

What Happens Before the First Mediation Session? An Empirical Study of Pre-Session Communications

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I. Introduction

Mediator preparation in advance of the first formal mediation session is widely seen as important for the effectiveness of the mediation,¹ as are party and lawyer preparation.² Two primary means of information exchange are thought to aid each group in their preparation: pre-

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¹ See, e.g., HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS* 161, 187-188 (2d Ed. 2010); DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR NEUTRALS AND ADVOCATES* 124 (2009); AM. BAR ASS'N SECTION OF DISPUTE RESOLUTION, *TASK FORCE ON IMPROVING MEDIATION QUALITY* (2008) [hereinafter *MEDIATION QUALITY*] at 3, 6-7, 32 (based on the responses of over 300 mediators, lawyers, and insurance company and corporate representatives throughout the United States who had "significant experience" in the private mediation of "large commercial and other civil cases in which all parties are represented by counsel;" *id.* at 4); Thomas J. Stipanowich, *Insights on Mediator Practices and Perceptions*, *DISP. RESOL. MAG.*, Winter 2016, at 6, 10 (based on the responses of 130 mediators (94 of whom regularly practice in United States) who are members of the International Academy of Mediators (IAM), an invitation-only professional membership organization of highly experienced commercial mediators. See *id.* at 6; <https://iamed.org/>).

² See, e.g., JOHN W. COOLEY, *THE MEDIATOR'S HANDBOOK: ADVANCED PRACTICE GUIDE FOR CIVIL LITIGATION* 69-70 (2d Ed. 2002); SUSAN NAUSS EXON, *ADVANCED GUIDE FOR MEDIATORS* 29-30, 35 (2014); Marilou Giovannucci & Karen Largent, *A Guide to Effective Child Protection Mediation: Lessons From 25 Years of Practice*, 47 *FAM. CT. REV.* 38, 45-46 (2009); *MEDIATION QUALITY*, *supra* note 1, at 7, 10, 33; BENNETT G. PICKER, *MEDIATION PRACTICE GUIDE: A HANDBOOK FOR RESOLVING BUSINESS DISPUTES* 76 (2d ed. 2003).

session³ communications between the mediator and the mediation participants⁴ and party submission of case information and documents to the mediator.⁵

The most common goals for pre-session communications are for (1) the mediator to develop a basic understanding of the dispute,⁶ (2) the mediation participants to gain an understanding of the mediator's approach and the mediation process,⁷ (3) the mediator and the mediation participants to discuss how to structure the mediation process for this dispute,⁸ and (4) the mediator and the mediation participants to begin to build rapport and trust.⁹ Accomplishing these goals would enable the mediator and the mediation participants to plan how they can most productively approach the first mediation session and would also help reduce the parties' stress before and during the mediation.¹⁰

³ Although these typically are referred to as "pre-mediation" communications and submissions, "mediation" is often considered to begin with the first contact between the mediator and the parties or their lawyers. *See* EXON, *supra* note 2, at 6; 42 PA. STAT. ANN. §5949(c); IOWA STAT. § 20.31 (mediation begins at the mediator's receipt of the assignment); JoAnne Donner, *When Does Mediation Really Start?* at <https://www.mediate.com/articles/donnerJ1.cfm>. Accordingly, we use the term "pre-session" (*i.e.*, before the first formal mediation session) to more accurately describe the timing.

⁴ ABRAMSON, *supra* note 1, at 95, 97, 161; COOLEY, *supra* note 2, at 69-70; EXON, *supra* note 2, at 6; JAY FOLBERG & DWIGHT GOLANN, *LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW* 270-271 (2016); DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION* 102-103 (2d ed. 2012); *MEDIATION QUALITY*, *supra* note 1, at 6-7, 10, 32; PICKER, *supra* note 2, at 27-29.

⁵ ABRAMSON, *supra* note 1, at 95, 97-98; COOLEY, *supra* note 2, at 127-129; EXON, *supra* note 2, at 42-43; FOLBERG & GOLANN, *supra* note 4, at 269-270; FRENKEL & STARK, *supra* note 4, at 102; *MEDIATION QUALITY*, *supra* note 1, at 6-7, 32; PICKER, *supra* note 2, at 29-30.

⁶ FRENKEL & STARK, *supra* note 4, at 102, 115-116; GOLANN, *supra* note 1, at 124, 141-142; PICKER, *supra* note 2, at 27-28.

⁷ ABRAMSON, *supra* note 1, at 97, 304, 320; EXON, *supra* note 2, at 30-31; FRENKEL & STARK, *supra* note 4, at 102; Giovannucci & Largent, *supra* note 2, at 46; *MEDIATION QUALITY*, *supra* note 1, at 8, 10-11, 33 (noting that "mediation users come to mediation with a great variety of understandings and misunderstandings about the mediation process" and stressing the importance that all participants have a clear understanding of the process); Jill S. Tanz & Martha K. McClintock, *The Physiologic Stress Response During Mediation*, 32 OHIO ST. J. ON DISP. RESOL. 29, 55-56 (2017).

⁸ ABRAMSON, *supra* note 1, at 319; FOLBERG & GOLANN, *supra* note 4, at 261; FRENKEL & STARK, *supra* note 4, at 102; *MEDIATION QUALITY*, *supra* note 1, at 7-9, 12-13; PICKER, *supra* note 2, at 30, 75-76; Stipanowich, *supra* note 1, at 10.

⁹ Marjorie Corman Aaron, *Do's and Don'ts of Mediation Practice*, DISP. RESOL. MAG., Winter 2005, at 19; ABRAMSON, *supra* note 1, at 97; FOLBERG & GOLANN, *supra* note 4, at 271; Giovannucci & Largent, *supra* note 2, at 46; GOLANN, *supra* note 1, at 124; Tanz & McClintock, *supra* note 7, at 54-55, 62.

¹⁰ FRENKEL & STARK, *supra* note 4, at 115-116; Tanz & McClintock, *supra* note 7, at 56, 62.

To help accomplish these goals, mediators and lawyers generally recommend the following topics be discussed or explored during pre-session communications:¹¹ (1) the mediation process, the role of the participants, and the mediator's approach;¹² (2) the background of the dispute, the main issues to be addressed, the parties' interests, and any non-legal issues;¹³ (3) the status of settlement negotiations and what offers have been exchanged, the obstacles to settlement, whether the parties need additional information, and possible settlement options;¹⁴ (4) the procedural status of the case;¹⁵ (5) the parties' personalities and emotional dynamics, issues of violence or coercion, who should or should not attend the mediation, and how the mediation process should proceed in this case (*e.g.*, opening presentations, the role the parties will play, or topics to be avoided in joint sessions);¹⁶ (6) giving the parties a chance to vent and work through emotions before the formal mediation session;¹⁷ (7) establishing the ground rules, encouraging a civil tone, and coaching on more productive opening presentations and communications;¹⁸ and (8) which documents should be submitted to the mediator before the first session and whether they should be exchanged among the parties.¹⁹

Whether pre-session communications are held and which of these topics are discussed are said to depend on a number of factors, including the mediator, the case, whether these

¹¹ See *MEDIATION QUALITY*, *supra* note 1, at 6 (noting that “[m]any mediation training programs have traditionally not paid substantial attention to the content” of pre-session discussions).

