

What the Early Stages of Mediation Look Like Today

By Roselle L. Wissler and Art Hinshaw

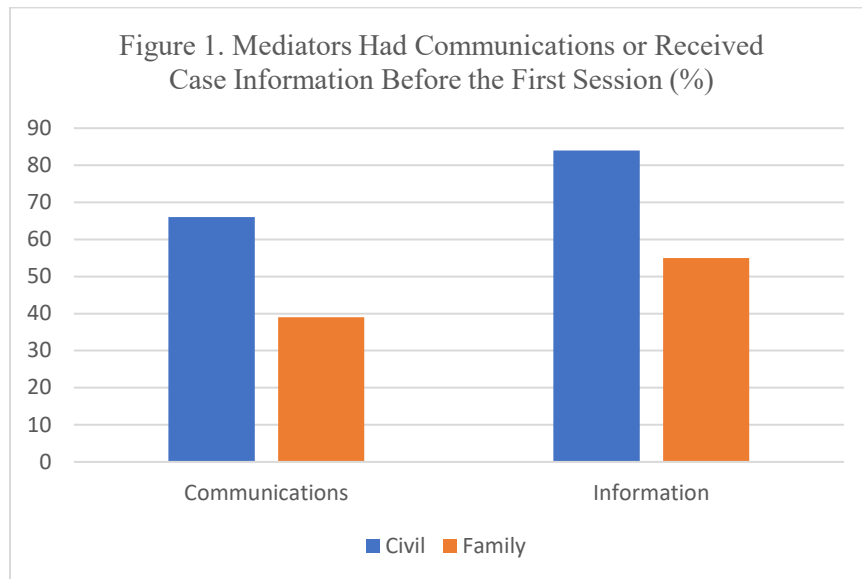
Over the past decade or two, several mediator surveys suggest that changes have been taking place in the early stages of mediation. Some mediators say they are more likely to have communications with the parties and/or their lawyers and to receive mediation memos or other documents before the first formal mediation session. Joint opening sessions may no longer be the standard way most initial mediation sessions begin, replaced increasingly by separate caucuses. Even when the first session begins with all parties together, mediators report less discussion among the participants than would have occurred historically.¹

To date, we know little about how frequently pre-session communications, document submissions, and joint opening sessions take place in settings and case types beyond the private mediation of large civil and commercial cases. We know even less about what actually occurs during pre-session communications and during initial mediation sessions, be they joint sessions or separate caucuses.

To get a sense of the current use of pre-session communications and initial joint sessions or initial separate caucuses, as well as what takes place during them, we conducted an online survey of civil and family mediators in state and federal court mediation programs and private mediation settings. The findings summarized here are based on the responses of 1,065 mediators across eight states and four regions of the United States concerning the case they mediated most recently.²

Pre-Session Communications

In civil cases, mediators communicated about nonadministrative matters with the parties and/or their lawyers before the first mediation session in two-thirds of cases. Mediators had access to one or more types of case documents in 84 percent of civil cases, most frequently party mediation statements. By contrast, mediators in family cases had pre-session communications in only 39 percent of cases (see Figure 1). Mediators received some case information in 55 percent of family cases, most commonly the pleadings and/or motions.



In civil and family cases, mediators had pre-session communications both prior to and on the same day as the first session in about half of cases; only prior to the day of the first session in a little over one-third of cases; and only on the same day as the first session in relatively few cases. In few civil cases but in almost one-third of family cases, there either was no feasible opportunity to have pre-session communications or they were prohibited.

Disputants' Participation

During communications held prior to the day of the first mediation session, one or both disputants were present, in person or by phone, in approximately one-fourth of civil cases and three-fourths of family cases. The disputants were more likely to be present during pre-session communications held on the same day as the first mediation session—in around 85 percent of both civil and family cases. During communications held at either time, the disputants who were present talked a considerable amount in around one-third of civil cases and in close to two-thirds of family cases.

