversed during initial caucuses. In family cases, there was no difference between the parties and the lawyers in the same case in whether they responded to the mediator during either initial joint sessions or initial caucuses. In sum, there is some discussion between the mediator and the parties and/or their lawyers in a majority of cases during joint opening sessions, though such discussions are even more likely during initial caucuses.

We also explored what the mediator and the parties discussed during the initial session that could help inform how to conduct the rest of the mediation. During initial joint sessions, a majority of the mediators in both civil and family cases assessed the parties' and lawyers' ability to communicate civilly, and around half explored options for structuring the remainder of the opening session after the mediator's opening remarks as well as for structuring the rest of the mediation. Fewer than half of the mediators in civil cases, but a majority of the mediators in family cases, assessed the parties' capacity to mediate, including issues of violence and coercive control, during initial joint sessions. The only difference between initial joint sessions and initial caucuses on these items was seen in family cases, where mediators were more likely to assess the parties' capacity to mediate in caucus than in joint session. During initial caucuses, around half of the mediators in both civil and family cases explored whether the parties would be okay being together in the same room, and around one-fifth coached the mediation participants on non-adversarial communications in preparation for subsequent joint sessions. In sum, a substantial proportion of mediators do not use the initial mediation session to explore whether or how to adapt the mediation's structure to the parties' needs or dynamics, thereby denying the parties a customized resolution process, one of mediation's main benefits.¹⁵⁸

Regarding what information about the substance of the dispute the mediator discussed with the mediation participants during initial sessions, there were many differences between civil and family cases,

158. See, e.g., Blankenship, *supra* note 3, at 187; MEDIATION QUALITY, *supra* note 20, at 3, 7, 12.

as well as between initial joint sessions and initial caucuses. During initial joint sessions in civil cases, broadly speaking, between half and two-thirds of the mediators explored the issues that needed to be addressed, the procedural and the negotiation status of the case, the parties' legal theories and facts, the parties' interests and goals, and the costs and risks of litigation. Between one-fourth and one-third of the mediators in civil cases developed the agenda and explored the obstacles to settlement and new substantive settlement proposals during initial joint sessions. Mediators in civil cases were more likely to discuss all but one of these substantive items, the agenda, during initial caucuses than during initial joint sessions, generally doing so in a majority of cases. During initial joint sessions in family cases, the mediators explored most of these substantive items in half or more of the cases, broadly speaking, but they explored the parties' legal theories and facts and the costs and risks of litigation in only around one-fourth of the cases. Mediators in family cases were more likely to discuss a majority of these items during initial caucuses than during initial joint sessions; but they were less likely to develop the agenda during initial caucuses, and there were no differences in whether they discussed the issues or the parties' interests or goals.

Thus, in a sizable proportion of cases, mediators do not discuss many of the central substantive aspects of the dispute during initial joint sessions, especially in civil cases; mediators are more likely to discuss substantive matters during initial caucuses. As a result, there is less chance during initial joint sessions for the mediator or the parties to learn new information about, or gain a better understanding of, the other side's positions, interests, or priorities.

We also examined whether there were discussions among the mediation participants during initial joint sessions. The parties and the lawyers in civil cases asked questions of or responded to questions or statements from the other side in fewer than half of the cases. They were more likely to ask questions of or respond to the other side through the mediator during initial caucuses, with over half of the parties and almost two-thirds of the lawyers doing so. The parties in civil cases were less likely than the lawyers in the same case to interact with the other side directly during both initial joint sessions and initial caucuses. In family cases, the parties asked questions of or responded to statements or questions from the other side in almost three-fourths of the cases during both initial joint sessions and initial caucuses. The lawyers asked questions of or responded to statements or questions from the other side in around half of the cases during initial joint sessions and in around two-thirds of the

cases during initial caucuses. In family cases, there were no differences between the parties and the lawyers in the same case in responding to the other side during either initial joint sessions or initial caucuses.

Thus, the limited interchange between the parties during initial joint sessions, especially in civil cases, suggests there is less opportunity for the disputants themselves to speak directly to each other and for the mediator to observe their dynamics, help them improve their communication, or develop a norm of information sharing for the rest of the mediation. There also is less chance for the parties to gain insights that could help humanize the other party or enhance their understanding of the other party's perspective or priorities.