¹² *ABRAMSON*, *supra* note 1, at 97, 304, 320; *EXON*, *supra* note 2, at 31; *FRENKEL & STARK*, *supra* note 4, at 102; *Giovannucci & Largent*, *supra* note 2, at 46; *MEDIATION QUALITY*, *supra* note 1, at 8, 10; *Tanz & McClintock*, *supra* note 7, at 55-56, 62.

¹³ See, *e.g.*, *ABRAMSON*, *supra* note 1, at 319; *Brian Farkas & Donna Erez Navot*, *First Impressions: Drafting Effective Mediation Statements*, 22 *LEWIS & CLARK L. REV.* 157, 183 (2018); *FOLBERG & GOLANN*, *supra* note 4, at 270; *FRENKEL & STARK*, *supra* note 4, at 102; *Giovannucci & Largent*, *supra* note 2, at 46; *MEDIATION QUALITY*, *supra* note 1, at 8, 32; *Stipanowich*, *supra* note 1, at 10.

¹⁴ See, *e.g.*, *ABRAMSON*, *supra* note 1, at 97, 320; *COOLEY*, *supra* note 2, at 16, 71; *Farkas & Navot*, *supra* note 13, at 182; *FOLBERG & GOLANN*, *supra* note 4, at 270-271; *GOLANN*, *supra* note 1, at 146; *MEDIATION QUALITY*, *supra* note 1, at 8-9, 32; *PICKER*, *supra* note 2, at 28; *Stipanowich*, *supra* note 1, at 10.

¹⁵ *COOLEY*, *supra* note 2, at 71; *MEDIATION QUALITY*, *supra* note 1, at 9.

¹⁶ *ABRAMSON*, *supra* note 1, at 97, 319-320; *COOLEY*, *supra* note 2, at 16; *Farkas & Navot*, *supra* note 13, at 183; *FOLBERG & GOLANN*, *supra* note 4, at 261; *FRENKEL & STARK*, *supra* note 4, at 102-113; *Giovannucci & Largent*, *supra* note 2, at 46; *MEDIATION QUALITY*, *supra* note 1, at 7-9, 12-13, 32-34; *PICKER*, *supra* note 2, at 28, 75-76; *Kelly Browe Olson*, *Screening for Intimate Partner Violence in Mediation*, *DISP. RESOL. MAG.*, Fall 2013, at 25, 27; *Stipanowich*, *supra* note 1, at 10; *Tanz & McClintock*, *supra* note 7, at 55, 60.

¹⁷ *COOLEY*, *supra* note 2, at 70; *FOLBERG & GOLANN*, *supra* note 4, at 271; *Giovannucci & Largent*, *supra* note 2, at 46; *Tanz & McClintock*, *supra* note 7, at 60, 62, 71.

¹⁸ *ABRAMSON*, *supra* note 1, at 320; *FRENKEL & STARK*, *supra* note 4, at 102; *MEDIATION QUALITY*, *supra* note 1, at 9, 13, 32; *PICKER*, *supra* note 2, at 27-28; *Tanz & McClintock*, *supra* note 7, at 70-71.

¹⁹ *ABRAMSON*, *supra* note 1, at 319; *FRENKEL & STARK*, *supra* note 4, at 102; *MEDIATION QUALITY*, *supra* note 1, at 9, 32; *PICKER*, *supra* note 2, at 28.

discussions occur before or on the same day as the first formal mediation session, and whether written case information has been or will be submitted.²⁰ These communications are typically said to be held prior to the day of the first mediation session, unless holding discussions right before the first session is the only option or is seen as more beneficial.²¹ Pre-session communications are said to generally take place between the mediator and the lawyers, without the disputants.²²

The submission of case information and documents to the mediator is another aspect of preparation for the first mediation session.²³ Whether mediators request pre-session submissions and what types of documents they want to receive is said to depend on the mediator, the complexity of the issues in the case, the amount at stake, and other factors.²⁴ In two studies, a majority of the mediators and lawyers in primarily commercial and civil cases requested (or thought it was important for parties to submit), a substantive memo or statement and pertinent documents (*e.g.*, contracts, accident reports) to the mediator before the first session; fewer thought it was important to provide the pleadings, discovery, or expert reports.²⁵ As to what information mediation memos should contain, mediators and lawyers most commonly recommend including the background of the dispute, a summary of the disputed factual or legal issues and the parties' positions on them, the relief sought, key people needed for resolution, the procedural status of the case, and the history of settlement discussions.²⁶

Much of what has been written about the use of pre-session communications and

²⁰ Aaron, *supra* note 9, at 19; ABRAMSON, *supra* note 1, at 97; COOLEY, *supra* note 2, at 70; FRENKEL & STARK, *supra* note 4, at 93-95, 115-116; MEDIATION QUALITY, *supra* note 1, at 8.

²¹ See ABRAMSON, *supra* note 1, at 319; Michael Geigerman, *New Beginnings in Commercial Mediations: The Advantages of Caucusing Before the Joint Session*, DISP. RESOL. MAG., Fall 2012, at 27, 29; Tanz & McClintock, *supra* note 7, at 55.

²² See ABRAMSON, *supra* note 1, at 319; Geigerman, *supra* note 21, at 29; MEDIATION QUALITY, *supra* note 1, at 6-8, 11 (also reporting that the lawyers preferred that the parties not be present during pre-session communications).

²³ See *supra* note 5 and accompanying text.

²⁴ See ABRAMSON, *supra* note 1, at 97, 271; COOLEY, *supra* note 2, at 128-129; Farkas & Navot, *supra* note 13, at 170-174; FOLBERG & GOLANN, *supra* note 4, at 269-270; FRENKEL & STARK, *supra* note 4, at 93-95, 102, 115-116; GOLANN, *supra* note 1, at 145; MEDIATION QUALITY, *supra* note 1, at 8, 12; PICKER, *supra* note 2, at 30, 77.

²⁵ Farkas & Navot, *supra* note 13, at 166-168 (based on the responses of 180 commercial and labor/employment mediators in New York and elsewhere in the U.S.); MEDIATION QUALITY, *supra* note 1, at 12. See also EXON, *supra* note 2, at 43.

