COMPARING JOINT SESSION AND CAUCUS OUTCOMES: FACTORING IN SUBSTANTIVE DISCUSSIONS AND CASE CHARACTERISTICS

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ABSTRACT

Many of the traditional components of initial joint sessions occur less frequently today than they did historically and are more likely to take place during initial caucuses than during initial joint sessions. These changes in mediation practice lead to questions about whether initial joint sessions still provide the benefits historically attributed to them and whether initial caucuses now provide not only the benefits specifically ascribed to them but also the benefits typically associated with initial joint sessions. The present Article addresses these questions while taking into consideration differences in case and mediator characteristics as well as the extent of discussions in each setting. The findings are based on the survey responses of over 1,000 mediators in general civil and family cases across eight states.

There were differences between cases that began mediation in joint session versus in caucus in several intermediate outcomes associated with the initial session, especially in civil cases, but few differences in final outcomes between cases where the disputants spent some versus no time together during the entire mediation. However, for the most part the differences disappeared or were reduced after we statistically adjusted for the extent of substantive discussions among the mediator, the disputants, and the lawyers as well as several case and mediator characteristics. Thus, the outcome differences largely appear to be explained by differences in the extent of discussions that occur during the initial mediation session as well as differences in case characteristics rather than simply by whether the disputants are together or apart during the mediation. The findings do not support some common assertions about the relative benefits of initial joint sessions and initial caucuses

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or the benefits of the parties being together for some time during the mediation, but they do provide evidence for the informational and relational benefits of mediation more generally.

I. Introduction

Historically, the mediator in most cases met jointly with all parties to begin the first formal mediation session.[1] These joint opening sessions traditionally would start with the mediator's remarks and explanation of the mediation process, followed by each side's opening statements.[2] Then the mediator typically would ask questions and facilitate the disputants' face-to-face discussion of the dispute.[3] These traditional components of the initial joint session were thought to give the parties a better understanding of the process and how to participate in it constructively,[4] as well as a better understanding of the disputed issues and the disputants' interests and perspectives.[5] The mediator's setting the tone of joint problem-solving and facilitating the disputants' dialogue was thought to promote civil communication and possibly reduce some bad

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[1] *See, e.g.,* Sarah R. Cole et al., Mediation: Law, Policy, and Practice 34–37 (2015–2016 ed.); Jay Folberg, *The Shrinking Joint Session: Survey Results*, Disp. Resol. Mag., Winter 2016, at 12, 20; Douglas N. Frenkel & James H. Stark, The Practice of Mediation 141 (3d ed. 2018).

[2] *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); Cole et al., *supra* note 1, at 35–36; Frenkel & Stark, *supra* note 1, at 141–47; Dwight Golann & Jay Folberg, Mediation: The Roles of Advocate and Neutral 147–51 (1st ed. 2006); Christopher W. Moore, The Mediation Process: Practical Strategies for Resolving Conflict 154–64 (1986).

[3] *See, e.g.*, Cole et al., *supra* note 1, at 35–36; Golann & Folberg, *supra* note 2, at 148, 151; Moore, *supra* note 2, at 168–71.

[4] *See, e.g.*, Harold I. Abramson, Mediation Representation: Advocating as a Problem-Solver in Any Country or Culture 98 (2d ed. 2010); Folberg, *supra* note 1, at 19–20; Frenkel & Stark, *supra* note 1, at 142–47; Eric Galton & Tracy Allen, *Don't Torch the Joint Session*, Disp. Resol. Mag., Fall 2014, 25, 26–27; Golann & Folberg, *supra* note 2, at 147–51; Moore, *supra* note 2 at 154–62; Roselle L Wissler & Art Hinshaw, *Mediators' Views of What Can Be Achieved Better in Initial Joint Sessions and Initial Separate Caucuses*, 70 Wash. U. J. L. & Pol'y 235, 241–42, 245 (2023).

[5] Abramson, *supra* note 4, at 175–76, 249–50; Am. Bar Ass'n Section of Dispute Resolution, Task Force on Improving Mediation Quality 12 (2008) [hereinafter Mediation Quality]; Lynne S. Bassis, *Face-to-Face Sessions Fade Away: Why Is Mediation's Joint Session Disappearing?*, Disp. Resol. Mag., Fall 2014, at 30, 32; Blankenship, *supra* note 2, at 174; William J. Caplan, *Mediation—Joint Session or No Joint Session? That Is the Question*, Ass'n Bus. Trial Laws. Rep. Orange Cnty., Fall 2013, 3, 9–10; Frenkel & Stark, *supra* note 1, at 164–65**;** Gary Friedman & Jack Himmelstein, Challenging Conflict: Mediation Through Understanding 187–89 (2008); Galton & Allen, *supra* note 4, at 26–27; Eric Galton, Lela Love & Jerry Weiss, *The Decline of Dialogue: The Rise of Caucus-Only Mediation and the Disappearance of the Joint Session*, 39 Alts. High Litig. 1, 95, 99–100 (2021); Golann & Folberg, *supra* note 2, at 147–148; Wissler & Hinshaw, *supra* note 4, at 242–47.

feelings and reset the disputants' relationship.[6] These informational and communication benefits of initial joint sessions were thought to make the mediation more productive and to generate more and more creative resolutions.[7]

Many components of the traditional joint opening session, however, are less likely to occur during initial joint sessions today than they did historically, especially in civil cases.[8] Party opening statements, especially by the disputants themselves, are less likely in both civil and family cases.[9] A majority of disputants and lawyers in both civil and family cases still respond to statements or questions from the mediator during initial joint sessions,[10] but discussion of substantive matters is less likely than it would have been historically.[11] Direct exchanges of statements, questions, and answers between the disputants or between their lawyers during initial joint sessions occur in fewer than half of civil cases; in family cases, disputants interacted directly in almost three-fourths of cases and lawyers did so in just over half.[12] Substantive settlement proposals are exchanged between the disputants or between their lawyers in around one-fifth of civil cases; in family cases, disputants exchange settlement proposals in almost half of cases and lawyers exchange proposals in around one-fourth of cases.[13]

In addition to the reduced occurrence of many traditional components during initial joint sessions, the use of joint sessions to begin the first mediation session has diminished over the past decade. Studies report that between approximately one-fourth and half of mediations begin in caucus, where the mediator meets separately with each party in turn.[14] Among the benefits ascribed to initial

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[6] *See, e.g.*, ABRAMSON, *supra* note 4, at 176, 208, 249–50**;** Bassis, *supra* note 5, at 32; FRENKEL & STARK, *supra* note 1, at 165**;** MOORE, *supra* note 2, at 168–71; Kelly Browe Olson, *One Crucial Skill: Knowing How, When, and Why to Go into Caucus*, DISP. RESOL. MAG., Winter 2016, at 32; Wissler & Hinshaw, *supra* note 4, at 242–44, 247–48.

[7] *See, e.g.*, ABRAMSON, *supra* note 4, at 207**;** Bassis, *supra* note 5, at 32; FRENKEL & STARK, supra note 1, at 164–65; FRIEDMAN & HIMMELSTEIN, *supra* note 5, at 197; Galton et al., *supra* note 5, at 97, 99–100. For a discussion of additional benefits ascribed to initial joint sessions, *see* Roselle L. Wissler & Art Hinshaw, *Joint Session or Caucus? Factors Related to How the Initial Mediation Session Begins,* 37 OHIO ST. J. DISP. RESOL. 391, 396–406 (2022); Wissler & Hinshaw, *supra* note 4, at 242–49.

[8] Roselle L. Wissler & Art Hinshaw, *The Initial Mediation Session: An Empirical Examination*, 27 HARV. NEGOT. L. REV. 1, 3–4, 14–33, 35–41 (2021). The main exception to this pattern is that most mediators still explain the mediation process, confidentiality, and the ground rules during initial joint sessions in both civil and family cases. *Id.* at 15–16, 18, 35.

[9] *Id.* at 3, 25–30, 36.

[10] *Id.* at 25–26, 28–29, 36–37.

[11] *Id.* at 20–24, 38.

[12] *Id.* at 25–26, 28–29, 38–39.

[13] *Id.* at 25–30, 39.

[14] Folberg, *supra* note 1, at 12–15; Thomas J. Stipanowich, *Insights on Mediator Practices and Perceptions*, 22 DISP. RESOL. MAG. 6, 6–7 (2016); Wissler & Hinshaw, *supra* note 8, at 10–11, 14–15.

caucuses are that the parties can skip mediator and party opening statements and get straight to negotiating because everyone already knows about the mediation process and the details of the dispute as the result of pre-session communications, information exchanges, and discovery.[15] In addition, many maintain that the mediator can learn more in caucus about the disputants' real concerns, needs, and obstacles to settlement because the participants can speak more freely when the other side is not present.[16] Some say that there is no need for the parties to talk directly because fewer disputes today involve either broader issues than those in the claim or continuing disputant relationships that would benefit from improved communication.[17] Moreover, many argue that initial caucuses avoid the disputants' angry outbursts and lawyers' grandstanding that can occur when the parties are together, especially in cases involving extreme anger or hostility, and thus prevent escalation that can interfere with meaningful settlement discussions.[18]

Recent research finds that many of the traditional elements of initial joint sessions actually are *more* likely to occur during initial caucuses than during initial joint sessions.[19] In both civil and family cases, mediators are more likely to discuss most substantive matters during initial caucuses than during initial joint sessions.[20] Disputants

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[15] *See, e.g.*, Bassis, *supra* note 5, at 31; Blankenship, *supra* note 2, at 182; Caplan, *supra* note 5, at 3, 10; Folberg, *supra* note 1, at 19; Galton & Allen, *supra* note 4, at 25; GOLANN & FOLBERG, *supra* note 2, at 277–78; MEDIATION QUALITY, *supra* note 5, at 34; Wissler & Hinshaw, *supra* note 4, at 255.

[16] *See, e.g.*, Abramson, *supra* note 4, at 178; Bassis, *supra* note 5, at 31; Blankenship, *supra* note 2, at 177; David A. Hoffman, *Mediation and the Art of Shuttle Diplomacy*, 27 NEGOT. J. 263, 279, 281 (2011); Olson, *supra* note 6, at 32, 34; Gary L. Welton, Dean G. Pruitt and Neil B. McGillicuddy, *The Role of Caucusing in Community Mediation*, 32 J. CONFLICT RESOL. 181, 184–85 (1988); Wissler & Hinshaw, *supra* note 4, at 253–55.

[17] *See, e.g.*, COLE ET AL., *supra* note 1, at 74–79 (describing changes over time in the type of cases being mediated); Folberg, *supra* note 1, at 20; GOLANN & FOLBERG, *supra* note 2, at 112; Elizabeth Ellen Gordon, *Attorneys' Negotiation Strategies in Mediation: Business as Usual?*, 17 MEDIATION Q. 377, 384 (2000); Hoffman, *supra* note 16, at 263.

[18] *See, e.g.*, ABRAMSON, *supra* note 4, at 178; Bassis, *supra* note 5, at 31; Blankenship, *supra* note 2, at 172, 174, 177; Caplan, *supra* note 5, at 11; Folberg, *supra* note 1, at 17, 19; Galton & Allen, *supra* note 4, at 25–26; MEDIATION QUALITY, *supra* note 5, at 13, 34; Jill S. Tanz & Martha K. McClintock, *The Physiologic Stress Response During Mediation*, 32 OHIO ST. J. DISP. RESOL. 29, 37–38, 45–46. 56–57, 65 (2017); Welton et al., *supra* note 16, at 184–85; Gary L. Welton, Dean G. Pruitt, Neil B. McGillicuddy, Carol A. Ippolito and Jo M. Zubek, *Antecedents and Characteristics of Caucusing in Community Mediation*, 3 INT'L J. CONFLICT MGMT. 303, 305 (1992); Wissler & Hinshaw, *supra* note 4, at 250–52.

[19] Wissler & Hinshaw, *supra* note 8, 15–32, 35–41. One exception to this pattern is discussing process matters. In civil cases, mediators are more likely to explain the mediation process and confidentiality and discuss the ground rules during initial joint sessions than during initial caucuses, with no difference in the other process matters discussed. In family cases, there is no difference between initial joint sessions and initial caucuses in most process matters discussed. Another exception is that disputants and lawyers are more likely to make an opening statement and add to another's opening presentation during initial joint sessions than during initial caucuses in civil cases, though the pattern in family cases is mixed. *Id.* at 15–20, 25–30.

[20] *Id.* at 20–24.

in civil cases and lawyers in both civil and family cases are more likely to respond to statements or questions from the mediator during initial caucuses than during initial joint sessions.[21] In addition, disputants and lawyers in civil cases are more likely to respond to or ask questions of the other side indirectly through the mediator during initial caucuses than directly during initial joint sessions, though there are no differences in family cases.[22] Disputants and lawyers in both civil and family cases are more likely to discuss substantive settlement proposals with the mediator during initial caucuses than they are to do so directly with the other side during initial joint sessions.[23]

As the use of initial caucuses has increased, mediators have been discussing whether using a joint session or separate caucuses to begin the first formal mediation session provides greater benefits for the mediation process and its outcomes.[24] Given that the traditional components of initial joint sessions are less likely to occur during joint sessions today than they did historically, it is possible that initial joint sessions no longer provide the benefits historically ascribed to them. Moreover, because some of the traditional components of joint opening sessions are more likely to occur during initial separate caucuses than during initial joint sessions, caucuses might provide both the benefits they typically are thought to have as well as the benefits usually associated with initial joint sessions and, as a result, might provide more benefits than initial joint sessions.