Regarding discussions specifically about substantive settlement proposals, the parties and the lawyers in civil cases exchanged proposals with the other side in one-fifth of the cases during initial joint sessions, but during initial caucuses they discussed settlement proposals with the mediator in a majority of the cases. The parties were less likely than the lawyers in the same case to discuss settlement proposals during both initial joint sessions and initial caucuses. In family cases, the parties exchanged settlement proposals with the other side during initial joint sessions in around half of the cases, while the lawyers did so in around one-fourth of the cases. The parties and the lawyers were more likely to discuss settlement proposals with the mediator during initial caucuses than during initial joint sessions, both groups doing so in a majority of family cases. There was no difference between parties and lawyers in the same case in whether they discussed settlement proposals during either initial joint sessions or initial caucuses. In sum, relatively few parties and lawyers discuss substantive settlement proposals during initial joint sessions, especially in civil cases; more do so in initial caucuses. Unless the parties are together again later in the mediation, this could reduce their ability to jointly consider how different settlement options meet their respective interests and goals and to develop more creative "outcomes that surface during face-to-face dialogue."¹⁵⁹

Regardless of how the initial session began, the parties (i.e., the disputants themselves) were together for at least some time later in the mediation in fewer than one-third of the civil cases and in just over half of the family cases. Considering the entire mediation, the parties were together for at least some time in around three-fourths

159. Bassis, *supra* note 9, at 32; see also FRIEDMAN & HIMMELSTEIN, *supra* note 8, at 197; Galton et al., *supra* note 38, at 99-100; Welsh, *supra* note 9, at 852.

of both civil and family cases. Among these cases where the parties were together for some of the mediation, that joint time was only during the initial session in a majority of civil cases but in relatively few family cases. Considering that there were limited direct interactions and substantive discussions among the parties in civil cases during initial joint sessions, there is likely to have been less dialogue between the parties in civil cases than might be suggested by the total proportion of cases in which there was at least some time spent jointly.

V. CONCLUSION

The present Article takes a systematic and comprehensive look at what currently happens during joint opening sessions and how that compares to the traditional joint opening session as well as to what currently happens when mediation begins in separate caucuses. Joint opening sessions are still held in a majority of civil and family cases, and mediators still explain the mediation process in most cases. The rest of what occurs during initial joint sessions, however, diverges from traditional practice. Party opening statements, the discussion of substantive matters with the mediator, and exchanges directly between the two sides occur less frequently than they did historically, with larger differences in civil cases than in family cases. Moreover, many of these actions are less likely to occur during initial joint sessions than during initial caucuses. Parties in civil cases generally are less likely than the lawyers in the same case to engage in most actions; there are virtually no differences between parties' and lawyers' actions in family cases. As a result of the many differences in what takes place between initial joint sessions and initial caucuses, as well as between civil and family cases, blanket assertions about what "typically" occurs during the initial mediation session cannot be made.

In sum, despite their use in a majority of cases, current joint opening sessions often are a shadow of their traditional selves, especially in civil cases. The differences between what took place traditionally in joint opening sessions and what presently happens in initial joint sessions and initial caucuses could have implications for the mediation process, the disputants' experience in mediation, and mediation outcomes.¹⁶⁰ For instance, the reduction in disputants' direct exchanges and substantive discussions might limit their ability

160. For the benefits that have been ascribed to various aspects of joint opening sessions, see *supra* Part I.A.

to gain insights about each other's perspectives and priorities, which could lead to fewer or less optimal settlements. Fewer face-to-face interactions could also reduce the chance for the parties to improve their communication and repair their relationships. The parties' decreased chance to tell their stories and to have their views acknowledged by the other party are likely to diminish their perception of the mediation as being procedurally just. In addition, mediators also would have less information on the disputants' communication dynamics and goals for the mediation, limiting the mediators' ability to effectively structure the rest of the mediation and assist the disputants in achieving their goals. Moreover, due to the lack of subsequent joint sessions in many cases, there is no opportunity later in the mediation to make up for what was not achieved during the initial session.

In a subsequent article, we will examine the relationships between what takes place during the initial mediation session and other aspects of the mediation process and outcomes to try to assess some possible effects of using different structures. In an additional article, we will explore how different factors, including case and mediator characteristics, region of the country, and whether the mediator had communications with the parties or their lawyers prior to the initial session, influence the use of initial joint sessions versus initial caucuses and what is discussed during those sessions. We hope these research findings encourage mediators to be mindful of the potential implications of the choices they make regarding the initial mediation session and spur researchers to expand on these findings by addressing related questions in greater depth using additional data sources, such as disputant surveys and observations of initial sessions.¹⁶¹

161. See SECTION OF DISP. RESOL., AM. BAR ASS'N, REPORT OF THE TASK FORCE ON RESEARCH ON MEDIATOR TECHNIQUES 59–60 (2017).