²⁶ See, ABRAMSON, *supra* note 1, at 305-306, 411-414; COOLEY, *supra* note 2, at 128; Farkas & Navot, *supra* note 13, at 178-181; FOLBERG & GOLANN, *supra* note 4, at 270; FRENKEL & STARK, *supra* note 4, at 115-116; GOLANN, *supra* note 1, at 145; PICKER, *supra* note 2, at 30. If the information will be submitted confidentially to only the mediator and not exchanged among the parties, additional items such as these are recommended to be included: candid analyses of the strengths and weaknesses of the case, the parties' nonlegal interests, proposed settlements, and any personal or emotional issues or dynamics. See, *e.g.*, COOLEY, *supra* note 2, at 128-129; Farkas & Navot, *supra* note 13, at 181-183.

submissions has been in the context of private mediation involving large civil and commercial cases, where such communications and submissions are reported to be common.²⁷ In smaller-stakes cases and court mediation settings, however, pre-session communications and submissions might be barred or “logistically impossible or cost prohibitive.”²⁸ Indeed, in a study that largely involved court-connected mediation in civil and family cases, fewer than 20% of the surveyed mediators and lawyers said they had a substantial pre-session discussion about the mediation in more than half of their recent cases.²⁹ In that same survey, 46% of the mediators and 62% of the lawyers said that all parties submitted a statement to the mediator in more than half of their recent cases.³⁰

Thus, the findings of the few empirical studies that have been conducted, taken together, suggest that practices regarding pre-session communications and document submissions might vary considerably in different case and mediation contexts.³¹ None of these studies has examined what factors contributed to whether pre-session communications and document submissions occurred. Nor have they examined what process or substantive matters were discussed during the pre-session communications.

The present Article reports the findings of a study that begins to fill the gaps in our empirical knowledge about the early stages of mediation before the first formal mediation session by taking a more systematic and comprehensive look at pre-session communications and

²⁷ ABRAMSON, *supra* note 1, at 97; MEDIATION QUALITY, *supra* note 1, at 7 (finding that many mediators reported they have pre-session discussions as part of their regular practice); Stipanowich, *supra* note 1, at 10.

²⁸ MEDIATION QUALITY, *supra* note 1, at 19. *See also id.* at 6; ABRAMSON, *supra* note 1, at 97-98; JAMES J. ALFINI, SHARON B. PRESS, JEAN R. STERNLIGHT & JOSEPH B. STULBERG, *MEDIATION THEORY AND PRACTICE* 118-119 (1st ed. 2001); EXON, *supra* note 2, at 6; FRENKEL & STARK, *supra* note 4, at 93-95, 102, 115-116; Geigerman, *supra* note 20, at 29; GOLANN, *supra* note 1, at 124; Tanz & McClintock, *supra* note 7, at 55.

²⁹ JOHN LANDE, *ANALYSIS OF DATA FROM NEW HAMPSHIRE MEDIATION TRAININGS* (2017) [hereinafter *ANALYSIS*] at 6-7, at <https://seureservercdn.net/45.40.149.159/gb8.254.myftpupload.com/wp-content/uploads/Analysis-NH-training-data.pdf>. The findings are based on the responses of 87 mediators and lawyers; a majority had mediated more than six years and over half had participated in over 100 mediations. *Id.* at 1-3. *See also* JOHN LANDE, *DATA FROM SURVEY OF NEW HAMPSHIRE MEDIATION TRAINING PARTICIPANTS* (2017) at 2, at <https://seureservercdn.net/45.40.149.159/gb8.254.myftpupload.com/wp-content/uploads/NH-training-survey-data.pdf>.)

³⁰ LANDE, *ANALYSIS*, *supra* note 29, at 5.

³¹ *See also* LANDE, *ANALYSIS*, *supra* note 29, at 6-7 (noting that it “would involve a change in the practice culture” for the mediators to regularly have pre-session communications); MEDIATION QUALITY, *supra* note 1, at 3, 18-19 (noting that there are many differences among different mediation contexts, and that the conclusions of the Task Force are limited to “the arena of private practice” in “commercial and civil cases involving reasonably sophisticated users of mediation. . . in which all parties are represented by counsel.”)

document submissions in a wider range of mediation settings and dispute types across the United States. Part II describes the survey procedure, the mediators who responded to the survey, and the mediated disputes that form the basis of the mediators' responses. Part III presents the survey findings regarding the mediators' pre-session communications with the parties and/or their lawyers, including whether and when pre-session communications took place, what case information the mediators had access to before the first mediation session, what factors were related to pre-session communications and document submissions, whether the disputants themselves were present and how much they spoke, and which process and substantive issues were discussed. Part IV discusses the findings and their implications for mediation practice, and Part V summarizes the key conclusions.

II. Survey Procedure and Respondents

We selected mediators from eight states across four regions of the United States for the survey.³² In each state, we obtained the names and email addresses of family and civil case mediators whose contact information was publicly available online, primarily from the mediator rosters of state and federal court mediation programs, the National Academy of Distinguished Neutrals, and the American Arbitration Association.³³

We sent a personalized email invitation to each mediator identified by this approach, asking them to participate in an online survey and providing them a unique code to access the survey. When the mediators logged in, they were first asked two screening questions to limit participation to those who had mediated (1) a non-appellate level civil or family dispute (other than small claims or probate) involving only two named parties (2) within the United States in the prior four months.³⁴

Of the 5,510 mediators whose email invitation was not returned as undeliverable and who met the survey eligibility criteria, 1,065 mediators participated in the survey, for a response rate of 19.3%. This response rate is within the bounds of what can be expected for the present survey given a number of factors, including the survey's web-based format, length, and complexity, as well as the lack of a connection between the researchers and the respondents.³⁵ Moreover, this

³² California and Utah in the West; Michigan and Illinois in the Midwest; Florida and North Carolina in the Southeast; and Maryland and New York in the Northeast.

³³ In Maryland and Utah, we obtained additional mediators' names from rosters of statewide professional conflict resolution organizations. Given the small number of mediators in Utah relative to the other states, we also included names from the roster of a statewide private ADR provider. Many mediators were on more than one roster in each state; we cross-checked the lists and eliminated duplicates. We included all mediators identified in each state, up to a randomly selected maximum of 1,000 per state.

³⁴ Experience was limited to the prior four months so that respondents would be more likely to remember the mediation and report it accurately. See FLOYD J. FOWLER, JR., *SURVEY RESEARCH METHODS* 93-94 (2d ed. 1988).

³⁵ See, e.g., American Association of Opinion Research (AAOR), *Response Rates – An Overview*, at <https://www.aapor.org/Education-Resources/For-Researchers/Poll-Survey->

figure is conservative because an unknown number of emails that were not returned as “undeliverable” might not have reached their intended recipients³⁶ due to outdated email addresses, spam filters, or other reasons.³⁷

We conducted tests of statistical significance to determine whether an observed difference between two or more groups (e.g., between civil and family cases) is a “true” difference (or whether an observed relationship between two measures is a “true” relationship) and does not merely reflect chance variation (or association).³⁸ Thus, throughout the article, any “differences” or “relationships” reported are statistically significant differences or relationships, while “no differences” or “no relationships” indicate there were no statistically significant differences or relationships.