To date, empirical research has not examined the relative benefits of using a joint session or caucuses during the initial mediation session. Several studies have examined the use of caucuses at some time during the mediation,[25] with mixed findings depending

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[21] *Id.* at 25–30. In family cases, there is no difference between initial joint sessions and initial caucuses in whether disputants respond to the mediator. *Id.* at 28–30.

[22] *Id.* at 26–30.

[23] *Id.*

[24] *See, e.g.*, Bassis, *supra* note 5, at 31; Galton & Allen, *supra* note 4, at 25; Folberg, *supra* note 1, at 14, 16 (reporting a divergence of mediators' views on the general impact of the diminishing use of initial joint sessions). *See generally* Wissler & Hinshaw, *supra* note 4 (reporting what mediators think are the specific benefits of each approach).

[25] *See* Douglas A. Henderson, *Mediation Success: An Empirical Analysis*, 11 Ohio St. J. Disp. Resol. 105, 126–27, 131–32, 144–45 (1996) (not specifying when during the mediation of construction disputes the caucus occurred); Maryland Administrative Office of the Courts, What Works in District Court Day of Trial Mediation: Effectiveness of Various Mediation Strategies on Short and Long-Term Outcomes 53 (2016) (using the percentage of mediation spent in caucus) [hereinafter Day of Trial]; Maryland Administrative Office of the Courts, What Works in Child Access Mediation: Effectiveness of Various Mediation Strategies on Short- and Long-Term Outcomes 39 (2016) (using the percentage of mediation spent in caucus) [hereinafter Child Access]; Welton et al., *supra* note 16, at 189–90 (comparing joint and caucus sessions that occurred in the same case throughout the mediation but noting that few cases had caucuses during the first third of the mediation); Welton et al., *supra* note 18, at 309–10 (comparing joint and caucus sessions that occurred in the same case during the latter two-thirds of the mediation, after the disputants had "told their stories" in joint session).

on the outcome measure. Disputants were more likely to ask hostile questions and make sarcastic remarks during joint sessions than during caucuses, but the findings regarding angry displays and swearing were mixed.[26] However, disputants tended to be more likely to criticize the other disputant's behavior and character during caucuses than during joint sessions.[27] Whether disputants provided more information or ideas during caucuses or during joint sessions varied depending on the study and the type of information.[28] None of the studies found a difference in settlement between cases that did versus did not use caucus[29] or a relationship between settlement and the percentage of mediation spent in caucus.[30] Studies also tended to find no difference in disputants' satisfaction with the process or the outcome, or found less satisfaction, when caucuses were used or when more time was spent in caucus.[31]

The present Article reports the findings of the first study to compare the benefits of initial joint sessions versus initial caucuses, while taking into consideration differences in the extent of discussions and case characteristics in each setting. The study also compares the outcomes of cases where the disputants are together for some versus none of the mediation, while taking into consideration differences in case characteristics in each group. Section II describes the survey procedure, the mediators who responded to the survey, and the mediated disputes on which the findings are based. Sections III and IV examine, for civil cases and family cases respectively, whether there were differences between initial joint sessions and initial caucuses in several intermediate outcomes: whether parties provided new information; disputants and lawyers made inflammatory remarks; and disputants' anger or hostility and lawyers' contentiousness decreased during the initial mediation session. Sections III and IV also examine the role that case characteristics and specific actions that took place during the initial session played in the joint versus caucus differences in intermediate outcomes. Section V examines, for both civil and family cases, if there were differences between

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[26] Welton et al., *supra* note 16, at 192; Welton et al., *supra* note 18, at 311.

[27] Welton et al., *supra* note 16, at 193; Welton et al., *supra* note 18, at 311.

[28] Welton et al., *supra* note 16, at 194 (finding that disputants were more likely to give new information and alternatives during caucuses than during joint sessions); Welton et al., *supra* note 18, at 311–13 (finding no differences between joint sessions and caucuses in whether disputants provided information about underlying values or feelings or ideas for solving the joint problem, but they provided more ideas for implementing the agreement during joint sessions and more information about the other party during caucuses).

[29] Henderson, *supra* note 25, at 126–27, 131–32, 144–45; Welton et al., *supra* note 18, at 308, 314.

[30] DAY OF TRIAL, *supra* note 25, at 53; CHILD ACCESS, *supra* note 25, at 60.

[31] DAY OF TRIAL, *supra* note 25, at 53; CHILD ACCESS, *supra* note 25, at 60 (but also finding more favorable views of the mediator when more time was spent in caucus); Welton et al., *supra* note 18, at 308, 314.

cases where the disputants were together for some of the mediation versus were never together during the entire mediation in whether they achieved relationship repair, settlement, and several other things. Section V also examines the role that case characteristics played in any differences in these outcomes. Section VI discusses the findings and their implications, and Section VII summarizes the key conclusions and provides recommendations for future research.

II. Survey Procedure and Respondents

The findings reported in the present Article are based on the responses of 1,065 civil and family mediators to an online survey.[32] The survey focused primarily on what took place before and during the initial mediation session, with a few questions about subsequent sessions and mediation outcomes. The responding civil and family mediators, respectively, had mediated an average of sixteen and thirteen years, and mediated an average of five and six cases per month.[33]

In the mediators' most recently concluded case,[34] the mediation began with both disputants together in joint session in a majority of both civil and family cases (71% and 64%, respectively) and in separate caucuses with the disputants apart in a minority of cases (26% and 33%, respectively).[35] After the initial mediation session, there was a later joint session with both disputants together in 30% of civil cases and 57% of family cases.[36] Taking into consideration both the initial and subsequent sessions, the disputants were together for some time during the mediation in approximately three-fourths

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[32] We selected mediators whose contact information was available online, primarily from the rosters of state and federal court mediation programs, the National Academy of Distinguished Neutrals, and the American Arbitration Association. We drew mediators from eight states across four regions of the United States: California, Utah, Michigan, Illinois, Florida, North Carolina, Maryland, and New York. Wissler & Hinshaw, *supra* note 8, at 10–12. For more details on the selection of mediators, the survey procedure, and the response rate, *see id.* The survey was conducted before the COVID-19 pandemic.

[33] *Id*. at 12. For additional mediator characteristics, *see id.* at 12–13.

[34] The mediators were asked to respond to the survey based on their most recently concluded mediation because focusing on a single recent case provides more accurate information. *See*, *e.g.*, Louise H. Kidder, Research Methods In Social Relations 156, 158–59 (4th ed. 1981).

[35] Wissler & Hinshaw, *supra* note 8, at 14–15. Three percent each of civil and family cases began mediation in some other way. *Id.* These cases are not included in the findings presented in this Article. As a result, some of the percentages reported in this Article differ slightly from those in other articles where the findings are based on the full set of cases from this survey.

[36] *Id.* at 33–34. These figures excluded cases where the disputants were together solely to finalize the agreement.

of cases (77% civil and 71% family) and were never together in approximately one-fourth of cases (23% civil and 29% family).[37]

The four substantive areas accounting for most of the civil cases the mediators discussed were tort, contract, employment, and property/real estate.[38] Over half of the family cases involved two or more types of divorce-related issues; roughly equal proportions of the remaining family cases involved only custody/visitation issues or only financial issues.[39] Both disputants had legal counsel in 89% of civil cases and 62% of family cases.[40]

We conducted tests of statistical significance to determine whether an observed difference between two or more groups (e.g., between initial joint sessions and initial caucuses) is a "true" difference (or whether an observed relationship between two measures is a "true" relationship) or merely reflects chance variation (or association).[41] Accordingly, any "differences" or "relationships" reported herein are statistically significant differences or relationships, while "no differences" or "no relationships" indicate there were no statistically significant differences or relationships.

III. Initial Joint Sessions and Initial Caucuses in Civil Cases

In this section, we look at whether the following things happened *during the initial mediation session* in civil cases: (1) the parties provided new information about the facts or issues, the disputants' interests or priorities, or new settlement options; (2)

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[37] *Id.* at 34–35. Whether the disputants were together later in the mediation was moderately related to whether they had been together during the initial session in civil cases and strongly related in family cases. *Id.* at 35. Specifically, disputants were more likely to be together later in the mediation if they began in joint session than if they began in caucus. *Id.*

[38] Wissler & Hinshaw, *supra* note 7, at 412.

[39] *Id.* at 412–13.

[40] *Id.* at 431. For additional dispute characteristics and disputant goals, *see id.* at 421–25.

[41] 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 229–31 (5th ed. 1984). The main test of differences used in this Article is the analysis of variance, which produces an F statistic. *See id.* at 310–11. Partial eta squared (η^2_p) indicates the size of effects for the F test, with .01 considered a small effect, .06 a moderate effect, and .14 a large effect. *See* Ruben Geert van den Berg, *Effect size: A Quick Guide*, SPSS Tutorials, https://www.spss-tutorials.com/effect-size [https://perma.cc/3UA6-Z3KG] (last visited Mar. 27, 2024). Pearson correlation (r) was used to examine relationships. *See* Runyon & Haber, *supra,* at 140–42. A Pearson r of .10 is considered a small relationship, .30 medium, and .50 a large relationship. *See* van den Berg, *supra*. The sign indicates the direction of the relationship, not its strength. *See* Runyon & Haber, *supra,* at 140–42. A cautionary note: finding a relationship between two items means that the items are associated with each other; it does not necessarily mean that one caused the other.

the disputants or lawyers made inflammatory remarks, engaged in grandstanding, or threatened violence; and (3) the disputants' level of anger or hostility and the lawyers' level of contentiousness increased, decreased, or stayed the same over the course of the initial session. For each of these measures, we first describe how often it occurred during the initial mediation session, regardless of whether the disputants were together or apart. Next, we report whether there were differences between initial joint sessions and initial caucuses on each measure.

Our prior research found many differences in what occurs during initial joint sessions and initial caucuses[42] and in some of the characteristics of cases in each setting,[43] any of which could potentially contribute to the differences we find between initial joint sessions and initial caucuses. Accordingly, for each measure of interest listed above where we find differences between initial joint sessions and initial caucuses, we examined whether those differences could be explained by joint versus caucus differences in process and substantive matters discussed; the disputants' and lawyers' actions and interactions; pre-session communications; case characteristics and disputant goals; and mediator practice and background characteristics.[44]

To assess whether the above factors played a role in the observed joint versus caucus differences in each measure of interest, we first examined if the factors were statistically related both to: (a) whether the mediation began in joint session versus in caucus; and to (b) the measure of interest.[45] We then examined whether these relationships would lead to a joint versus caucus difference in the same direction as observed.[46]

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[42] *See supra* notes 19–23 and accompanying text.

[43] *See* Wissler & Hinshaw, *supra* note 7, at 439–41.

[44] Because the goal is to see if other factors might explain the observed differences in the measures of interest to be able to statistically adjust for those factors, we do not need to examine the role of other factors when there is no difference between initial joint sessions and initial caucuses. In addition, we do not examine factors that are not logically relevant to a specific measure. *See* Morris Rosenberg, The Logic of Survey Analysis 38 (1968). Reducing the number of statistical analyses conducted by eliminating analyses that are not necessary helps reduce the risk of finding differences due to chance alone (known as a Type 1 error). *See* Runyon & Haber, *supra* note 41, at 234–35, 310.

[45] *See* Rosenberg, *supra* note 44, at 38–39 (stating that factors used as "controls" must be statistically related to both variables). "If the test factor is not associated statistically *both* with the independent *and* the dependent variables, then it cannot be responsible for the relationship." *Id*. at 39.

[46] This involves examining the *direction* of the relationships to see whether they would lead to the measure occurring more during initial joint sessions than during initial caucuses or vice versa. If the relationships would lead to a joint versus caucus difference in the direction *opposite* the observed difference, that factor could not have produced the observed difference.

Finally, for each of the remaining potentially confounding factors, we conducted an analysis of covariance[47] which determined whether the observed joint versus caucus difference remained (i.e., was still statistically significant) or disappeared (i.e., was no longer statistically significant) after we statistically adjusted for that factor. When an observed joint versus caucus difference disappeared after we adjusted for a factor, that told us that factor explains that difference.[48] In this Section, we report the analyses for each control factor that led the observed joint versus caucus difference to disappear or reduced the size of the difference.[49]

A. *New Information and Settlement Options*

During the initial mediation session, one or both parties[50] in civil cases provided new information about the facts or issues in 53% of cases and new information about the disputants' interests or priorities in 33% of cases. Parties suggested new settlement options in 22% of cases. Parties provided one or more of these three types of new information in 62% of civil cases, but they provided all three types in only 12% of cases.[51]

Parties in civil cases were more likely to provide new information about the facts or issues,[52] interests or priorities,[53] and settlement options[54] during initial caucuses than during initial joint sessions.

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47 "[C]ovariance analysis provides a means to statistically adjust the dependent variable for these preexisting differences" on other factors." ALBERT R. WILDT & OLLI T. AHTOLA, ANALYSIS OF COVARIANCE 16 (1978).