What Mediators Did and Discussed

At some time during their pre-session communications,³ mediators engaged in the following actions in a majority of both civil and family cases: they explained the mediation process and the mediator's role, their approach, the ground rules, and confidentiality; they discussed what information should be submitted before the first session; they assessed the parties' and lawyers' ability to communicate civilly; and they explored whether the parties would be okay being together in the same room. In a majority of civil cases but in half or fewer family cases, mediators explored options for how to structure the opening session and who should or should not attend the mediation. In fewer than half of civil cases but in three-fourths of family cases, mediators assessed the disputants' capacity to mediate. In both civil and family cases, mediators explored options for structuring the rest of the mediation after the opening session in fewer than half of cases and coached the disputants and/or their lawyers on nonadversarial communications in around one-third of cases.

Regarding which substantive aspects of the dispute mediators discussed at some time during their pre-session communications, in a majority of both civil and family cases, the mediators explored which issues needed to be addressed, the disputants' interests and their goals for the mediation, and the procedural or litigation status of the case. In a majority of civil cases but in fewer than half of family cases, mediators explored what offers had been exchanged, the obstacles to settlement, and the parties' legal theories and surrounding facts. Mediators in both civil and family cases explored new settlement proposals and the costs and risks of litigation in half or fewer cases.

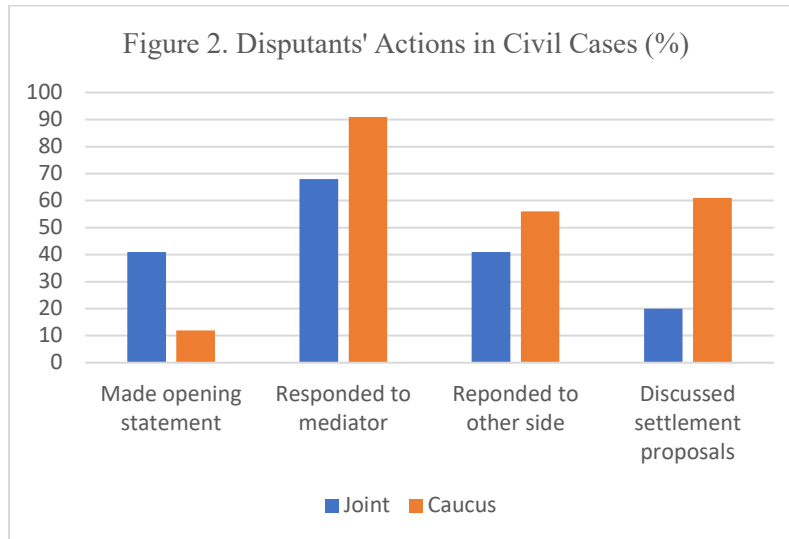
The Initial Mediation Session

The initial mediation session began with both parties together in a majority of both civil and family cases (71 percent and 64 percent, respectively). In most of the remaining cases, the first mediation session started with both sides apart. Few cases started with opposing lawyers together but the disputants apart.

Disputants' and Lawyers' Participation

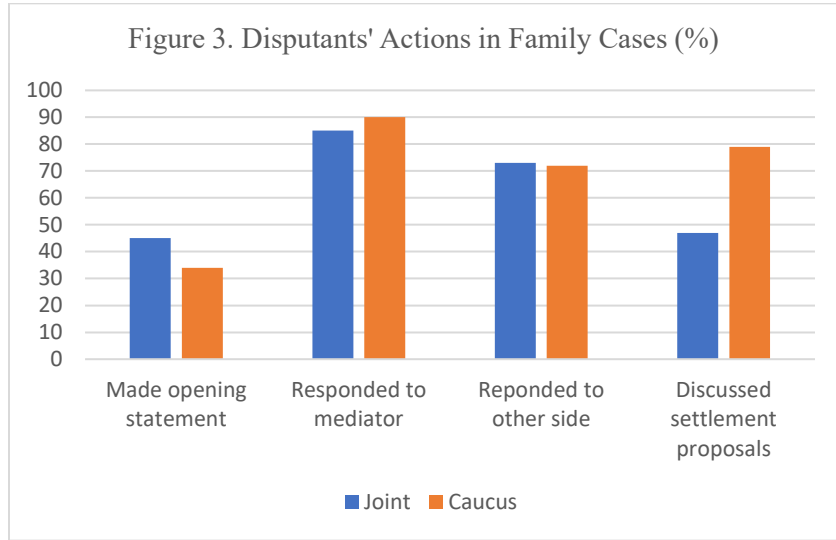
In civil cases, the disputants themselves made an opening statement or presentation in fewer than half of cases during initial joint sessions, and in even fewer cases during initial separate caucuses (see Figure 2). The disputants responded to questions or statements from the mediator in a majority of cases during initial joint sessions, and in even more cases during initial caucuses. During initial joint sessions, the disputants directly asked questions of or responded to questions or statements from the other side in fewer than half of cases, and they exchanged settlement offers with the other side in around one-fifth of cases.