FAQ/Response-Rates-An-Overview.aspx (last accessed August 3, 2020); Weimiao Fan & Zheng Yan, *Factors Affecting Response Rates of the Web Survey: A Systematic Review*, 26 COMPUTERS IN HUMAN BEHAVIOR 132, 133-134, 136 (2010); Mirta Galesic & Michael Bosnjak, *Effects of Questionnaire Length on Participation and Indicators of Response Quality in a Web Survey*, 73 PUBLIC OPINION QUARTERLY 349 (Summer 2009); Bennett Porter, *Tips and Tricks to Improve Survey Response Rate*, at (<https://www.surveymonkey.com/curiosity/improve-survey-response-rate/>) (last accessed August 3, 2020); Tse-Hua Shih and Xitao Fan, *Comparing Response Rates in Email and Paper Surveys: A Meta-Analysis*, 4 EDUCATIONAL RESEARCH REVIEW 26, 36-37 (2009). Moreover, the response rate is not necessarily an indicator of the quality of the survey findings. See AAOR, *supra*; Colleen Cook, Fred Heath, & Russel L. Thompson, *A Meta-Analysis of Response Rates in Web- or Internet-Based Surveys*, 60 EDUCATIONAL AND PSYCHOLOGICAL MEASUREMENT 821 (2000).

³⁶ See also Donna Shestowsky, *How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study*, 49 U.C. DAVIS L. REV. 793, 807, n.55 (2015-2016) (explaining that the 10% response rate in that study was conservative for a similar reason: due to uncertainty about address accuracy, one could not tell whether a non-response to the mailed survey was because the survey did not reach the intended recipient or because that person chose not to participate).

³⁷ Spot-checking revealed that some mediators had changed firms; others had moved out of the relevant state or were no longer actively mediating; and some had died. Others might not have responded out of fear that the survey invitation was a phishing attempt; several mediators contacted us to confirm the authenticity of the survey request, but others with similar concerns might simply have deleted the invitation.

³⁸ The conventional level of probability for determining the statistical significance of findings is the .05 level (*i.e.*, $p < .05$). Findings of $p < .10$ are considered “marginally significant” -- the difference is not statistically significant but is worth mentioning -- and those are noted as such. Cramer's *V* provides a measure of the strength of the effect for chi-square (χ^2) analyses. See RICHARD P. RUNYON & AUDREY HABER, *FUNDAMENTALS OF BEHAVIORAL STATISTICS* 140-142, 230, 278-80 (5th ed. 1984). As a rough guide to interpreting the size of effects, .10 is considered a small effect; .30, a medium effect; and .50, a large effect. ROBERT ROSENTHAL & RALPH L. ROSNOW, *ESSENTIALS OF BEHAVIORAL RESEARCH* 361 (1984).

Two-thirds of the mediators who responded to the survey most frequently mediate civil cases, while one-third most frequently mediate family cases. Three-fourths of the mediators had been mediating for eight or more years and typically mediate two or more cases per month.³⁹ A majority of both civil and family mediators (88% and 68%, respectively) had only a law background, and a minority had only a non-law background (3% and 21%, respectively).⁴⁰ Over two-thirds of the mediators who usually mediate civil cases (68%) and almost half of those who usually mediate family cases (47%) have served regularly as a neutral in one or more non-mediator roles where they make a formal decision, recommendation, or evaluation, most commonly as an arbitrator or case evaluator or in a role where they make recommendations to the court about the children.⁴¹

When responding to most of the questions in the survey, the mediators were asked to focus on their most recently concluded mediation that involved a civil or family dispute with only two named parties. Focusing on a single recent case provides more accurate information⁴² and enables us to examine relationships between case characteristics and what took place before the first mediation session.⁴³

Approximately two-thirds of the mediators' most recent mediations were civil cases (68%) and one-third were family cases (32%). The four substantive areas accounting for most of the civil cases were tort (30%), contract (27%), employment (21%), and property/real estate (10%). Over half of the family cases involved two or more types of divorce-related issues (58%); roughly equal proportions of the remaining family cases involved only custody/visitation issues (22%) or only financial issues (19%). One or both parties did not have legal counsel in relatively few civil cases (11%) but in over one-third of family cases (37%).⁴⁴ A majority of parties in both

³⁹ The civil mediators had mediated, on average, three years longer than the family mediators (means of 16 years vs. 13 years; $t(944) = -3.58, p < .001$). The civil mediators mediate, on average, one fewer case per month than the family mediators (means of 5 vs. 6 cases per month, $t(940) = 3.28, p < .01$).

⁴⁰ The civil mediators were more likely than the family mediators to have only a law background and were less likely to have only a non-law background ($\chi^2(2) = 82.10, p < .001, V = .29$). Eight percent of the civil mediators and 11% of the family mediators had both law and non-law backgrounds. The most common non-law backgrounds included mental health fields, business, construction or engineering, accounting, and conflict resolution.

⁴¹ The civil mediators were less likely than the family mediators to have not served regularly in any role where they make a formal decision, recommendation, or evaluation (32% vs. 53%; $\chi^2(1) = 37.03, p < .001, V = .20$).

⁴² See, e.g., CLAIRE SELLTIZ, LAWRENCE S. WRIGHTSMAN, & STUART W. COOK, RESEARCH METHODS IN SOCIAL RELATIONS 307 (3d ed. 1976); DONNA STIENSTRA, RULES OF THUMB FOR DESIGNING AND ADMINISTERING MAILED QUESTIONNAIRES (RESEARCH DIVISION, FEDERAL JUDICIAL CENTER, March 2000) at 4.

⁴³ SELLTIZ ET AL., *supra* note 42, at 307.

⁴⁴ One or both parties were less likely to not have counsel, and both parties were more likely to have counsel (89% vs. 63%), in civil cases than in family cases ($\chi^2(2) = 101.18, p < .001, V = .31$).

civil and family cases had no prior mediation experience (63% to 75%), with the exception of responding parties in civil cases (34%).⁴⁵

In both civil and family cases, the two most common referral sources were court mediation programs/judges (42% and 39%, respectively) and the lawyers (43% and 30%, respectively); few civil cases but almost one-fourth of family cases were referred from the parties; and fewer than 10% of civil and family cases were referred from a professional mediation organization or a private mediation provider or firm.⁴⁶ Some civil and family cases “directly referred” from the parties or the lawyers might nonetheless have been in a court-connected mediation program because, in some programs, the parties or their lawyers directly contact the mediator.⁴⁷

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

There were differences among the states in the proportion of cases referred from different sources, especially from state and federal courts,⁴⁸ in part as a result of the different rosters from which mediators’ contact information was obtained in each state. Due to this and other

⁴⁵ Both complainants and respondents had more prior mediation experience in civil cases than in family cases (complainants: $\chi^2(3) = 24.96$, $p < .001$, $V = .16$; respondents: $\chi^2(3) = 182.63$, $p < .001$, $V = .44$).

⁴⁶ Civil cases were more likely to be referred from federal courts/judges or directly from the lawyers, and were less likely to be referred from state courts/judges or directly from the parties, than were family cases ($\chi^2(4) = 170.62$, $p < .001$, $V = .41$).