48 "If, when the influence of the extraneous test factor is held constant, one finds that the relationship [or difference] disappears, then it may be concluded that the relationship [or difference] is due to the extraneous variable." ROSENBERG, *supra* note 44, at 32–33. Conversely, if the relationship or difference remains statistically significant, then the relationship or difference is not due to that test factor, though it might play a partial role if the size of the difference is reduced. *Id.* at 37.

49 In Section I of the Appendix, *infra*, we report analyses for factors that were not related to how the mediation began or to the measures of interest; that had relationships which would have led to differences in the direction opposite the observed findings; and/or that did not lead the observed joint versus caucus differences to disappear or did not reduce the size of the differences.

50 The survey used the term "parties" and did not ask whether it was the disputants or the lawyers or both who provided the information.

51 In both initial joint sessions and initial caucuses in civil cases, parties were more likely to provide new information about the facts or issues than about interests or priorities and were least likely to provide new settlement options. Joint: Facts vs. interests: $t(433) = 9.07$, $p < .001$; facts vs. options: $t(443) = 12.61$, $p < .001$; interests vs. options: $t(443) = 4.36$, $p < .001$. Caucus: Facts vs. interests: $t(163) = 3.55$, $p < .001$; facts vs. options: $t(163) = 5.99$, $p < .001$; interests vs. options: $t(163) = 3.24$, $p < .001$.

52 $F(1,606) = 8.54$, $p < .01$, $\eta^2_p = .01$ (63% vs. 50%).

53 $F(1,606) = 26.08$, $p < .001$, $\eta^2_p = .04$ (49% vs. 27%).

54 $F(1,606) = 18.35$, $p < .001$, $\eta^2_p = .03$ (34% vs. 18%).

Parties also provided more of these three types of new information during initial caucuses than during initial joint sessions.[55] However, the small to medium differences[56] between initial joint sessions and initial caucuses in new information provided disappeared after we statistically adjusted for different aspects of the discussions that took place during the initial mediation session, as described below. Thus, the apparent joint versus caucus differences in new information provided are explained by more discussions taking place during initial caucuses than during initial joint sessions.[57]

i. New Information About Facts or Issues.

The joint versus caucus difference in whether parties provided new information about facts or issues disappeared after we statistically adjusted for each of the following: the number of substantive matters discussed;[58] whether the disputants responded to statements or questions from the mediator;[59] whether the disputants discussed substantive settlement proposals (directly with the other side during initial joint sessions and with the mediator during initial caucuses);[60] whether the lawyers discussed substantive settlement proposals;[61]

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[55] $F(1,606) = 29.66$, $p < .001$, $\eta^2_p = .05$. This measure ranged from no new information provided to all three types of information provided. Parties provided one or more types of new information in 76% of initial caucuses and 56% of initial joint sessions; they provided all three types of new information in 20% of initial caucuses and 10% of initial joint sessions.

[56] S*ee supra* note 41 (how to interpret the size of the differences based on η^2_p).

[57] *See supra* note 48.

[58] More substantive matters were discussed during initial caucuses than during initial joint sessions ($F(1,618) = 72.65$, $p < .001$, $\eta^2_p = .10$). Analyses involving the number of substantive matters discussed used a measure that ranged from no substantive matters discussed to all ten were discussed. The substantive matters discussed included the parties' interests and goals, their legal theories and related facts, and the obstacles to settlement. For the full list and joint versus caucus differences for each item, *see* Wissler & Hinshaw, *supra* note 8, at 20–22. In cases where more substantive matters were discussed, parties were more likely to provide new information about facts or issues ($r(602) = .23$, $p < .001$). After we adjusted for the number of substantive matters discussed, the joint versus caucus difference disappeared ($p = .23$).

[59] Disputants were more likely to respond to statements or questions from the mediator during initial caucuses than during initial joint sessions. *See* Wissler & Hinshaw, *supra* note 8, at 25–26. In cases where disputants responded to the mediator, parties were more likely to provide new information about facts or issues ($r(443) = .31$, $p < .001$). After we adjusted for whether disputants responded to the mediator, the joint versus caucus difference disappeared ($p = .15$).

[60] Disputants were more likely to discuss settlement proposals during initial caucuses than during initial joint sessions. *See* Wissler & Hinshaw, *supra* note 8, at 25–26. In cases where disputants discussed settlement proposals, parties were more likely to provide new information about facts or issues ($r(443) = .20$, $p < .001$). After we adjusted for whether disputants discussed settlement proposals, the joint versus caucus difference disappeared ($p = .16$).

[61] Lawyers were more likely to discuss settlement proposals during initial caucuses than during initial joint sessions. *See* Wissler & Hinshaw, *supra* note 8, at 26–27. In cases where lawyers discussed settlement proposals, parties were more likely to provide new information about facts or issues ($r(467) = .17$, $p < .001$). After we adjusted for whether lawyers discussed settlement proposals, the joint versus caucus difference disappeared ($p = .52$).

whether the lawyers responded to statements or questions from the mediator;[62] and whether the lawyers asked questions of or responded to questions or statements from the other side (directly during initial joint sessions and indirectly through the mediator during initial caucuses).[63]

Thus, each of the aspects of discussions in the preceding paragraph, which were more likely to occur during initial caucuses, explains parties being more likely to provide new information about facts or issues during initial caucuses than during initial joint sessions.[64] Several other aspects of discussions during the initial mediation session might have been expected to play a role in joint versus caucus differences in parties providing new information about facts or issues but did not, including whether disputants or lawyers made an opening statement or added to another's opening presentation and whether disputants asked questions of or responded to the other side.[65] Case, mediator, and pre-session characteristics, including whether the mediator held pre-session communications with the parties or had access to case information before the first session, also did not play a role in the joint versus caucus differences in parties providing new information about facts or issues.[66]

ii. New Information About Interests or Priorities.

The joint versus caucus difference in whether parties provided new information about the disputants' interests or priorities disappeared after we adjusted for whether the disputants discussed settlement proposals.[67] In addition, the size of the joint versus caucus difference was reduced[68] after we adjusted individually for each of

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[62] Lawyers were more likely to respond to statements or questions from the mediator during initial caucuses than during initial joint sessions. *See* Wissler & Hinshaw, *supra* note 8, at 26–27. In cases where lawyers responded to the mediator, parties were more likely to provide new information about facts or issues ($r(467) = .20$, $p < .001$). After we adjusted for whether lawyers responded to the mediator, the joint versus caucus difference disappeared ($p = .09$).

[63] Lawyers were more likely to ask questions of or respond to the other side during initial caucuses than during initial joint sessions. *See* Wissler & Hinshaw, *supra* note 8, at 26–27. In cases where lawyers responded to the other side, parties were more likely to provide new information about facts or issues ($r(467) = .26$, $p < .001$). After we adjusted for whether lawyers responded to the other side, the joint versus caucus difference disappeared ($p = .22$).

[64] *See supra* note 48.

[65] *See generally infra* Section I of Appendix.

[66] S*ee* Appendix, *infra* notes 215–29 and accompanying text.

[67] Disputants were more likely to discuss settlement proposals during initial caucuses than during initial joint sessions. *See* Wissler & Hinshaw, *supra* note 8, at 25–26. In cases where disputants discussed settlement proposals, parties were more likely to provide new information about interests or priorities ($r(443) = .33$, $p < .001$). After we adjusted for whether disputants discussed settlement proposals, the joint versus caucus difference disappeared ($p = .15$).

[68] This determination was based on comparing the size of the differences using η^2_p in these analyses to that in note 53, *supra*. *See supra* notes 41, 48.

the following: the number of substantive matters discussed;[69] whether the lawyers discussed settlement proposals;[70] whether the disputants responded to the mediator;[71] whether disputants asked questions of or responded to the other side;[72] and how angry or hostile disputants were at the start of the initial session.[73] When we adjusted for the immediately preceding set of factors as a group, the joint versus caucus difference in new information about interests or priorities disappeared.[74]

Thus, disputants being more likely to discuss settlement proposals during initial caucuses explains parties being more likely to provide new information about interests or priorities during initial caucuses than during initial joint sessions. In addition, the preceding set of factors combined, each of which was more likely in initial caucuses, explains parties being more likely to provide new information about interests or priorities during initial caucuses than during initial joint sessions. Several other aspects of discussions, as well as case and mediator characteristics, might have been expected to play a role in joint versus caucus differences in parties providing

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[69] More substantive matters were discussed during initial caucuses than during initial joint sessions. *See supra* note 58. In cases where more substantive matters were discussed, parties were more likely to provide new information about interests or priorities ($r(602) = .29, p < .001$). After we adjusted for the number of substantive matters discussed, the size of the joint versus caucus difference was reduced ($F(1,601) = 8.76, p < .01, \eta^2_p = .01$).

[70] Lawyers were more likely to discuss settlement proposals during initial caucuses than during initial joint sessions. *See* Wissler & Hinshaw, *supra* note 8, at 26–27. In cases where lawyers discussed settlement proposals, parties were more likely to provide new information about interests or priorities ($r(467) = .30, p < .001$). After we adjusted for whether lawyers discussed settlement proposals, the size of the joint versus caucus difference was reduced ($F(1, 466) = 6.04, p < .05, \eta^2_p = .01$).

[71] Disputants were more likely to respond to statements or questions from the mediator during initial caucuses than during initial joint sessions. *See* Wissler & Hinshaw, *supra* note 8, at 25–26. In cases where disputants responded to the mediator, parties were more likely to provide new information about interests or priorities ($r(443) = .19, p < .001$). After we adjusted for whether disputants responded to the mediator, the size of the joint versus caucus difference was reduced ($F(1, 442) = 10.71, p < .01, \eta^2_p = .02$).

[72] Disputants were more likely to ask questions of or respond to statements or questions from the other side during initial caucuses than during initial joint sessions. *See* Wissler & Hinshaw, *supra* note 8, at 25–26. In cases where disputants responded to the other side, parties were more likely to provide new information about interests or priorities ($r(443) = .29, p < .001$). After we adjusted for whether the disputants responded to the other side, the size of the joint versus caucus difference was reduced ($F(1,442) = 11.98, p < .001, \eta^2_p = .03$).

[73] Disputants were more angry or hostile at the start of initial caucuses than at the start of initial joint sessions ($F(1,606) = 10.36, p < .01, \eta^2_p = .02$). The mediators indicated what the disputants' level of anger or hostility had been at the beginning of the initial mediation session on a five-point scale that ranged from none to extremely high. In cases where disputants were more angry or hostile at the start of the first session, parties were more likely to provide new information about interests or priorities ($r(591) = .18, p < .001$). After we adjusted for the level of disputant anger or hostility at the start of the first session, the size of the joint versus caucus difference was reduced ($F(1,590) = 19.14, p < .001, \eta^2_p = .03$).

[74] $p = .40$.

new information about interests or priorities but did not. These included whether the lawyers responded to the mediator or the other side; whether the mediator explained confidentiality; whether the mediator held pre-session communications with the parties; whether the disputants had the goal of feeling heard; and whether the mediator had a non-legal background.[75]

iii. New Settlement Options.

The joint versus caucus difference in whether parties provided new settlement options disappeared after we adjusted for whether the disputants[76] or the lawyers[77] discussed substantive settlement proposals. In addition, the size of the joint versus caucus difference was reduced after we adjusted individually for each of the following: the number of substantive matters discussed;[78] whether the disputants responded to the mediator;[79] whether the disputants asked questions of or responded to the other side;[80] and whether the lawyers responded to the other side.[81] When we adjusted for

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[75] *See generally infra* Section I of Appendix.

[76] Disputants were more likely to discuss substantive settlement proposals during initial caucuses than during initial joint sessions. *See* Wissler & Hinshaw, *supra* note 8, at 25–26. In cases where disputants discussed settlement proposals, parties were more likely to provide new settlement options ($r(443) = .32$, $p < .001$). After we adjusted for whether disputants discussed settlement proposals, the joint versus caucus difference disappeared ($p = .38$).

[77] Lawyers were more likely to discuss substantive settlement proposals during initial caucuses than during initial joint sessions. *See* Wissler & Hinshaw, *supra* note 8, at 26–27. In cases where lawyers discussed settlement proposals, parties were more likely to provide new settlement options ($r(467) = .31$, $p < .001$). After we adjusted for whether lawyers discussed settlement proposals, the joint versus caucus difference disappeared ($p = .31$).

[78] More substantive matters were discussed during initial caucuses than during initial joint sessions. *See supra* note 58. In cases where more substantive matters were discussed, parties were more likely to provide new settlement options ($r(602) = .31$, $p < .001$). After we adjusted for the number of substantive matters discussed, the size of the joint versus caucus difference was reduced ($F(1,601) = 7.32$, $p < .01$, $\eta^2_p = .01$).

[79] Disputants were more likely to respond to the mediator during initial caucuses than during initial joint sessions. *See* Wissler & Hinshaw, *supra* note 8, at 25–26. In cases where disputants responded to the mediator, parties were more likely to provide new settlement options ($r(443) = .16$, $p < .001$). After we adjusted for whether disputants responded to the mediator, the size of the joint versus caucus difference was reduced ($F(1,442) = 7.67$, $p < .01$, $\eta^2_p = .02$).