During initial caucuses, the disputants were more likely to ask questions of or respond to the other side and to discuss settlement proposals indirectly through the mediator, doing so in over half of cases.



Like the disputants, the lawyers in civil cases were more likely to make an opening statement or presentation during initial joint sessions than during initial separate caucuses. Additionally, the lawyers were less likely to respond to the mediator, respond to/ask questions of the other side, and discuss settlement proposals during initial joint sessions than during initial caucuses. Lawyers were more likely than disputants in the same case to make an opening statement, to respond to/ask questions of the other side, and to discuss settlement proposals in initial joint sessions and in initial caucuses. Lawyers were more likely than disputants in the same case to respond to the mediator during initial joint sessions, but they were less likely to do so during initial caucuses.

In family cases, for the most part the disputants' actions were not different in initial joint sessions than in initial separate caucuses (see Figure 3). The disputants made an opening statement or presentation in fewer than half of cases, responded to the mediator in most cases, and asked questions of or responded to the other side (directly in joint sessions or indirectly through the mediator in caucuses) in a majority of cases during initial joint sessions and initial caucuses. The only difference was that the disputants exchanged settlement offers directly with the other side in around half of cases during initial joint sessions, but discussed settlement proposals with the mediator in a majority of cases during initial caucuses.



In family cases, the lawyers were less likely to engage in the actions listed in Figure 3 during initial joint sessions than during initial separate caucuses, except there was no difference in whether they responded to the other side. For the most part, there were no differences between lawyers and disputants in the same case in whether they engaged in these actions during initial joint sessions or initial separate caucuses. The sole exception was that lawyers were more likely than disputants in the same case to make an opening statement during initial caucuses.

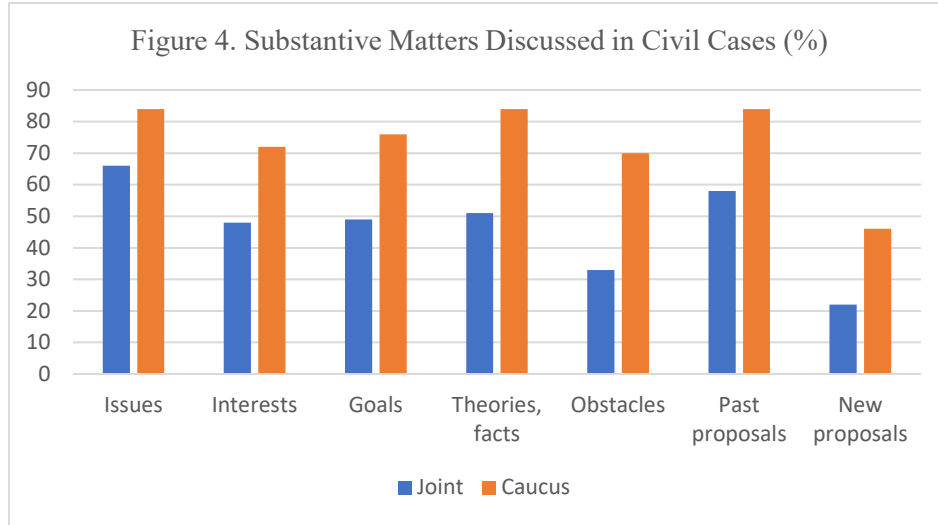
What Mediators Did and Discussed

There were few and relatively small differences between initial joint sessions and initial separate caucuses in the process actions the mediators engaged in. During initial joint sessions and initial caucuses in both civil and family cases, mediators explained the mediation process and the mediator's role, as well as confidentiality, in most cases; they explained their approach and the ground rules for the mediation in a majority of cases. Mediators in civil cases were slightly more likely to explain these aspects of mediation during initial joint sessions than during initial separate caucuses.