⁴⁷ See, e.g., C.D. CAL., Gen. Order 11-10 §7.1(a); UTAH CODE JUD. ADMIN. Rule 4-510.05(4)(E); U.S. DISTRICT CT. S. DISTRICT OF FLA., LOC. R. 16.2(d)(1)(B); MICHIGAN COURT RULES 2.411(B)(1) (civil), 3.216(F)(2)(e) (family); THE SUPREME COURT OF NORTH CAROLINA, RULES FOR MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS, Rule 2.A.

⁴⁸ Civil: $\chi^2(21) = 300.21$, $p < .001$, $V = .40$; family: $\chi^2(21) = 77.51$, $p < .001$, $V = .49$. For instance, 71% of the civil cases in Maryland were referred directly from a state court; the proportion of state court referrals in the other states was 33% or fewer. And 58% of the civil cases in New York were referred directly from a federal court, compared to 12% or fewer in the other states. In states other than Maryland and New York, the largest proportion of civil cases was referred directly from the lawyers, ranging between 45% and 74%. And among family cases, across the states the proportion of cases referred from state courts ranged from one-fifth to half of the cases, and the proportion of cases referred directly from the lawyers or the parties each ranged from fewer than 10% to around 60%.

differences related to the case referral sources,⁴⁹ any observed inter-state differences in pre-session communications might reflect these other factors rather than the practices and policies in each state. To address this, we would need to examine differences among the states while controlling for the case referral source; unfortunately, there seldom were sufficient numbers of cases to permit these analyses. We were able to examine whether the case referral source, the mediator's background, and whether the parties had counsel were related to most aspects of pre-session communications.

III. Pre-Session Communications and Case Information

The mediators were asked about their mediation communications with the parties and/or their lawyers before the first formal mediation session that dealt with topics other than hiring, scheduling, or other administrative matters, as well as what case information they had access to before the first mediation session.

A. Whether and When Mediators Held Pre-Session Communications

Overall, 66% of the mediators in civil cases and 39% in family cases held pre-session discussions about non-administrative matters with the parties and/or their lawyers in their most recent case.⁵⁰ As to the timing of these discussions, around half of the mediators in both civil and family cases (54% and 47%, respectively) held pre-session communications both prior to and on the same day as (but before) the first mediation session; over one-third held discussions only prior to the day of the first session (37% and 35%, respectively); and the rest had pre-session communications only on the same day as the first session (9% and 18%, respectively).⁵¹

Some mediators had no feasible opportunity to hold pre-session discussions with the parties and/or their lawyers (9% in civil cases and 24% in family cases) and a few were prohibited from doing so (2% and 7%, respectively), while others were required to hold pre-session discussions (18% and 13%, respectively). Over half of the mediators, however, had no requirements for or constraints on pre-session communications (71% in civil cases and 56% in family cases).⁵²

⁴⁹ For instance, in both civil and family cases, the case referral source was related to whether the mediators had a non-legal background (civil, $\chi^2(3) = 20.07$, $p < .05$, $V = .18$; family, $\chi^2(3) = 18.39$, $p < .001$, $V = .25$) and to whether the parties had counsel (civil, $\chi^2(3) = 38.16$, $p < .001$, $V = .24$; family, $\chi^2(3) = 100.81$, $p < .001$, $V = .56$).

⁵⁰ Conversely, one-third of mediators in civil cases and almost two-thirds in family cases did not have pre-session communications. Mediators in civil cases were more likely than those in family cases to have pre-session communications ($\chi^2(1) = 65.52$, $p < .001$, $V = .25$).

⁵¹ Mediators in civil cases were more likely than those in family cases to have communications at both times and were less likely to have communications only on the same day as the first mediation session ($\chi^2(2) = 8.84$, $p < .05$, $V = .12$).

⁵² Mediators in civil cases were more likely than those in family cases to have no requirements or constraints on mediation communications before the first session and were less likely to say that communications before the first mediation session were not feasible ($\chi^2(3) = 59.67$, $p < .001$, $V = .24$).

Whether there were requirements for or constraints on pre-session discussions varied depending on the referral source. Civil cases were more likely to have no requirements for or constraints on pre-session discussions when the case was referred from the lawyers or a private provider (85% and 75%, respectively) than when it was referred from a state or federal court (56% and 47%, respectively).⁵³ Family cases were more likely to have no requirements for or constraints on pre-session discussions when the case was referred from the parties or the lawyers (72% and 63%, respectively) than when it was referred from a state court or mediation organization (43% and 28%, respectively).⁵⁴

Because there were differences among the states in the proportion of cases referred from different sources, and because some of the sources were more likely than others to have requirements or constraints,⁵⁵ we examined inter-state differences in requirements for or constraints on pre-session discussions while controlling for the case referral source.⁵⁶ In civil cases, there were no inter-state differences in constraints or requirements on pre-session discussions in cases referred directly from the lawyers, but there were differences in cases referred from state courts.⁵⁷ In family cases, there were no inter-state differences in constraints or requirements on pre-session discussions in cases referred either directly from the lawyers or from the state courts.⁵⁸

⁵³ $\chi^2(9) = 139.27, p < .001, V = .27$. Pre-session communications were most likely to be infeasible in cases referred from state courts and most likely to be required in cases referred from federal courts. See *supra* note 47 and accompanying text for a caveat regarding cases “directly referred” from the parties or the lawyers.

⁵⁴ $\chi^2(9) = 29.82, p < .001, V = .18$. Pre-session communications were most likely to be infeasible in cases referred from state courts or mediation organizations and most likely to be required in cases referred from mediation organizations.

⁵⁵ See *supra* notes 48, 53, and 54 and accompanying text.

⁵⁶ We looked at inter-state differences in cases referred from the lawyers and, separately, in cases referred from state courts. There were not enough cases referred from federal courts, mediation providers, or the parties to analyze inter-state differences separately in those sets of cases. These analyses were conducted by comparing the category of no requirements or constraints versus the three other categories combined (required, prohibited, and infeasible), given the small numbers of cases in some of those categories in some states.

⁵⁷ Lawyers: $p = .29$; state courts: $\chi^2(7) = 14.11, p < .05, V = .29$. Among cases referred from state courts, Illinois mediators were the most likely to report constraints or requirements on pre-session communications (83%), followed by mediators in Maryland (60%) and Florida (56%), with the other states ranging between 27% to 41%. Maryland and Illinois state courts do not appear to have rules requiring or prohibiting pre-session communications in civil cases; Florida state courts require mediators to determine whether mediation is the proper process in civil and family cases, see FLA. MED. RULES 10.400. This suggests that informal policies, judge-specific rules, or the infeasibility of having pre-session communications might instead have contributed to the observed differences in “constraints” among the states.

⁵⁸ Lawyers: $p = .46$; state courts: $p = .10$.