[80] Disputants were more likely to ask questions of or respond to the other side during initial caucuses than during initial joint sessions. *See* Wissler & Hinshaw, *supra* note 8, at 25–26. In cases where disputants responded to the other side, parties were more likely to provide new settlement options ($r(443) = .24$, $p < .001$). After we adjusted for whether disputants responded to the other side, the size of the joint versus caucus difference was reduced ($F(1,442) = 8.48$, $p < .01$, $\eta^2_p = .02$).

[81] Lawyers were more likely to ask questions of or respond to the other side during initial caucuses than during initial joint sessions. *See* Wissler & Hinshaw, *supra* note 8, at 26–27. In cases where lawyers responded to the other side, parties were more likely to provide new settlement options ($r(467) = .22$, $p < .001$). After we adjusted for whether lawyers responded to the other side, the size of the joint versus caucus difference was reduced ($F(1,466) = 11.59$, $p < .001$, $\eta^2_p = .02$).

the immediately preceding set of factors as a group, the joint versus caucus difference in new settlement options disappeared.[82]

Thus, not surprisingly, disputants and lawyers being more likely to discuss settlement proposals during initial caucuses explains parties being more likely to provide new settlement options during initial caucuses than during initial joint sessions. In addition, the preceding set of factors combined, each of which was more likely in initial caucuses, also explain parties being more likely to provide new settlement options. Other factors might have been expected to play a role in joint versus caucus differences in parties providing new settlement options but did not, including whether the lawyers responded to the mediator and whether the mediator had explained confidentiality and had more years of experience.[83]

B. *Inflammatory Remarks, Grandstanding, or Violence*

During the initial mediation session in civil cases, *disputants* made inflammatory remarks or outbursts in 21% of cases. *Lawyers* made inflammatory remarks or outbursts in 10% of cases and engaged in grandstanding in 20%.[84] One or more participants threatened or engaged in acts of violence in fewer than one percent of cases.

Disputants were more likely to make inflammatory remarks during initial caucuses than during initial joint sessions.[85] Similarly, lawyers were more likely to make inflammatory remarks and engage in grandstanding during initial caucuses than during initial joint sessions.[86] However, the small differences between initial joint sessions and initial caucuses in inflammatory remarks and grandstanding disappeared after we statistically adjusted for the disputants' anger or hostility and the lawyers' contentiousness at the start of the initial session, plus several aspects of the discussions that occurred, as described below. Thus, the apparent joint versus caucus differences in inflammatory remarks and grandstanding are explained by the disputants' greater anger or hostility and the

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[82] $p = .20$.

[83] *See generally infra* Section I of Appendix.

[84] There was a strong relationship between lawyers making inflammatory remarks and grandstanding ($r(606) = .46$, $p < .001$). Lawyers engaged in one or both actions in 23% of cases. There was a moderate relationship between disputants making inflammatory remarks and lawyers making inflammatory remarks and/or grandstanding ($r(606) = .30$, $p < .001$).

[85] $F(1,606) = 5.12$, $p < .05$, $\eta^2_p = .01$ (27% caucus, 18% joint).

[86] Lawyers' inflammatory: $F(1,606) = 10.43$, $p < .01$, $\eta^2_p = .02$ (16% caucus, 8% joint). Grandstand: $F(1,606) = 7.30$, $p < .01$, $\eta^2_p = .01$ (27% caucus, 18% joint). Too few cases involved violence or threats of violence to be able to examine joint versus caucus differences.

lawyers' greater contentiousness at the start of the first session, as well as by more discussions taking place during initial caucuses than during initial joint sessions.

i. Disputants' Inflammatory Remarks

The joint versus caucus difference in disputants' inflammatory remarks disappeared after we adjusted for how angry or hostile disputants were at the start of the initial session.[87] The difference also disappeared after we adjusted for each of the following aspects of the discussions: the number of substantive matters discussed;[88] whether disputants responded to statements or questions from the mediator;[89] whether disputants asked questions of or responded to statements or questions from the other side;[90] whether disputants discussed substantive settlement proposals;[91] and whether lawyers discussed substantive settlement proposals.[92]

Thus, disputants' greater anger or hostility at the start of the initial session and each of the aspects of discussions listed in the preceding paragraph explain disputants being more likely to make inflammatory remarks during initial caucuses than during initial joint sessions. Several other case characteristics and aspects

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[87] Disputants were more angry or hostile at the start of initial caucuses than at the start of initial joint sessions. *See supra* note 73. In cases where disputants were more angry or hostile at the start of the first session, they were more likely to make inflammatory remarks ($r(591) = .40$, $p < .001$). After we adjusted for the disputants' initial anger or hostility, the joint versus caucus difference disappeared ($p = .28$).

[88] More substantive matters were discussed during initial caucuses than during initial joint sessions. *See supra* note 58. In cases where more substantive matters were discussed, disputants were more likely to make inflammatory remarks ($r(602) = .17$, $p < .001$). After we adjusted for the number of substantive matters discussed, the joint versus caucus difference disappeared ($p = .33$).

[89] Disputants were more likely to respond to the mediator during initial caucuses than during initial joint sessions. *See* Wissler & Hinshaw, *supra* note 8, at 25–26. In cases where disputants responded to the mediator, they were more likely to make inflammatory remarks ($r(443) = .19$, $p < .001$). After we adjusted for whether disputants responded to the mediator, the joint versus caucus difference disappeared ($p = .66$).

[90] Disputants were more likely to respond to the other side during initial caucuses than during initial joint sessions. *See* Wissler & Hinshaw, *supra* note 8, at 25–26. In cases where disputants responded to the other side, they were more likely to make inflammatory remarks ($r(443) = .24$, $p < .001$). After we adjusted for whether disputants responded to the other side, the joint versus caucus difference disappeared ($p = .44$).

[91] Disputants were more likely to discuss substantive settlement proposals during initial caucuses than during initial joint sessions. *See* Wissler & Hinshaw, *supra* note 8, at 25–26. In cases where disputants discussed settlement proposals, they were more likely to make inflammatory remarks ($r(443) = .18$, $p < .001$). After we adjusted for whether disputants discussed settlement proposals, the joint versus caucus difference disappeared ($p = .96$).

[92] Lawyers were more likely to discuss substantive settlement proposals during initial caucuses than during initial joint sessions. *See* Wissler & Hinshaw, *supra* note 8, at 26–27. In cases where lawyers discussed settlement proposals, disputants were more likely to make inflammatory remarks ($r(467) = .14$, $p < .01$). After we adjusted for whether lawyers discussed settlement proposals, the joint versus caucus difference disappeared ($p = .06$).

of discussions during the initial mediation session might have been expected to play a role in joint versus caucus differences in disputants' inflammatory remarks but did not, including whether the case involved unusually angry or emotional disputants or disputants who had a prior relationship; whether the ground rules were discussed; whether the disputants made an opening statement; or whether the mediator had more years of experience.[93]

ii. Lawyers' Inflammatory Remarks.

The joint versus caucus difference in lawyers' inflammatory remarks in civil cases disappeared after we adjusted for how contentious the lawyers were at the start of the initial session.[94] In addition, the size of the joint versus caucus difference in lawyers' inflammatory remarks was reduced after we adjusted for the number of substantive matters discussed[95] and whether lawyers discussed substantive settlement proposals.[96] When we adjusted for the immediately preceding two factors together, the joint versus caucus difference in lawyers' inflammatory remarks disappeared.[97]

Thus, lawyers being more contentious at the start of initial caucuses explains lawyers' being more likely to make inflammatory remarks during initial caucuses than during initial joint sessions. Taken together, discussing more substantive matters and lawyers being more likely to discuss settlement proposals in initial caucuses also explain lawyers being more likely to make inflammatory remarks. Other case characteristics and aspects of discussions during the initial session might have been expected to play a role in joint versus caucus differences in lawyers' inflammatory remarks but did not,

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[93] *See generally infra* Section I of Appendix.

[94] Lawyers were more contentious at the start of initial caucuses than at the start of initial joint sessions ($F(1,566) = 12.68$, $p < .001$, $\eta^2_p = .02$). The mediators indicated what the lawyers' level of contentiousness had been at the beginning of the initial mediation session on a five-point scale that ranged from none to extremely high. In cases where lawyers were more contentious at the start of the first session, they were more likely to make inflammatory remarks ($r(556) = .38$, $p < .001$). After we adjusted for the lawyers' contentiousness, the joint versus caucus difference disappeared ($p = .06$).

[95] More substantive matters were discussed during initial caucuses than during initial joint sessions. *See supra* note 58. In cases where more substantive matters were discussed, lawyers were more likely to make inflammatory remarks ($r(602) = .13$, $p < .01$). After we adjusted for the number of substantive matters discussed, the size of the joint versus caucus difference was reduced ($F(1,601) = 5.67$, $p < .05$, $\eta^2_p = .01$).

[96] Lawyers were more likely to discuss settlement proposals with the mediator in caucus than directly with the other side in joint session. *See* Wissler & Hinshaw, *supra* note 8, at 26–27. In cases where lawyers discussed settlement proposals, they were more likely to make inflammatory remarks ($r(467) = .13$, $p < .01$). After we adjusted for whether lawyers discussed settlement proposals, the size of the joint versus caucus difference was reduced ($F(1, 466) = 4.17$, $p < .05$, $\eta^2_p = .01$).

[97] $p = .08$.

including whether the mediator discussed the ground rules; whether the lawyers made an opening statement, added to another's opening presentation, or asked questions of or responded to questions from the other side; and whether the case involved unusually angry or emotional lawyers.[98]

iii. Lawyers' Grandstanding

The joint versus caucus difference in lawyers' grandstanding in civil cases disappeared after we adjusted for lawyers being more contentious at the start of the initial caucuses than initial joint sessions[99] and lawyers being more likely to discuss substantive settlement proposals during initial caucuses.[100] Thus, these two factors explain the joint versus caucus difference in lawyers' grandstanding. Other aspects of discussions during the initial session might have been expected to play a role in differences in lawyers' grandstanding but did not, including whether lawyers made an opening statement or responded to the other side.[101]

C. *Changes in Disputants' Anger or Hostility*[102]

Disputants' anger or hostility decreased from the beginning to the end of the initial mediation session in 31% of cases, increased in 6%, and did not change in 62% of cases. The disputants' anger or hostility was more likely to decrease and was less likely to not change during initial caucuses than during initial joint sessions, with no difference in whether the disputants' anger or hostility increased.[103]

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[98] *See generally infra* Section I of Appendix.

[99] Lawyers were more contentious at the start of initial caucuses than at the start of initial joint sessions. *See supra* note 94. In cases where lawyers were more contentious at the start of the first session, they were more likely to grandstand ($r(556) = .34$, $p < .001$). After we adjusted for lawyers' contentiousness, the joint versus caucus difference disappeared ($p = .16$).

[100] Lawyers were more likely to discuss settlement proposals during initial caucuses than during initial joint sessions. *See* Wissler & Hinshaw, *supra* note 8, at 26–27. In cases where lawyers discussed settlement proposals, they were more likely to grandstand ($r(467) = .18$, $p < .05$). After we adjusted for whether lawyers discussed settlement proposals, the joint versus caucus difference disappeared ($p = .37$).

[101] *See generally infra* Section I of Appendix.

[102] The mediators indicated what the disputants' level of anger or hostility had been at the beginning and at the end of the initial mediation session, rating each on a five-point scale that ranged from none to extremely high. We calculated the difference between these two ratings for each case and report the extent to which the disputants' anger or hostility increased, decreased, or did not change over the course of the initial mediation session.

[103] $F(1,595) = 10.42$, $p < .01$, $\eta^2_p = .02$. Decreased: 43% caucus, 27% joint; increased: 6% each; no change, 51% caucus, 66% joint.

However, the small difference between initial joint sessions and initial caucuses in the reduction in disputants' anger or hostility disappeared after we adjusted for how angry or hostile the disputants were at the start of the initial session.[104] In addition, the size of the joint versus caucus difference was reduced after we adjusted for each of the following: the number of substantive matters discussed;[105] whether disputants responded to questions or statements from the mediator or the other side;[106] and whether lawyers asked questions of or responded to the other side.[107] When we adjusted for the immediately preceding set of factors as a group, the joint versus caucus difference in the reduction in disputants' anger or hostility disappeared.[108]

Thus, disputants' greater anger or hostility at the start of the first session explains the greater reduction in their anger or hostility during initial caucuses than during initial joint sessions. The preceding set of factors combined, each of which was more likely in initial caucuses, also explains the greater reduction in disputants' anger or hostility during initial caucuses. Several other case characteristics and aspects of discussions during the initial session might have been expected to play a role in joint versus caucus differences in the reduction in disputants' anger or hostility but did not, including whether the disputants made an opening statement or discussed substantive settlement proposals and the mediator's years of experience.[109]

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104 Disputants were more angry or hostile at the start of initial caucuses than at the start of initial joint sessions. *See supra* note 73. The more angry or hostile disputants were at the start of the first session, the more likely their anger or hostility was to decrease during the initial session ($r(595) = -.48$, $p < .001$). After we statistically adjusted for the disputants' anger at the start of the initial session, the joint versus caucus difference disappeared ($p = .06$).

105 More substantive matters were discussed during initial caucuses than during initial joint sessions. *See supra* note 58. In cases where more substantive matters were discussed, the disputants' anger or hostility was more likely to decrease ($r(590) = -.16$, $p < .001$). After we adjusted for the number of substantive matters discussed, the size of the joint versus caucus difference was reduced ($F(1,589) = 4.35$, $p < .05$, $\eta^2_p = .01$).