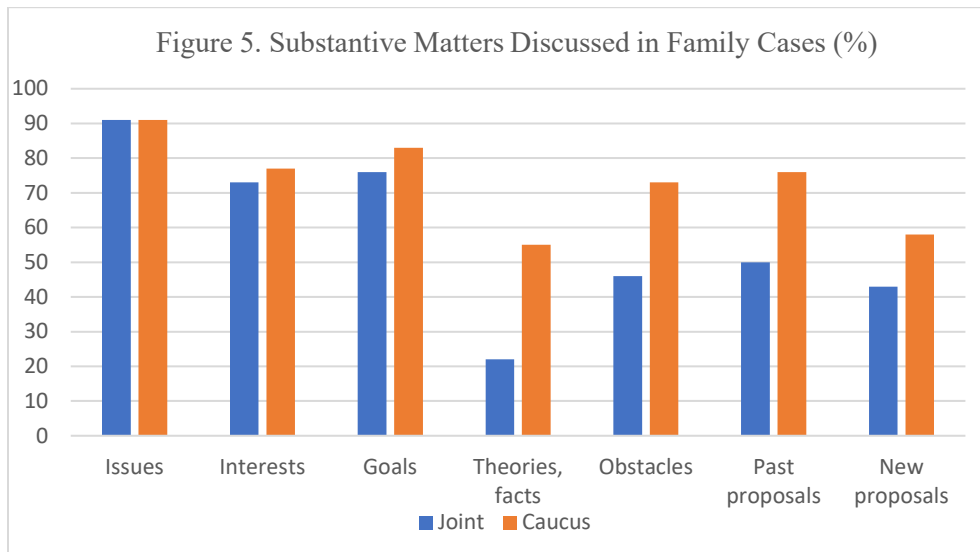
During initial joint sessions and initial caucuses, mediators in both civil and family cases assessed the disputants' and/or their lawyers' ability to communicate civilly in a majority of cases; they explored options for how to proceed after the mediators' remarks, options for structuring the rest of the mediation, and whether the parties would be okay being together in the same room in around half of cases. During initial joint sessions and initial caucuses, mediators in civil cases assessed the disputants' capacity to mediate in fewer than half of cases, while mediators in family cases did so in a majority of cases. Mediators in family cases were less likely to assess the disputants' capacity to mediate during initial joint sessions than during initial separate caucuses. During initial separate caucuses, mediators in both civil and family cases coached participants on nonadversarial communications in about one-fifth of cases to prepare for a later joint session.

With regard to substantive matters, in contrast, mediators in civil cases were less likely to discuss all but one of the specified substantive matters during initial joint sessions than during initial separate caucuses. Mediators discussed the following matters in half to two-thirds of cases during initial joint sessions, but in three-fourths or more cases during initial caucuses: the issues that needed to be addressed in mediation; disputants' interests; disputants' goals for the mediation; the procedural or litigative status of the case; what offers and proposals had been exchanged; and the parties' legal theories and facts (see Figure 4). Mediators in civil cases explored the following matters in one-fourth to half of cases during initial joint

sessions, but in half to three-fourths of cases during initial caucuses: the obstacles to settlement; new substantive settlement proposals; and the costs and risks of litigation. Developing the agenda, which mediators did in around one-third of cases, was the only item where there was no difference between initial joint session and initial caucuses.