When pre-session communications were not required, prohibited, or infeasible, they took place in 73% of civil cases and 51% of family cases.⁵⁹ We examined whether several case and mediator practice and background characteristics were related to whether mediators held pre-session discussions when they had no constraints or requirements to do so.⁶⁰

The factor that was by far the most strongly related to whether mediators held pre-session discussions in both civil and family cases was the mediators' usual practice regarding pre-session discussions: the more frequently mediators typically hold pre-sessions discussions in their cases, the more likely they were to do so in the instant case.⁶¹ Other mediator practice⁶² or background characteristics generally had small or no relationships with whether pre-session communications were held. In civil cases but not in family cases, mediators were less likely to hold pre-session discussions if they have not served regularly in any non-mediation evaluative or decision-making role than if they have served in one or more of those roles.⁶³ In both civil and family cases, whether mediators held pre-session communications was not related to whether they had only a law background, only a non-law background, or both backgrounds.⁶⁴

⁵⁹ Mediators in civil cases were more likely than those in family cases to have pre-session communications when there were no constraints or requirements ($\chi^2(1) = 30.34, p < .001, V = .21$).

⁶⁰ A cautionary note: finding an association between a particular factor and whether pre-session communications were held does not mean that factor necessarily influenced the decision to have pre-session communications. That is, a factor might be *associated with* the increased use of pre-session communications but might not have *influenced* whether those communications took place (*i.e.*, correlation does not equal causation).

⁶¹ Civil: $\chi^2(2) = 177.71, p < .001, V = .62$; family: $\chi^2(2) = 55.11, p < .001, V = .58$. In civil cases, 95% of mediators who usually or always have pre-session communications did so in the instant case, compared to 61% of mediators who have pre-session communications in one-third to two-thirds of their cases and 34% of mediators who never or seldom have pre-session communications. A similar pattern was seen in family cases: 87% of mediators who usually or always have pre-session communications did so in the instant case, compared to 58% of mediators who have pre-session communications in one-third to two-thirds of their cases and 26% of mediators who never or seldom have pre-session communications.

⁶² Mediators in civil cases were more likely to have pre-session communications when they mediate fewer disputes per month ($r(447) = -.10, p < .05$); there was no relationship for family cases ($p = .79$). There was no relationship between the number of years the mediators had been mediating and whether they had pre-session communications in either civil or family cases (p 's of .30 and .11, respectively).

⁶³ Civil: 64% vs. 76% ($\chi^2(1) = 7.14, p < .01, V = .13$). Mediators in civil cases were more likely to have pre-session communications if they have served regularly as an arbitrator (77% vs. 66%, $\chi^2(1) = 7.06, p < .01, V = .13$) or a case evaluator (84% vs. 69%, $\chi^2(1) = 8.62, p < .01, V = .14$); there was no difference if mediators have served as a judge ($p = .73$). There were no differences in family cases (p 's ranged from .28 to .83).

⁶⁴ Civil: $p = .22$; family, $p = .63$.

Several case characteristics⁶⁵ in addition to the general type of case (*i.e.*, civil or family case)⁶⁶ had relatively small relationships with whether mediators held pre-session communications. There was a difference among the main civil case subtypes in whether pre-session discussions took place, but not among family cases subtypes.⁶⁷ In civil cases, pre-session discussions were more likely when one or both parties had counsel than when neither party had counsel; there was no difference in family cases.⁶⁸ There was no relationship between the disputants' prior mediation experience and whether pre-session communications were held in civil cases; in family cases, pre-session discussions were more likely to be held when the responding party had more rather than less prior mediation experience.⁶⁹ In both civil and family cases, the case referral source was related to whether pre-session discussions were held.⁷⁰ In civil cases referred directly from the lawyers, there were differences among the states in the use of pre-session communications.⁷¹

B. What Case Information Mediators Had Access to Before the First Mediation Session

⁶⁵ We examined only those case characteristics that mediators might be aware of at the time they were deciding whether to have pre-session communications, as that decision could not have been influenced by case features the mediators did not know about.

⁶⁶ See *supra* note 59 and accompanying text.

⁶⁷ Mediators in civil cases were less likely to have pre-session communications with the parties and/or their lawyers in tort cases (63%) than in contract, property, or employment cases (76%, 77%, and 81%, respectively) ($\chi^2(3) = 11.42$, $p < .05$, $V = .16$). This could not be explained by differences among these case subtypes in referral source or in whether the parties had counsel, as those characteristics would have produced different patterns. Family: $p = .92$.

⁶⁸ Neither party vs. both had counsel: civil, 74% vs. 42% ($\chi^2(1) = 9.69$, $p < .01$, $V = .14$); family: $p = .42$.

⁶⁹ Civil: p 's = .23 and .70. Family: responding party, $r(163) = .16$, $p < .05$; complaining party, $p = .14$.

⁷⁰ This was true even though these cases had no requirements for or constraints on pre-session communications. Mediators in civil cases were more likely to have pre-session communications when the case was referred directly from a private provider (87%) than from a federal court or from the lawyers (77% and 75%, respectively); they were least likely to have pre-session communications when the case was referred from a state court (63%) ($\chi^2(3) = 10.14$, $p < .05$, $V = .15$). Mediators in family cases were marginally more likely to have pre-session communications when the case was referred directly from the parties (61%) than from the lawyers or a mediation organization (52% and 50%, respectively); they were least likely to have pre-session communications when the case was referred from a state court (36%) ($\chi^2(3) = 7.35$, $p = .06$, $V = .21$).

⁷¹ Pre-session communications in civil cases referred from the lawyers were least likely to take place in North Carolina (46%), followed by Utah (67%); they were more likely to take place in the rest of the states (ranging from 79% to 92%) ($\chi^2(6) = 27.43$, $p < .001$, $V = .34$). There were insufficient cases to repeat this analysis for the other case referral sources in civil cases and to examine inter-state differences within any of the referral sources in family cases.

Relatively few mediators in civil cases but almost half in family cases did not have access to any information about the dispute before the first mediation session (*see* Table 1).⁷² In civil cases, over three-fourths of the mediators had party mediation statements or memos, around half had the pleadings and/or motions, and almost one-fourth had other case documents (*e.g.*, financial statements, medical records, contracts). In family cases, almost one-third of the mediators had the pleadings and/or motions; fewer than one-fifth had mediation statements or other case documents.⁷³ Few civil or family mediators had access to the results of intimate partner violence screening before the first mediation session.⁷⁴

Table 1. What Case Information Mediators Had Access to Before the First Mediation Session		
	<i>Civil Cases</i>	<i>Family Cases</i>
Parties' mediation statements or memos	77%	19%
Pleadings and/or motions	51%	32%
Depositions and/or expert reports	11%	2%
Results of intimate partner violence (IPV) screening	0.3%	11%
Other documents (financial, medical, contracts, etc.)	23%	14%
Other	2%	8%
No information	16%	45%
<i>Total Ns</i>	679	321

Whether the mediators had case information before the first mediation session varied depending on whether the parties had counsel. When neither party had counsel, mediators in both civil and family cases were more likely to not have any information about the dispute⁷⁵ and were less likely to have the pleadings and/or motions⁷⁶ than when both parties had counsel. And mediators in civil cases were less likely to have mediation memos when neither party had

⁷² Mediators in civil cases were less likely than those in family cases to not have any information about the dispute before the first mediation session ($\chi^2(1) = 96.94, p < .001, V = .31$).