106 Disputants were more likely to respond to statements or questions from the mediator and the other side during initial caucuses than during initial joint sessions. S*ee* Wissler & Hinshaw, *supra* note 8, at 25–26. In cases where these discussions occurred, the disputants' anger or hostility was more likely to decrease (mediator: $r(430) = -.11$, $p < .05$; other: $r(430) = -.14$, $p < .01$). After we adjusted separately for whether the disputants responded to the mediator or to the other side, the size of the joint versus caucus difference was reduced (mediator: $F(1,429) = 4.13$, $p < .05$, $\eta^2_p = .01$; other: $F(1,429) = 4.71$, $p < .05$, $\eta^2_p = .01$).

107 Lawyers in civil cases were more likely to ask questions of or respond to questions from the other side during initial caucuses than during initial joint sessions. *See* Wissler & Hinshaw, *supra* note 8, at 26–27. In cases where lawyers responded to the other side, disputants' anger or hostility was more likely to decrease during the initial session ($r(456) = -.15$, $p < .01$). After we adjusted for whether lawyers responded to the other side, the size of the joint versus caucus difference was reduced ($F(1,455) = 5.14$, $p < .05$, $\eta^2_p = .01$).

108 $p = .29$.

109 *See generally infra* Section I of Appendix.

D. *Changes in Lawyers' Contentiousness*[110]

Lawyers' contentiousness decreased from the beginning to the end of the initial mediation session in 17% of cases, did not change in 78%, and increased in only 5% of cases. There was no difference between initial joint sessions and initial caucuses in whether the lawyers' contentiousness changed over the course of the initial mediation session in civil cases.[111]

IV. Initial Joint Sessions and Initial Caucuses in Family Cases

In this section, we look at the same measures examined in civil cases in Section III, *supra*, but this time we do so for family cases. We report how often each occurred and whether there were differences between initial joint sessions and initial caucuses. For the two measures where we found joint versus caucus differences, we examined whether those differences could be explained by differences in case characteristics or the extent of discussions during initial joint sessions and initial caucuses.[112] In this Section, we report the analyses for each control factor that led the observed joint versus caucus differences in family cases to disappear or reduced the size of the differences.[113]

A. *New Information and Settlement Options Provided*

During the initial mediation session, one or both parties provided new information about the facts or issues in 66% of cases and about the disputants' interests or priorities in 60% of cases. Parties suggested new settlement options in 55% of cases. Parties provided

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[110] The mediators indicated what the lawyers' level of contentiousness had been at the beginning and at the end of the initial mediation session, rating each on a five-point scale that ranged from none to extremely high. We calculated the difference between these two ratings for each case and report the extent to which the lawyers' contentiousness increased, decreased, or did not change over the course of the initial mediation session.

[111] $p = .12$. Decreased: 22% caucus, 15% joint; increased: 6% caucus, 5% joint; no change: 72% caucus, 81% joint.

[112] *See supra* notes 44–48 (describing the factors and the analyses).

[113] In Section I of the Appendix, we report analyses for other factors that were not related to how the mediation began or to the measures of interest; that had relationships which would have led to differences in the direction opposite the observed findings; and/or that did not lead the observed joint versus caucus differences to disappear or did not reduce the size of the differences.

one or more of these three types of new information in 83% of cases, but they provided all three types in only 34% of cases.[114] There were no differences between initial caucuses and initial joint sessions in whether parties provided any of the types of new information[115] or in how many of the three types of new information[116] they provided.

B. *Inflammatory Remarks, Grandstanding, or Violence*

During the initial mediation session, disputants in family cases made inflammatory remarks or outbursts in 52% of cases. Lawyers made inflammatory remarks or outbursts in 8% of cases and engaged in grandstanding in 11% of cases.[117] One or more participants threatened or engaged in acts of violence in 1% of cases. There was no difference between initial caucuses and initial joint sessions in whether disputants made inflammatory remarks.[118] Lawyers were more likely to make inflammatory remarks during initial caucuses than during initial joint sessions, but there was no difference in whether they engaged in grandstanding.[119]

However, the small difference between initial joint sessions and initial caucuses in lawyers' inflammatory remarks disappeared after we adjusted for whether the lawyers were unusually angry or emotional.[120] Thus, lawyers being more likely to be unusually angry or

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[114] In initial joint sessions, there were no differences among the three types of new information parties provided (p's ranged from .11 to .32). In initial caucuses, parties were more likely to provide new information about the facts or issues than about interests or priorities and new settlement options, but there was no difference between providing information about interests and settlement options. Facts vs. interests: $t(99) = 3.28$, $p < .001$; facts vs. options: $t(99) = 3.45$, $p < .001$; interests vs. options: $p = .14$.

[115] Facts: $p = .22$ (71% caucus, 64% joint). Interests: $p = .41$ (57% caucus, 62% joint). Options: $p = .19$ (50% caucus, 58% joint).

[116] $p = .67$. Parties provided one or more types of new information in a majority of cases during both initial caucuses and initial joint sessions (82% and 83%, respectively); they provided all three types of new information in approximately one-third of cases (30% and 36%, respectively).

[117] There was a strong relationship between lawyers making inflammatory remarks and grandstanding ($r(277) = .68$, $p < .001$). Lawyers engaged in one or both actions in 12% of family cases. There was a small relationship between disputants making inflammatory remarks and lawyers making inflammatory remarks and/or grandstanding ($r(277) = .18$, $p < .001$).

[118] $p = .62$ (50% caucus, 53% joint).

[119] Lawyers inflammatory, $F(1,277) = 4.52$, $p < .05$, $\eta^2_p = .02$ (12% caucus, 5% joint). Lawyers grandstand: $p = .25$ (15% caucus, 14% joint). Too few cases involved violence or threats of violence to be able to examine joint versus caucus differences.

[120] Family cases that began in caucus were more likely to involve unusually angry or emotional lawyers than cases that began in joint session. *See* Wissler & Hinshaw, *supra* note 7, at 422. (This is a different measure than how contentious the lawyers were at the start of the first mediation session. *Cf. supra* note 94.) In cases involving unusually angry or emotional lawyers, lawyers were more likely to make inflammatory remarks ($r(277) = .17$, $p < .01$). After we adjusted for whether the case involved unusually angry or emotional lawyers, the joint versus caucus difference disappeared ($p = .10$).

emotional in cases that began in caucus than in joint session explains more inflammatory remarks by lawyers during initial caucuses than during initial joint sessions. Several other case characteristics and aspects of discussions might have been expected to play a role in the joint versus caucus difference in lawyers' inflammatory remarks but did not, including how contentious the lawyers were at the start of the initial session, whether the lawyers made an opening statement or discussed substantive settlement proposals, whether the mediator discussed the ground rules, and the mediators' years of experience.[121]

C. *Changes in Disputants' Anger or Hostility*[122]

Disputants' anger or hostility decreased from the beginning to the end of the initial mediation session in 53% of cases, increased in 7% of cases, and did not change in 40% of cases. There was no difference between initial joint sessions and initial caucuses in whether the disputants' anger or hostility changed.[123]

D. *Changes in Lawyers' Contentiousness*[124]

Lawyers' contentiousness decreased over the course of the initial mediation session in 25% of cases, did not change in 70% of cases, and increased in only 5% of cases. Lawyers' contentiousness was *less likely* to decrease and was more likely to not change during initial caucuses than during initial joint sessions, with no difference in whether the lawyers' contentiousness increased.[125]

However, the difference between initial joint sessions and initial caucuses in the reduction in lawyers' contentiousness disappeared after we adjusted for whether lawyers discussed settlement proposals during the initial session.[126] Thus, the apparent joint versus

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121 *See generally infra* Section I of Appendix.

122 *See supra* note 102 for an explanation of this measure.

123 $p = .34$. Decreased: 48% caucus, 55% joint; increased: 7% each; no change: 45% caucus, 38% joint.

124 *See supra* note 110 for an explanation of this measure.

125 $F(1,139) = 4.86$, $p < .05$, $\eta^2_p = .03$. Decreased: 18% caucus, 34% joint; increased: 6% caucus, 3% joint; no change: 76% caucus, 62% joint.

126 Lawyers were more likely to discuss settlement proposals during initial caucuses than during initial joint sessions. *See* Wissler & Hinshaw, *supra* note 8, at 29–30. Lawyers' contentiousness was less likely to decrease in cases where they discussed settlement proposals ($r(105) = .20$, $p < .05$). After we adjusted for whether the lawyers discussed settlement proposals, the joint versus caucus difference disappeared ($p = .44$).

caucus difference in the reduction in the lawyers' contentiousness is explained by lawyers being more likely to discuss settlement proposals during initial caucuses than during initial joint sessions. Other aspects of the discussions and case characteristics might have been expected to play a role in joint versus caucus differences in the reduction in lawyers' contentiousness but did not, including whether lawyers made an opening statement, whether lawyers responded to the other side, and the mediators' years of experience.[127]

V. Some Versus No Joint Time During the Entire Mediation in Civil and Family Cases

In this section, we look at whether the following outcomes resulted from *the entire mediation* (i.e., the initial session and subsequent sessions) in both civil and family cases: (1) relationship repair, (2) settlement, and (3) other things that could facilitate future resolution in cases that did not reach a full settlement. For each measure, we first report how often it occurred, regardless of whether the disputants had been together during the mediation. Then we examine if there were differences in each measure depending on whether the disputants were together for some time during the mediation or were never together.

Unlike in the preceding sections, we could not examine whether the discussions and interactions might explain the observed differences on the above measures between cases where the disputants were together for some versus none of the mediation. Because the survey focused primarily on what took place before and during the initial mediation session, we do not have information about the actions that occurred during later mediation sessions. Relying solely on actions associated with the initial session to draw conclusions about the entire mediation would provide an incomplete and potentially misleading picture. However, we were able to examine whether cases where the disputants were together for some of the mediation differed from cases where the disputants were never together on case characteristics and disputant goals, pre-session communications, and mediator practice and background characteristics that were potentially relevant to relationship repair.[128] In this Section, we report the analyses for each control factor that

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127 *See generally infra* Section I of Appendix.

128 We could not examine whether case characteristics explained the differences in settlement or in addressing broader issues in family cases because there were insufficient cases in some of the categories to permit analysis.

led the observed difference in relationship repair between cases where the disputants were together for some time versus were never together to disappear or reduced the size of the difference.[129]

A. *Repair of the Disputants' Relationship*

Mediators reported that disputants achieved at least some relationship repair in 40% of civil cases and 62% of family cases in which the disputants had a prior business or personal relationship.[130] In both civil and family cases, disputants were more likely to achieve at least some relationship repair when they had been together for some time during the mediation than when they were never together.[131] This difference was small in civil cases and moderate in family cases.

The size of the joint versus caucus difference in relationship repair was reduced after we adjusted for the following characteristics. In both civil and family cases, the size of the difference was reduced after we adjusted for whether disputants had the goal of talking directly with the other side.[132] In family cases, the size of the difference also was reduced after we adjusted separately for whether disputants had the goal of preserving or restoring their relationship[133] or the goal of ending their relationship amicably[134] and how long

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[129] In Section II of the Appendix, *infra*, we report analyses for other characteristics that were not related to whether the disputants had been together during the mediation or to relationship repair or, when used as a control factor, did not lead the observed difference between some versus no joint time to disappear or did not reduce the size of the difference.

[130] Mediators answered this question only in cases where: (a) the disputants had a business or personal relationship before the dispute arose; and (b) the mediator knew if there had been any relationship repair as a result of the mediation.

[131] Civil: $F(1,328) = 6.28$, $p < .05$, $\eta^2_p = .02$ (some joint, 44%, no joint, 27%). Family: $F(1,223) = 17.14$, $p < .001$, $\eta^2_p = .07$ (some joint, 70%, no joint, 41%).

[132] Disputants were more likely to have the goal of talking directly to the other party in cases where they were together for some of the mediation than in cases where they were never together (civil: $F(1,602) = 22.22$, $p < .001$, $\eta^2_p = .04$; family: $F(1,296) = 46.28$, $p < .001$, $\eta^2_p = .14$). In cases where disputants had this goal, relationship repair was more likely (civil: $r(319) = .16$, $p < .01$; family: $r(214) = .24$, $p < .001$). After we adjusted for whether disputants had the goal of talking directly to the other party, the size of the difference in relationship repair was reduced (civil: $F(1,317) = 4.65$, $p < .05$, $\eta^2_p = .01$; family: $F(1,213) = 6.63$, $p < .05$, $\eta^2_p = .03$).

[133] In family cases, disputants were more likely to have the goal of preserving or restoring their relationship in cases where they were together for some of the mediation than in cases where they were never together ($F(1,296) = 10.74$, $p < .01$, $\eta^2_p = .04$). In cases where disputants had this goal, relationship repair was more likely ($r(214) = .28$, $p < .001$). After we adjusted for this goal, the size of the difference in relationship repair was reduced ($F(1,213) = 8.38$, $p < .01$, $\eta^2_p = .04$).