In family cases, mediators were less likely to discuss several of the substantive topics during initial joint sessions than during initial separate caucuses. Mediators discussed the following matters in half or fewer cases during initial joint sessions, but in a majority of cases during initial caucuses: the procedural or litigation status of the case; what offers and proposals had been exchanged; the obstacles to settlement; and new substantive settlement proposals (see Figure 5). Mediators in family cases explored the costs and risks of litigation and the parties' legal theories and facts in around one-fourth of cases during initial joint sessions, but in over half of cases during initial caucuses. However, mediators in family cases were more likely to develop the agenda during initial joint sessions than during initial caucuses, doing so in more than half versus in fewer than half of cases, respectively. There were no differences between initial joint sessions and initial caucuses in whether mediators explored the issues that needed to be addressed and the disputants' interests and goals, which they did in a majority of cases.



Conclusion

When mediators have pre-session communications with the disputants and/or their lawyers, a majority of the time they explain the mediation process and their approach, assess whether the participants can communicate civilly and be in the same room together, and discuss various substantive aspects of the case. However, pre-session communications and document submissions do not take place in many family cases, and disputants often do not attend or actively participate in civil cases.

As a result, before the first mediation session, a sizeable number of mediators will not have been able to acquire a basic understanding of the dispute; develop rapport and trust with the disputants and/or lawyers; directly assess the disputants or hear their interests and perspectives; or work with the mediation participants to tailor the mediation process to their case. In addition, mediation participants might not know how best to prepare for or participate in the mediation. This makes what occurs during the initial mediation session all the more important.

Joint opening sessions still take place in a majority of both civil and family cases. In initial joint sessions and initial separate caucuses, mediators explain key aspects of the mediation process in many cases, as they would have done traditionally. Much of what else happens during joint opening sessions, however, diverges from what would have taken place historically. Most notably, disputant opening statements, direct interactions between the disputing sides, and the mediator's exploration of substantive matters tend to occur less frequently during joint opening sessions, especially in civil cases, than they had traditionally.

In addition, many topics that would have been discussed during traditional joint opening sessions are now more likely to be discussed during initial separate caucuses rather than during initial joint sessions. And in civil cases, the lawyers are more likely than the disputants themselves to present the issues and discuss matters and settlement proposals with the other side. Thus, communications that historically would have occurred directly between the disputing parties are now more likely to occur indirectly through the mediator and between the lawyers, especially in civil cases. Future research should explore what effect these changes in the initial mediation session have on the mediation process, the disputants' experience in mediation, and mediation outcomes.

¹ See, e.g., AM. BAR ASS'N SECTION OF DISPUTE RESOLUTION, TASK FORCE ON IMPROVING MEDIATION QUALITY (2008) at 6-7, 12-13, 32-34; 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. 165-166 (2010); Brian Farkas & Donna Erez Navot, *First Impressions: Drafting Effective Mediation Statements*, 22 LEWIS & CLARK L. REV. 157, 166-68 (2018); Jay Folberg, *The Shrinking Joint Session: Survey Results*, DISP. RESOL. MAG., Winter 2016, at 12-15, 17, 19; John Lande, *Analysis of Data from New Hampshire Mediation Trainings*, INDISPUTABLY (Dec. 10, 2017), at 6-7, <https://securereservercdn.net/45.40.149.159/gb8.254.myftpupload.com/wp-content/uploads/Analysis-NH-training-data.pdf> [<https://perma.cc/HRJ9-J7U4>]; Thomas J. Stipanowich, *Insights on Mediator Practices and Perceptions*, DISP. RESOL. MAG., Winter 2016, at 6-7, 10.

² The findings presented here are drawn from these articles: Roselle L. Wissler & Art Hinshaw, *The Initial Mediation Session: An Empirical Examination*, 27 HARVARD NEGOT. L. REV. 1 (2021), and Roselle L. Wissler & Art Hinshaw, *What Happens Before the First Mediation Session? An Empirical Study of Pre-Session Communications*, 23 CARDOZO J. CONFLICT RESOL. 143 (2022). Please refer to these articles for more details on the study methodology and for the full sets of findings and their many nuances. The AAA/ICDR Foundation provided partial financial support for the study.

³ Mediators were more likely to discuss some things and less likely to discuss others during communications held prior to versus on the same day as the first session. The patterns varied depending

on whether they had communications at only one time or at both times. For these details, *see* Wissler & Hinshaw, *Pre-Session Communications*, *supra* note 2.