⁷³ Mediators in civil cases were more likely than those in family cases to have mediation statements ($\chi^2(1) = 298.56, p < .001, V = .55$), pleadings/motions ($\chi^2(1) = 29.86, p < .001, V = .17$), depositions/expert reports ($\chi^2(1) = 25.17, p < .001, V = .16$), and other case documents ($\chi^2(1) = 9.50, p < .01, V = .10$).

⁷⁴ These small percentages might suggest that cases involving intimate partner violence (IPV) had been screened out before referral to the mediator, or that screening had not yet taken place and was to be done by the mediator. Mediators in civil cases were less likely than those in family cases to have the results of IPV screening ($\chi^2(1) = 71.10, p < .001, V = .27$).

⁷⁵ Neither party vs. both had counsel: civil, 54% vs. 13% ($\chi^2(1) = 50.15, p < .001, V = .28$); family, 60% vs. 40% ($\chi^2(1) = 8.68, p < .01, V = .18$).

⁷⁶ Neither party vs. both had counsel: civil, 12% vs. 55% ($\chi^2(1) = 27.60, p < .001, V = .21$); family, 14% vs. 38% ($\chi^2(1) = 14.38, p < .001, V = .23$).

counsel than when both parties had counsel; there was no difference in family cases.⁷⁷ Whether the mediators themselves had a legal background (*i.e.*, law only or law in addition to a non-law background) compared to only a non-law background was related to what case information they had before the first mediation session in civil cases but not in family cases.⁷⁸

The case referral source also was related to whether mediators had case information before the first mediation session. In civil cases, mediators in cases referred from federal courts were less likely to not have any information about the case, and were more likely to have mediation memos, than were mediators in cases referred from state courts, with cases referred from the lawyers or from mediation organizations or providers falling between the federal and state courts.⁷⁹ Mediators in civil cases were much more likely to have pleadings and/or motions in cases referred from federal courts than in cases referred from the three other sources.⁸⁰ In family cases, mediators in cases referred directly from the parties were less likely to have the pleadings and/or motions than were mediators in cases referred from the lawyers, state courts, or mediation organizations.⁸¹ Mediators in family cases were marginally less likely to have mediation memos in cases referred from the parties or state courts than in cases referred from the lawyers or from mediation organizations.⁸² Whether mediators in family cases had no information of any kind was not related to the case referral source.⁸³

C. Parties' Presence and Participation in Pre-Session Communications

For mediation communications that took place prior to the day of the first session,⁸⁴ neither party (*i.e.*, the disputants themselves) was present in person or by phone for any of the communications in approximately three-fourths of civil cases and one-fourth of family cases (*see* Table 2). One party was present for at least some of the communications in almost one-fourth of

⁷⁷ Neither party vs. both had counsel: civil, 22% vs. 82% ($\chi^2(1) = 80.74, p < .001, V = .35$); family, $p = .26$. Whether the mediators had access to other case documents was not related to whether the parties had counsel in either civil or family cases (p 's of .21 and .33, respectively).

⁷⁸ In civil cases, mediators who had a law background were more likely to have mediation memos (79% vs. 32%, $\chi^2(1) = 27.34, p < .001, V = .21$) and the pleadings (53% vs. 33%, $\chi^2(1) = 7.71, p < .01, V = .11$), but were less likely to have no information (14% vs. 50%, $\chi^2(1) = 21.20, p < .001, V = .18$), than were mediators who had only a non-law background. There were no differences in family cases (p 's ranged from .22 to .97).

⁷⁹ No information: federal courts, 0%; organizations, 12%; lawyers, 15%; state courts, 25% ($\chi^2(3) = 34.90, p < .001, V = .23$). Mediation memos: federal courts, 97%; organizations, 84%; lawyers, 79%; state courts, 66% ($\chi^2(3) = 40.95, p < .001, V = .25$).

⁸⁰ Federal courts, 89%; other sources, 36% to 49% ($\chi^2(3) = 74.00, p < .001, V = .34$).

⁸¹ Parties, 10%; other sources, 35% to 44% ($\chi^2(3) = 25.37, p < .001, V = .28$).

⁸² Parties, 14%; state courts, 16%; lawyers, 26%; organizations, 33% ($\chi^2(3) = 7.35, p = .06, V = .15$).

⁸³ $p = .16$.

⁸⁴ Findings regarding communications held prior to the day of the first session include cases that had communications only prior to the day of the first session as well as the "prior to" communications in cases that had communications both prior to and on the same day as the first session. This applies throughout the rest of the Article.

civil cases and almost half of family cases; both parties were present during all discussions in few civil cases and over one-fourth of family cases.⁸⁵ For pre-session communications held on the same day as the first mediation session,⁸⁶ neither party was present in relatively few cases while both parties were present in around half of the cases in both civil and family cases (*see* Table 2).⁸⁷ Parties generally were less likely to be present for pre-session discussions held prior to the day of the first session than on the same day as the first session⁸⁸ in both civil and family cases.⁸⁹

Table 2. Whether the Parties Themselves Were Present for Pre-Session Communications				
	<i>Civil Cases</i>		<i>Family Cases</i>	
	Prior To	Same Day	Prior To	Same Day
Both parties were present for all communications	6%	46%	28%	56%
At least one party was present for some or all communications	18%	40%	48%	28%
Neither party was present for any communications	76%	14%	24%	17%
<i>Total N's</i>	385	263	96	72

⁸⁵ Parties in civil cases were less likely to be present for communications held prior to the day of the first session than were parties in family cases ($\chi^2(2) = 97.97, p < .001, V = .45$).

⁸⁶ Findings regarding pre-session communications held on the same day as the first mediation session include cases that had communications only on the same day as the first session as well as the “same day” communications in cases that had communications at both times. This applies throughout the rest of the Article.

⁸⁷ There was no difference between civil and family cases in whether parties were present for pre-session communications held on the same day as the first session ($p = .19$).

⁸⁸ Separate analyses needed to be conducted for (1) the set of cases where pre-session communications were held at both times and (2) the set of cases where pre-session communications were held at one time or the other. For the first set of cases, the analyses compared the parties’ presence at the two different times in the same case. For the second set of cases, the analyses compared (a) the parties’ presence during communications prior to the day of the first session in cases that had communications only at that time versus (b) the parties’ presence during pre-session communications on the same day as the first session in cases that had communications only at that time. Because these two sets of analyses are based on different sets of cases, the resulting percentages will differ from each other, and from those reported in the text or tables. This applies throughout the rest of the Article.

⁸⁹ In civil cases, one or both parties were less likely to be present for communications held prior to the day of the first session than on the same day as the first session when communications were held at both times (22% vs. 87%, $t(200) = -18.93, p < .001$) and when communications were held at one time or the other (21% vs. 75%, $t(203) = -7.61, p < .001$). In family cases, one or both parties were less likely to be present for communications held prior to the day of the first session than on the same day as the first session when communications were held at both times (73% vs. 89%, $t(44) = -2.85, p < .01$), but there was no difference when communications were held at one time or the other ($p = .92$).