[134] In family cases, disputants were more likely to have the goal of ending their relationship amicably in cases where they were together for some of the mediation than in cases where they were never together ($F(1,296) = 14.45$, $p < .001$, $\eta^2_p = .05$). In cases where disputants had this goal, relationship repair was more likely ($r(214) = .18$, $p < .01$). After we adjusted for this goal, the size of the difference in relationship repair was reduced ($F(1,213) = 10.42$, $p < .01$, $\eta^2_p = .05$).

the mediator had been mediating.[135] In family cases, the difference in relationship repair disappeared when we adjusted for these three disputant goals and the mediator's experience combined.[136]

Thus, disputants in civil cases being more likely to have the goal of talking directly to the other side, and disputants in family cases being more likely to have the goals of talking directly, preserving or restoring their relationship, or ending it amicably, as well as mediators having more years of experience, help explain the greater likelihood of at least some relationship repair when disputants had spent some versus no time together during mediation. Several other disputant goals as well as case, pre-session, and mediator characteristics might have been expected to play a role in the difference in relationship repair but did not, including how angry or hostile the disputants were at the start of the initial session and the mediator's background.[137]

B. *Settlement*[138]

Parties reached a full settlement in 62% of civil cases, with a partial settlement in 3% and a provisional settlement in 10% of cases. There was no settlement of any kind in 25% of civil cases. There was no difference in settlement between cases where the disputants were together for some time during the mediation versus where they were never together.[139]

In family cases, parties reached a full settlement in 62% of cases, with a partial settlement in 12% and a provisional settlement in 14% of cases. There was no settlement of any kind in 12% of family cases. Full settlement and no settlement were more likely when the disputants were never together than when they were together for some time during the mediation. However, reaching a partial settlement or a provisional settlement was more likely when the

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135 In family cases, the more years the mediator had served as a mediator, the more likely that disputants were together for some time during the mediation ($r(293) = .17$, $p < .01$). The more years mediating, the more likely there was some relationship repair ($r(219) = .14$, $p < .05$). After we adjusted for the number of years the mediator had been mediating, the size of the difference in relationship repair was reduced ($F(1,285) = 8.67$, $p < .01$, $\eta^2_p = .03$).

136 $p = .08$.

137 *See generally infra* Section II of Appendix.

138 The measure of settlement had four categories which were defined as follows in the survey: *Full settlement*: all issues were settled and a written agreement, memorandum of understanding, or agreed-upon term sheet was signed. *Partial settlement*: some issues were settled and a written agreement, memorandum of understanding, or agreed-upon term sheet was signed. *Provisional settlement*: an agreement was pending additional actions, a signature or consent, or additional information. *No settlement*: no settlement was reached.

139 $p = .19$. Full: some joint, 62%, no joint, 64%. Partial: some joint, 2%, no joint, 4%. Provisional: some joint, 11%, no joint, 6%. No settlement: some joint, 25%, no joint, 26%.

disputants were together for some time during the mediation than when they were never together.[140]

C. *Other Things Accomplished When a Full Settlement Was Not Reached*

In civil cases that did not reach a full settlement, the parties identified additional information or people needed to facilitate resolution in 43% of cases; addressed broader issues than those in the claim in 28% of cases; and planned, structured, or set a time limit for discovery in 10% of cases. There was no difference between cases where the disputants were together for some time during the mediation versus were never together in any of these measures.[141] In civil cases that did not reach any form of agreement (i.e., did not reach a full, partial, or provisional settlement), 70% made some progress toward resolution. There was no difference between cases where the disputants were together for some time during the mediation versus were never together in whether they made progress toward resolution.[142]

In family cases that did not reach a full settlement, the parties identified additional information or people needed to facilitate resolution in 37% of cases; addressed broader issues than those in the claim in 28% of cases; and planned, structured, or set a time limit for discovery in 10% of cases. Broader issues than those in the claim were more likely to be addressed when the disputants were together for some time during the mediation than when they were never together.[143] However, there were no differences between cases where the disputants were together for some time during the mediation versus were never together in whether they structured discovery or identified additional information or people needed to facilitate resolution.[144] In family cases that did not reach any form of agreement, 70% made some progress toward resolution. There was no difference between cases where the disputants were together

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[140] $\chi^2(3) = 10.03$, $p < .05$, $V = .18$. Full: some joint, 59%, no joint, 68%. Partial: some joint, 15%, no joint, 7%. Provisional: some joint, 16%, no joint, 8%. No settlement: some joint, 9%, no joint, 17%.

[141] Information: $p = .10$ (some joint, 40%, no joint, 53%). Broader: $p = .09$ (some joint, 31%, no joint, 18%). Discovery: $p = .60$ (some joint, 10%, no joint, 12%).

[142] $p = .91$ (some joint, 70%, no joint, 69%).

[143] $F(1,106) = 5.67$, $p < .05$, $\eta^2_p = .05$ (some joint, 34%, no joint, 11%).

[144] Information: $p = .24$ (some joint, 34%, no joint, 46%). Discovery: $p = .18$ (some joint, 12%, no joint, 4%).

for some time during the mediation versus were never together in whether they made progress toward resolution.[145]

VI. Discussion and Implications of the Findings

We found differences between cases that began mediation in joint session versus in caucus in several intermediate outcomes associated with the initial session, especially in civil cases, but few differences in final outcomes between cases where the disputants spent some time versus no time together during the entire mediation. However, for the most part the differences disappeared or were reduced after we statistically adjusted for the extent of substantive discussions among the mediator, the disputants, and the lawyers, as well as for several case and mediator characteristics. Thus, these differences in outcomes largely appear to be explained by differences in the extent of discussions and case characteristics rather than simply by whether the disputants are together or apart during the mediation. We begin this section by discussing the implications of the findings regarding the intermediate outcome measures associated with the initial mediation session, first for civil cases and then for family cases.[146] Next, we discuss the implications of the findings regarding the outcomes of the entire mediation. We conclude this section with implications for the mediation process more generally.

Parties in civil cases were more likely to provide several types of new information during initial caucuses than during initial joint sessions. However, after we statistically adjusted for most aspects of the discussions that took place during the initial session, differences between initial joint sessions and initial caucuses in whether parties provided new information about facts or issues disappeared. Differences in whether parties provided new information about interests or priorities and new settlement options disappeared after we adjusted for whether disputants and lawyers discussed settlement proposals, with additional aspects of the discussions playing a smaller role in these differences.

These findings suggest the following for civil cases. First, differences in the extent of substantive discussions and back-and-forth among the mediation participants play a role in the differences between initial joint sessions and initial caucuses in whether new information is provided. Second, the somewhat different patterns of

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[145] $p = .24$ (some joint, 61%, no joint, 80%).

[146] This overview of the findings does not reflect their many nuances. For the detailed findings, *see supra* Sections III to V.

findings among the types of new information provided in civil cases might suggest that parties are somewhat more forthcoming about more sensitive information, such as their interests and settlement options, during initial caucuses than during initial joint sessions,[147] while being willing to discuss facts and issues in both settings.[148] Third, finding that parties did *not* provide more new information during initial joint sessions than during initial caucuses, even after adjusting for the extent of discussions that took place, suggests that the face-to-face nature of communications during joint sessions does not, by itself, generate new information.[149]

Disputants' and lawyers' inflammatory remarks and lawyers' grandstanding were *more* common during initial caucuses than during initial joint sessions in civil cases, the opposite of what we would have expected from prior discussions and studies.[150] Not surprisingly, differences in inflammatory remarks and grandstanding disappeared after we adjusted, respectively, for the disputants' anger and the lawyers' contentiousness at the start of the initial session. Differences in disputants' inflammatory remarks also disappeared after we adjusted for the number of substantive matters discussed, disputants' involvement in discussions, and whether disputants and lawyers discussed settlement proposals. Differences in lawyers' inflammatory remarks and grandstanding also tended to disappear after we adjusted for whether they discussed settlement proposals and more substantive matters.

Thus, greater disputant anger and lawyer contentiousness at the start of the first session in civil cases, not surprisingly, result in more inflammatory remarks and grandstanding. In addition, more disputant participation in discussions appears to be accompanied by disputants making inflammatory remarks. With the exception of discussing settlement proposals, however, the same pattern is not seen for lawyers. That disputants would be less restrained verbally than lawyers during mediation discussions would be consistent with their respective personal versus professional roles in the dispute as well as differences in their level of experience engaging in such discussions. Importantly, after adjusting for the above factors,

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147 *Cf. supra* note 16 and accompanying text.

148 *See supra* note 28 and accompanying text (reporting the varied findings of prior studies).

149 *Cf. supra* note 5 and accompanying text. *But see* Welton et al., *supra* note 18, at 311–13 (finding that parties provided more ideas for implementing the agreement in joint sessions than in caucus).

150 *See supra* notes 18, 26 and accompanying text. The difference between the present findings and those of prior studies could be the result of any of a number of differences between the studies, including differences in the nature of the disputes and the corresponding differences in the disputants' relationships and whether they had counsel; the measures used; and when, how, and by whom the disputants' behavior was reported. *See* Welton et al., *supra* note 16, at 187–91; Welton et al., *supra* note 18, at 307–09.

inflammatory remarks were *not* more common during initial joint sessions than during initial caucuses. This suggests that the presence of the other disputant and opposing counsel does not, by itself, stimulate inflammatory remarks and grandstanding.[151]

In civil cases, disputants' anger or hostility was more likely to decrease during initial caucuses than during initial joint sessions. This difference disappeared, however, after taking into consideration that disputants were more angry or hostile at the start of initial caucuses than at the start of initial joint sessions, with several aspects of the discussions playing a smaller role in the differences. There was no joint versus caucus difference in whether lawyers' contentiousness decreased. Thus, neither the absence of the other side during initial caucuses nor their presence during initial joint sessions, per se, seem to produce a greater reduction in disputants' anger or hostility.[152] Interestingly, disputant involvement in substantive discussions with the mediator and the other side appear to contribute to a reduction in their anger rather than to escalation.

Turning to family cases, there were no differences between initial joint sessions and initial caucuses in whether parties provided any of the three types of new information, disputants made inflammatory remarks, lawyers engaged in grandstanding, or the disputants' anger decreased. Although lawyers in family cases were more likely to make inflammatory remarks during initial caucuses than during initial joint sessions, that difference disappeared after we adjusted for whether the case involved unusually angry or emotional lawyers. Lawyers' contentiousness was less likely to decrease during initial caucuses than during initial joint sessions; that difference disappeared after we adjusted for whether lawyers discussed settlement proposals.

Thus, the findings suggest that, in family cases, the mere presence of the other side during initial joint sessions does not prevent parties from providing new information or stimulate disputants or lawyers to make inflammatory remarks or grandstand. Conversely, the absence of the other side during initial caucuses does not appear to encourage more disclosure or fewer inflammatory remarks and less grandstanding. Disputants' anger or hostility and lawyers' contentiousness were not reduced to a greater degree by speaking directly with the other side during initial joint sessions, nor by avoiding direct contact in initial caucuses.

We can only speculate about what might explain the different pattern of findings in civil cases than in family cases. Perhaps in family cases there were fewer differences in outcomes because there were fewer differences in disputants' discussions and interactions with the

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151 *Cf. supra* note 18 and accompanying text.

152 *See supra* notes 6, 18 and accompanying text.

mediator and the other side.[153] In addition, the greater familiarity and intimacy of the disputants' relationship in family cases might lead the disputants to feel less constrained during initial joint sessions than disputants in civil cases. This could result in smaller differences between initial joint sessions and initial caucuses in parties providing new information and making inflammatory remarks in family cases than in civil cases. Disputants in family cases also were less likely to have lawyers, especially during initial joint sessions, than disputants in civil cases.[154] To the extent that lawyers limit the information disputants provide and counsel them against outbursts during initial joint sessions,[155] fewer lawyers in family cases could lead to fewer joint versus caucus differences in family cases than in civil cases. The different findings in civil and family cases demonstrate the importance of studying more than one category of cases to see whether the findings are limited to a specific case category or apply to mediation more broadly.

Looking beyond the initial session to outcomes from the entire mediation, we found few differences between cases where the disputants spent some time together during mediation and cases where they were never together. In civil cases, there was no difference in settlement depending on whether the disputants were together during the mediation.[156] In family cases, both full settlement and no settlement were less likely in cases when the disputants were together for some time during the mediation than when they were never together, but partial or provisional settlements were more likely when the disputants were together for some of the mediation. In family cases that did not reach a full settlement, broader issues than those in the claim were more likely to be addressed when the disputants were together for some of the mediation than none of the mediation; there was no difference in civil cases. In both civil and family cases, whether the disputants had or had not been together during mediation did not lead to differences in whether discovery was structured, parties identified additional information or people needed to resolve the dispute, or parties made progress toward settlement.

In both civil and family cases, at least some repair of the disputants' relationship was more likely when the disputants spent some time together during mediation than when they were never

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153 *See* Wissler & Hinshaw, *supra* note 8 at 25–29.

154 *See* Wissler & Hinshaw, *supra* note 7, at 431–32.

155 *See e.g.*, Harold I. Abramson, Mediation Representation: Advocating in a Problem Solving Process 229–237 (2004); Raymond G. Chadwick, Success at Mediation: How to Define and Accomplish It 27–31 (2015).

156 *See supra* note 29 and accompanying text (reporting that other studies did not find differences in settlement).

together. In civil cases, the size of that difference was reduced after we adjusted for disputants' goals, but a small difference remained. In family cases, the size of the difference also was reduced after we adjusted for disputants' goals and the mediators' years of experience; when these characteristics were combined, the difference disappeared. Thus, relationship repair might be somewhat more likely when disputants spend some time together during the mediation. But because we were unable to take into consideration other differences in what took place during mediations where the parties were together or apart, we cannot rule out that some other factor we were not able to examine played a role in differences in relationship repair.[157]

Finally, looking at the initial mediation session more broadly, the findings do not support several common assertions about what does or should take place. First, mediators reported that parties provided some new information during the initial session in a majority of civil cases and in most family cases. This suggests that the mediator and presumably the parties do not already know "everything" about the case when it reaches mediation, as some assert.[158] Further, finding that parties were *not* less likely to provide new information during the initial mediation session in cases where the mediator had held pre-session communications or had received case information before the initial session is contrary to assertions that these pre-session practices preclude the need to discuss issues or priorities during the initial mediation session.[159] In addition, during the mediation, parties identified information or people needed to facilitate resolution in almost half of civil cases and over one-third of family cases that did not reach a full settlement, again suggesting that parties do not have everything they need to resolve the dispute when they enter mediation. Thus, it appears that the initial mediation session provides the opportunity to learn new information about the dispute that could facilitate an agreement or make it better. However, finding that parties provided all three types of new information in only approximately ten percent of civil cases and one-third of family cases suggests that parties do not take full advantage of this opportunity, especially with regard to discussing their interests or priorities and settlement options.

Second, with the exception of disputants' inflammatory remarks in family cases, which occurred about half the time, disputants and lawyers made inflammatory remarks or engaged in grandstanding

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[157] *See supra* note 128 and accompanying text. This also applies to settlement and the other outcomes from the entire mediation.

[158] *See supra* note 15 and accompanying text.

[159] *See id.*

during initial joint sessions in fewer than one-fourth of cases. Thus, these actions occur less frequently when the parties are together than one would expect based on how often concerns about these actions are listed as reasons to avoid initial joint sessions.[160] Third, disputants' anger or hostility and lawyers' contentiousness increased during initial joint sessions in only three to six percent of both civil and family cases—less than expected given the alarms raised about escalation during joint sessions and the preceding findings regarding inflammatory remarks and grandstanding.[161] Moreover, disputants' anger or hostility and lawyers' contentiousness were three to eight times more likely to *decrease* than to increase. Taken together, these findings suggest that increased animosity and escalation during initial joint sessions as a result of direct interactions and inflammatory remarks might be less of a problem than is often suggested.

Fourth, mediators reported that the disputants achieved at least some relationship repair in 40% of civil cases[162] and 62% of family cases where the disputants had a prior business or personal relationship. Even in civil cases, over half of disputants had a prior relationship and almost one-fifth expected to have future dealings.[163] Thus, more civil cases seem to involve relationships than is often asserted,[164] and mediation can help some disputants repair them.

Finally, 62% of both civil and family cases reached a full settlement, with an additional 13% of civil cases and 26% of family cases reaching a partial or provisional settlement.[165] In a majority of cases that did not reach any type of settlement, mediators reported the parties made some progress toward resolution. In cases that did not reach a full settlement (and in an unknown number of cases that did reach a full settlement), broader issues than those in the claim were addressed in over one-fourth of both civil and family cases.

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160 *See supra* note 18 and accompanying text.

161 *See id.*

162 *Cf.* Dwight Golann, *Is Legal Mediation a Process of Repair - or Separation? An Empirical Study, and its Implications*, 7 HARV. NEGOT. L. REV. 301, 311, 317 (2002) (reporting relationship repair in seventeen percent of "typical civil legal disputes" where the parties had a relationship prior to the dispute). The lower rate of repair in Golann's study than in civil cases in the present study likely reflects his narrower definition of relationship repair: "if parties left mediation with a plan to relate in the future, their relationship was deemed repaired; if not, it was considered a non-repair regardless of whether the parties regained their prior level of good feelings." *Id.* at 313.

163 *See* Wissler & Hinshaw, *supra* note 7, at 422 n.120.

164 *See supra* note 17 and accompanying text.

165 These findings are in line with the settlement rate in other studies. *See, e.g.*, Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y & L. 129, 138 (2002) (finding the range of settlement in most studies of custody mediation to be between fifty percent and eighty-five percent); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. DISP. RESOL. 641, 692 (2002) (finding the range of settlement in most studies of civil mediation to be between one-third and two-thirds of cases).

Broader issues than those in the claim might play a role in more cases than some have suggested,[166] even if in only a minority.

VII. Conclusion

The present Article reports the findings of the first study to compare the benefits of initial joint sessions and initial caucuses while taking into consideration differences in the extent of discussions and case characteristics in each setting. We find that whether the disputants are together or apart during the initial session or the entire mediation, *per se*, does not appear to account for differences in the outcomes. Instead, the outcome differences are largely explained by differences in the extent of discussions that occur during the initial mediation session[167] as well as by differences in the characteristics of cases in each setting. The findings do not support some common assertions about the relative benefits of disputants being together or apart during mediation, but they do provide evidence for the informational and relational benefits of mediation more generally.

The present study provides a foundation for future empirical research to expand our understanding of the dynamics of initial joint sessions and initial caucuses. After seeing the important role that discussions during initial mediation sessions appear to play in intermediate outcomes, in a subsequent article we examine directly the relationships between several aspects of the discussions and the outcomes, separately for initial joint sessions and initial caucuses, to gain a better understanding of the processes operating in initial mediation sessions.[168] Future surveys should use measures with more gradations to see if those measures might reveal more or larger differences. Such measures could involve ratings of how much information parties provide or how frequent or intense their inflammatory remarks are, rather than simply whether they occur.

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166 *See supra* note 17 and accompanying text. *See also*, *e.g.*, Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negot. L. Rev. 7, 18–23 (1996); Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 Geo. Mason L. Rev. 863, 884–87 (2008).

167 Professor McEwen reached an analogous conclusion when he observed that "mediation can be a useful tool" for achieving certain goals, but "only if parties and lawyers employ it to those ends," and whether mediation achieves those goals "may say less about mediation per se and more about the use to which mediation has been put . . . " *See* Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 Ohio St. J. Disp. Resol. 1, 24, 27 (1998).

168 *See generally*, Roselle L. Wissler & Art Hinshaw, *Participant Actions and Intermediate Outcomes in Initial Joint Sessions and Initial Caucuses*, J. Disp. Resol. (forthcoming 2025).

Measures of additional aspects of discussions during the initial session could also be included, such as mediator actions or styles and whether mediators address emotional or relational issues in addition to substantive ones.[169] Importantly, future surveys need to include the perspectives of disputants and lawyers to see if they have different views than mediators of what takes place during initial sessions or of the outcomes.[170] Future surveys should include additional outcome measures, such as disputants' perceptions of the fairness of the process and the agreement, because they are important measures of effectiveness[171] and because prior studies have found that some aspects of mediation discussions have different effects on disputants' perceptions than on settlement.[172]

Appendix

Factors That Did Not Play a Role in Differences in the Measures of Interest

Section I of this Appendix focuses on factors that did not play a role in the differences between initial joint sessions and initial caucuses in intermediate outcomes. These factors (a) were not related to whether the mediation began in joint session or in caucus; (b) were not related to those measures of interest that differed between initial joint sessions and initial caucuses;[173] (c) had relationships which would have led to differences in the direction opposite those observed; or (d), when used as a control factor, did

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169 *See generally*, ABA Sec. Disp. Resol., Report of the Task Force on Research on Mediator Techniques, 12, 50 (2017) [hereinafter Task Force].

170 For example, in response to other questions in the present survey, mediators said that initial caucuses better enabled *them* to learn about the dispute than did initial joint sessions, but that initial joint sessions better enabled *the parties* to learn about the dispute than did initial caucuses. *See* Wissler & Hinshaw, *supra* note 4, at 258. We do not know whether disputants or lawyers would see joint sessions and caucuses the same way as mediators do. Disputants might also have very different views than mediators of whether relationship repair occurred.

171 *See, e.g.*, Wissler, *supra* note 165, at 658–59.

172 *See* Task Force, *supra* note 169, at 4, 52–56.

173 *See supra* note 44. In civil cases, there were joint versus caucus differences in whether parties provided three types of new information, disputants and lawyers made inflammatory remarks and lawyers engaged in grandstanding, and the disputants' anger decreased, but there was no difference in whether the lawyers' contentiousness decreased. *See supra* Section III. In family cases, there were joint versus caucus differences in whether the lawyers made inflammatory remarks and whether their contentiousness decreased, but not in whether parties provided new information, disputants made inflammatory remarks, lawyers engaged in grandstanding, or the disputants' anger decreased. *See supra* Section IV.

not reduce the size of the observed joint versus caucus difference or lead it to disappear.[174]

Section II focuses on factors that did not play a role in outcome differences between cases where disputants spent some time together versus no time together during the entire mediation (i.e., the initial session and subsequent sessions). These factors (a) were not related to whether the disputants spent some time together versus no time together during the mediation; (b) were not related to relationship repair;[175] or (c), when used as a control factor, did not reduce the size of the observed difference or lead it to disappear.[176]

I. Factors that Did Not Play a Role in Joint versus Caucus Differences

A. *Process Matters Discussed*

Most process matters discussed during the initial mediation session did not differ between initial joint sessions and initial caucuses in either civil[177] or family[178] cases. The few process matters discussed that did differ between initial joint sessions and initial caucuses were not related to any of the measures of interest in either civil[179] or family[180] cases.

B. *More Substantive Matters Discussed*

In civil and family cases, more substantive matters were discussed during initial caucuses than during initial joint sessions.[181] In civil cases, discussing more substantive matters was related to lawyers'

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174 *See supra* note 48 and accompanying text.

175 *See supra* note 128 and accompanying text (explaining why we could not examine the discussion factors or outcome measures other than relationship repair).

176 None of the factors examined had relationships that would have led to differences in relationship repair in the direction opposite those observed.

177 Wissler & Hinshaw, *supra* note 8, at 15–18 (finding the only differences were that mediators were more likely to explain the process, confidentiality, and ground rules during initial joint sessions than during initial caucuses).

178 *Id.* at 18–20 (finding the only difference was that mediators were less likely to assess the disputants' capacity to mediate during initial joint sessions than during initial caucuses).

179 Explain the process: p's ranged from .15 to .99. Discuss ground rules: p's ranged from .15 to .89. Explain confidentiality: p's ranged from .20 to .78.

180 Assess disputants' capacity to mediate: p's of .32 and .62.

181 Civil: *see supra* note 58. Family: $F(1,284) = 23.74$, $p < .001$, $\eta^2_p = .08$.

grandstanding,[182] but the difference in grandstanding remained after we adjusted for the number of substantive matters discussed.[183] In family cases, the number of substantive matters discussed was not related to the measures of interest.[184]

C. *Disputants' Interactions with the Mediator and the Other Side*

In civil cases, disputants were less likely to make an opening statement or add details or context to another's opening presentation during initial caucuses than during initial joint sessions.[185] These actions were related to several measures of interest,[186] but the relationships would have led to joint versus caucus differences in the direction opposite those observed. Disputants were more likely to ask questions of or respond to statements or questions from the other side during initial caucuses than during initial joint sessions.[187] Responding to the other side was related to parties providing new information about facts or issues,[188] but the difference in new information remained after we adjusted for whether disputants responded to the other side.[189] Disputants were more likely to discuss settlement proposals with the other side during initial caucuses than during initial joint sessions,[190] but that action was not related to disputants' anger decreasing.[191]

In family cases, there was no joint versus caucus difference in disputants making an opening statement.[192] Disputants were marginally less likely to add to another's opening presentation during initial caucuses than during initial joint sessions,[193] but that action was not related to the measures of interest.[194] In addition, there was no difference between initial joint sessions and initial

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182 $r(602) = .13, p < .01$.

183 $F(1,601) = 3.88, p < .05, \eta^2_p = .01$.

184 p's of .27 and .48.

185 *See* Wissler & Hinshaw, *supra* note 8, at 25–26.

186 Opening: facts: $r(443) = .11, p < .05$; disputants' inflammatory: $r(443) = .26, p < .001$; remaining measures: p's ranged from .19 to .99. Add: facts: $r(443) = .15$, $p < .01$; disputants' inflammatory: $r(443) = .21$, $p < .001$; lawyers' inflammatory: $r(443) = .14$, $p < .01$; lawyers' grandstanding: $r(443) = .10, p < .05$; remaining measures: p's ranged from .13 to .62.

187 *See* Wissler & Hinshaw, *supra* note 8, at 25–26.

188 $r(443) = .24, p < .001$.

189 $F(1,442) = 5.73, p < .05, \eta^2_p = .01$.

190 *See* Wissler & Hinshaw, *supra* note 8, at 25–26.

191 $p = .35$.

192 *See* Wissler & Hinshaw, *supra* note 8, at 28–29.

193 *Id.*

194 p's of .21 and .57.

caucuses in whether disputants responded to the mediator or asked questions of or responded to the other side.[195] Disputants were more likely to discuss settlement proposals during initial caucuses than during initial joint sessions,[196] but that action was not related to the measures of interest.[197]

D. *Lawyers' Interactions with the Mediator and the Other Side*

In civil cases, lawyers were less likely to make an opening statement or add details or context to another's opening presentation during initial caucuses than during initial joint sessions.[198] Each of these actions was related only to parties providing new information about facts or issues; those relationships would have led to joint versus caucus differences in the direction opposite those observed.[199] Lawyers were more likely to respond to statements or questions from the mediator during initial caucuses than during initial joint sessions.[200] Lawyers' responding to the mediator was related to most intermediate outcome measures;[201] the differences remained after we adjusted for whether lawyers responded to the mediator.[202] Lawyers were more likely to ask questions of or respond to statements or questions from the other side during initial caucuses than during initial joint sessions.[203] Responding to the other side was related to several outcome measures;[204] the differences remained after we adjusted for whether lawyers responded to the other side.[205] Lawyers were more likely to discuss settlement proposals during

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195 *See* Wissler & Hinshaw, *supra* note 8, at 28–29.

196 *Id.*

197 p's of .30 and .52.

198 *See* Wissler & Hinshaw, *supra* note 8, at 26–27.

199 Lawyers' opening: facts: $r(467) = .11$, $p < .05$; remaining measures: p's ranged from .18 to .99. Lawyers' add: facts: $r(467) = .09$, $p < .05$; remaining measures: p's ranged from .07 to .96.

200 *See* Wissler & Hinshaw, *supra* note 8, at 26–27.

201 Interests: $r(467) = .20$, $p < .001$; options: $r(467) = .14$, $p < .01$; disputants' inflammatory: $r(467) = .09$, $p < .05$; grandstanding: $r(467) = .14$, $p < .01$; lawyers' inflammatory: $p = .08$; disputants' anger decreased: $p = .54$.

202 Interests: $F(1,466) = 24.03$, $p < .001$, $\eta^2_p = .05$; options: $F(1,466) = 15.30$, $p < .001$, $\eta^2_p = .03$; disputants' inflammatory: $F(1,466) = 8.72$, $p < .01$, $\eta^2_p = .02$; grandstanding: $F(1,466) = 5.29$ $p < .05$, $\eta^2_p = .01$.

203 *See* Wissler & Hinshaw, *supra* note 8, at 26–27.

204 Interests: $r(467) = .30$, $p < .001$; disputants' inflammatory: $r(467) = .15$, $p < .01$; lawyers' inflammatory: $r(467) = .09$, $p < .05$; grandstanding: $r(467) = .17$, $p < .001$.

205 Interests: $F(1,466) = 18.25$, $p < .001$, $\eta^2_p = .04$; disputants' inflammatory: $F(1,466) = 6.76$, $p < .05$, $\eta^2_p = .01$; lawyers' inflammatory: $F(1,466) = 7.91$, $p < .01$, $\eta^2_p = .02$; grandstanding: $F(1,466) = 4.18$, $p < .05$, $\eta^2_p = .01$.

initial caucuses than during initial joint sessions,[206] but that action was not related to disputants' anger decreasing.[207]

In family cases, lawyers were marginally more likely to make an opening statement during initial caucuses than during initial joint sessions,[208] but that action was not related to the measures of interest.[209] There was no difference between initial joint sessions and initial caucuses in whether lawyers added to another's opening presentation or asked questions of or responded to the other side.[210] Lawyers were more likely to respond to the mediator during initial caucuses than during initial joint sessions,[211] but that action was not related to the measures of interest.[212] Lawyers were more likely to discuss settlement proposals during initial caucuses than during initial joint sessions.[213] That action was not related to lawyers making inflammatory remarks; it was related to lawyers contentiousness decreasing but would have led to a difference in the direction opposite that observed.[214]

E. *Case Characteristics and Disputant Goals*

Most individual case characteristics and disputant goals were not related to whether mediation began in joint session versus in caucus in civil or family cases.[215] Several case characteristics[216] and disputant

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206 *See* Wissler & Hinshaw, *supra* note 8, at 26–27.

207 $p = .08$.

208 *See* Wissler & Hinshaw, *supra* note 8, at 29–30.

209 p's of .37 and .48.

210 *See* Wissler & Hinshaw, *supra* note 8, at 29–30.

211 *Id.*

212 p's of .38 and .76.

213 *See* Wissler & Hinshaw, *supra* note 8, at 29.

214 Lawyers' inflammatory, $p = .61$; contentiousness: $r(105) = .20$, $p < .05$.

215 In both civil and family cases, these included whether the case involved coercion or unusually angry or emotional parties; the disputants had a prior relationship or expected to have future dealings; the case involved non-monetary issues or broader issues than those in the claim; and the disputants had prior mediation experience. *See* Wissler & Hinshaw, *supra* note 7, at 422–25. In addition, in civil cases there was no joint versus caucus difference in whether the case involved unusually angry or emotional lawyers, or the disputants had the goal of feeling heard. *See id.* In family cases, there was no joint versus caucus difference in disputants' anger or hostility ($p = .32$) or lawyers' contentiousness ($p = .36$) at the start of the first session. Whether disputants had counsel was related to how the mediation began in both civil and family cases (*see id.*, at 431–32), but there were insufficient cases where one or both disputants did not have counsel to examine differences.

216 In civil cases, disputants were more angry or hostile at the start of initial caucuses than at the start of initial joint sessions. *See supra* note 73. Disputants' anger or hostility at the start of the first mediation session was not related to whether they provided new information about facts or issues or new settlement options (both p's = .08). Family cases that began in joint session were less likely to involve unusually angry or emotional lawyers. *See* Wissler & Hinshaw, *supra* note 7, at 422. This characteristic was not related to whether the lawyers' contentiousness decreased ($p = .90$).

goals for the mediation[217] did differ between cases that began in joint session versus in caucus, but they were not related to the measures of interest or they had relationships that would produce differences in the direction opposite those observed. In civil cases, lawyers were more contentious at the start of initial caucuses than at the start of initial joint sessions.[218] Greater lawyer contentiousness at the start of the first session was related to parties being more likely to provide new information about interests or priorities and to disputants being more likely to make inflammatory remarks, but not to parties providing new information about facts or issues or new settlement options.[219] After we adjusted for how contentious the lawyers were at the start of the first session, the joint versus caucus differences remained.[220]

F. *Pre-Session Communications*

Most aspects of pre-session communications did not differ between cases that began in joint session versus in caucus in either civil or family cases.[221] Those aspects that did differ were not related to the measures of interest in civil[222] or family cases.[223]

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[217] Disputants in civil cases that began in caucus were less likely than those in cases that began in joint session to have the goal of wanting to talk directly to the other party (Wissler & Hinshaw, *supra* note 7, at 423). Having this goal was related to: parties being more likely to provide new information (facts: $r(576) = .09$, $p < .05$; interests: $r(576) = .12$, $p < .01$; options: $r(576) = .09$, $p < .05$); disputants being more likely to make inflammatory remarks ($r(576) = .12$, $p < .01$); and disputants' anger or hostility being more likely to decrease ($r(565) = -.10$, $p < .05$). Each of these relationships, however, would produce joint versus caucus differences in the direction opposite those observed. Disputants in civil cases that began in caucus were less likely than those in cases that began in joint session to want to resolve broader issues than those in the claim. *See id.* at 423–24. Having this goal was related to parties providing new information about interests or priorities ($r(576) = .13$, $p < .01$) and settlement options ($r(576) = .11$, $p < .01$); disputants being more likely to make inflammatory remarks ($r(576) = .17$, $p < .001$); and disputants' anger or hostility being more likely to decrease ($r(565) = -.15$, $p < .001$). Each of these relationships, however, would produce joint versus caucus differences in the direction opposite those observed. Wanting to resolve broader issues was not related to parties providing new information about facts or issues ($p = .63$).

[218] *See supra* note 94.

[219] Interests: $r(556) = .12$, $p < .01$; inflammatory: $r(556) = .23$, $p < .001$; facts: $p = .91$; options: $p = .28$.

[220] Interests: $F(1,555) = 25.57$, $p < .001$, $\eta^2_p = .04$; inflammatory: $F(1,555) = 4.84$, $p < .05$, $\eta^2_p = .01$.

[221] In both civil and family cases, these included whether pre-session communications were held and whether most process and substantive matters were discussed. In civil cases, there was no joint versus caucus difference in whether disputants were present during pre-session communications. In family cases, there was no difference in whether mediators had access to case information. *See* Wissler & Hinshaw, *supra* note 7, at 415–20.

[222] Mediators in civil cases were more likely to have pre-session access to case information in cases that began in caucus than in joint session. *See* Wissler & Hinshaw, *supra* note 7, at 415–16. But that factor was not related to any of the measures of interest (p's ranged from .054 to .86).

[223] In family cases, disputants' presence during pre-session communications was related to how the mediation began (*see id.* at 417), but that was not related to the measures of interest (p's of .21 and .26).

G. *Mediator Characteristics*

Several mediator characteristics were not related to how the mediation began.[224] In both civil and family cases, the mediation was more likely to begin in caucus if the mediator had only a law background than if he or she had only a non-legal background or both backgrounds.[225] The mediator's background was not related to some measures of interest in civil cases and to neither of the measures in family cases.[226] For the measures to which the mediators' background was related in civil cases,[227] the relationships would produce differences in the direction opposite those observed. In family cases, mediation was more likely to begin in joint session when the mediator had been mediating longer,[228] but years mediating was not related to the measures of interest.[229]

II. Factors that Did Not Play a Role in Differences in Relationship Repair Between Cases with Some Versus No Joint Time During Mediation

A. *Case Characteristics and Disputant Goals*

Several case characteristics and disputant goals were not related to whether the disputants spent time together during mediation[230]

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224 In both civil and family cases, these included the number of cases mediated per month and whether the mediator regularly served in an evaluative or decision-making role. *See* Wissler & Hinshaw, *supra* note 7, at 430–31. In civil cases, there was no relationship between years mediating and how the mediation began. *See id.*

225 Civil: $F(1,607) = 8.89$, $p < .01$, $\eta^2_p = .01$; family: $F(1,293) = 3.95$, $p < .05$, $\eta^2_p = .01$.

226 Civil: p's ranged from .29 to .96; family: p's of .66 and .97.

227 In civil cases, parties were less likely to provide new information about facts ($r(591) = -.13$, $p < .01$) and about settlement options ($r(591) = -.09$, $p < .05$), and disputants were less likely to make inflammatory remarks ($r(591) = -.08$, $p < .05$) in cases where the mediators had only a law background than where they had only a non-legal background or both backgrounds.

228 Wissler & Hinshaw, *supra* note 7, at 431.

229 p's of .16 and .71.

230 In both civil and family cases, these included whether: the disputants expected to have a future relationship (civil, $p = .13$; family, $p = .12$); the disputants were unusually angry or emotional (civil, $p = .10$; family, $p = .81$); or the disputants had the goal of feeling heard (civil, $p = .18$; family, $p = .06$). In civil cases, the disputants' goals of preserving or restoring their relationship ($p = .29$) or ending their relationship amicably ($p = .32$) were not related to whether the disputants spent some versus no time together during mediation. In family cases, the disputants' anger or hostility at the start of the first session ($p = .26$) and the goal of resolving broader issues than those in the claim ($p = .13$) were not related to whether the disputants spent some versus no time together during mediation.

or to relationship repair[231] in civil and family cases. In civil cases, disputants were more likely to have the goal of resolving broader issues than those in the claim in cases where they were together for some of the mediation than in cases where they were never together.[232] Having this goal was related to relationship repair;[233] the difference remained after we adjusted for whether disputants had this goal.[234]

B. *Pre-Session Communications*

None of the aspects of pre-session communications were related to whether the disputants spent some time together during mediation or to relationship repair in civil or family cases.[235]

C. *Mediator Characteristics*

The mediator's background was not related to whether the disputants spent some time together during mediation or to relationship repair in civil and family cases.[236] The mediator's years mediating was not related to whether disputants spent some time together during mediation in civil cases.[237]

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231 In civil cases, the disputants' anger or hostility at the start of the initial mediation session was related to whether the disputants spent some time together during mediation ($F(1,602) = 6.60$, $p < .05$, $\eta^2_p = .01$), but it was not related to relationship repair ($p = .10$).

232 $F(1,602) = 4.89$, $p < .05$, $\eta^2_p = .01$.

233 $r(319) = .16$, $p < .01$.

234 $F(1,317) = 6.30$, $p < .05$, $\eta^2_p = .02$.

235 In civil cases, whether there were pre-session communications ($p = .65$) or the disputants were present ($p = .61$) was not related to whether the disputants spent some time together during mediation. Having case information was related to disputants spending some time together in mediation ($F(1,632) = 14.70$, $p < .001$, $\eta^2_p = .02$), but it was not related to relationship repair ($p = .07$). In family cases, the disputants' presence ($p = .56$) and having case information ($p = .76$) were not related to whether the disputants spent some time together during mediation. Having had pre-session communications was related to whether the disputants spent some time together during mediation ($F(1,303) = 4.44$, $p < .05$, $\eta^2_p = .01$), but it was not related to relationship repair ($p = .22$).

236 In civil cases, whether the mediator had only a legal background or had a non-legal background instead of or in addition to a legal background was related to whether disputants spent some time together during mediation ($F(1,604) = 7.26$, $p < .01$, $\eta^2_p = .01$), but it was not related to relationship repair ($p = .06$). In family cases, the mediator's background was not related to whether the disputants spent some time together during mediation ($p = .17$).

237 $p = .76$.