Parties' presence during pre-session communications held prior to the day of the first session was related to whether they had counsel in both civil and family cases.⁹⁰ When both parties had counsel, one or both parties were present in 20% of civil cases and 62% of family cases; by contrast, when neither party had counsel, one or both parties were present in 100% of civil and family cases.⁹¹ Whether parties had counsel was not related to parties' presence during pre-session communications held on the same day as the first session in civil cases; in family cases, one or both parties were less likely to be present when both parties had counsel than when neither party had counsel (76% vs. 100%).⁹²

With regard to party participation during pre-session communications prior to and on the same day as the first session, the parties (*i.e.*, the disputants themselves) talked a considerable amount in around one-third of civil cases and almost two-thirds of family cases (*see* Table 3).⁹³ The parties did not talk at all in approximately one-fourth to one-third of civil cases but in few family cases. There was no difference between communications held prior to versus on the same day as the first session in how much the parties talked in either civil or family cases.⁹⁴

Table 3. How Much the Parties Themselves Talked During Pre-Session Communications				
	<i>Civil Cases</i>		<i>Family Cases</i>	
	Prior To	Same Day	Prior To	Same Day
Not at all	32%	26%	7%	7%
A little	34%	35%	28%	33%
A considerable amount	33%	38%	65%	60%
<i>Total N's</i>	87	221	68	55

⁹⁰ Because the question asked whether neither, one, or both parties had counsel and, similarly, whether neither, one, or both parties were present, we could not match the presence of a particular party with whether they did or did not have counsel. Accordingly, these analyses were conducted at the level of the case rather than the individual party.

⁹¹ Civil: $\chi^2(1) = 37.04$, $p < .001$, $V = .32$; family: $\chi^2(1) = 13.36$, $p < .001$, $V = .40$. Of course, parties who did not have counsel would have to be present in order for pre-session discussions to take place.

⁹² Civil: $p = .36$; family: $\chi^2(1) = 5.56$, $p < .05$, $V = .30$. There were too few cases in which the parties were present and the mediators had a non-law background to examine that relationship.

⁹³ Parties in civil cases talked less than parties in family cases during communications held prior to ($\chi^2(2) = 19.55$, $p < .001$, $V = .36$) and on the same day as ($\chi^2(2) = 11.92$, $p < .01$, $V = .21$) the first session.

⁹⁴ For the set of cases where pre-session communications took place either only prior to or only on the same day as the first mediation session, there was no difference between the two times in how much the parties talked (civil: $p = .41$; family: $p = .14$). There were too few cases where communications were held at both times and the parties were present both times to analyze differences in that set of cases.

How much the parties talked during communications held prior to the day of the first mediation session was related to whether they had counsel in civil cases but not in family cases.⁹⁵ Parties in civil cases talked a considerable amount in 26% of the cases when both parties had counsel, compared to in 67% of the cases when neither party had counsel. Conversely, parties did not talk at all in 41% of the cases when both parties had counsel but in none of the cases when neither party had counsel. During pre-session communications held on the same day as the first mediation session, however, there was no relationship between having counsel and how much the parties talked in either civil or family cases.⁹⁶

D. Actions the Mediators Engaged in Regarding the Mediation Process Itself

This section describes the actions the mediators engaged in regarding the mediation process itself during pre-session communications held prior to and on the same day as the first mediation session. We examine whether the mediators' actions differed at the two times and in civil versus family cases. We also examine whether the mediators' process actions varied depending on whether the parties were or were not present for pre-session communications and on the mediator's professional background.

Civil Cases. During communications with the parties and/or their lawyers held prior to the day of the first mediation session, a majority of the mediators discussed what information to submit before the first mediation session and explored who should or should not attend the mediation (*see* Table 4). Over half of the mediators explored options for how the opening mediation session might be structured, assessed the parties' and/or their lawyers' ability to communicate civilly, explored whether the parties would be okay being together in the same room, and explained their approach. Broadly speaking between one-third and half of the mediators explained the mediation process, explained the ground rules, explained mediation confidentiality, and explored options for structuring the rest of the mediation after the opening session. Around one-fourth of the mediators assessed the parties' capacity to mediate (*e.g.*, cognitive ability, violence, coercive control or intimidation) and coached the parties and/or their lawyers on non-adversarial communications.

⁹⁵ Civil: $\chi^2(2) = 7.91$, $p < .05$, $V = .32$; family: $p = .14$. Because the question asked about the parties' overall participation, not separately for each party, we could not match the participation of a particular party with whether they did or did not have counsel. Accordingly, these analyses were conducted at the level of the case rather than the individual party.

⁹⁶ Civil: $p = .31$; family: $p = .36$. There were too few cases in which the parties were present and the mediators had a non-law background to examine that relationship.

Table 4. Actions Mediators Engaged in Regarding the Mediation Process Itself In Civil Cases

	<i>Prior To</i>	<i>Same Day</i>	<i>At One or Both Times</i>
Explained the process/mediator's role	43%	81%	71%
Explained my approach	52%	71%	71%
Explained the ground rules	39%	81%	68%
Explained mediation confidentiality	36%	73%	62%
Discussed what information to submit	76%	--	76%
Explored who should or should not attend mediation	69%	12%	67%
Assessed participants' ability to communicate civilly	54%	49%	65%
Assessed the parties' capacity to mediate	26%	47%	43%
Explored whether parties would be okay together	52%	49%	63%
Explored options for structuring the opening session	57%	41%	64%
Coached on non-adversarial communications	21%	34%	33%
Explored options for structuring the rest of mediation	32%	46%	48%
Other	5%	3%	--
None of the above	6%	2%	--
<i>Total Ns</i>	387	252	--

During pre-session communications held on the same day as the first session, a majority of the mediators explained the mediation process, the ground rules, mediation confidentiality, and their approach (*see* Table 4). Almost half of the mediators assessed the parties' and/or their lawyers' ability to communicate civilly, explored whether the parties would be okay being together in the same room, assessed the parties' capacity to mediate, and explored options for how the opening session and the rest of the mediation might be structured. Approximately one-third of the mediators coached the parties and/or their lawyers on non-adversarial communications; few explored who should or should not attend the mediation.

To get an overall sense of how frequently mediators engaged in each action at some time during pre-session communications, we created a single overall measure for each action. That is, if an action occurred either prior to or on the same day as the first session, or at both times, that action was counted as having occurred.⁹⁷ Using this measure, we see that, at some time during pre-session communications, a majority (between 62% and 71%) of the mediators in civil cases engaged in most of the process actions (*see* the final column in Table 4). Broadly speaking between one-third and half of the mediators explored options for how to structure the rest of the mediation after the opening session, assessed the parties' capacity to mediate, and coached the parties and/or their lawyers on non-adversarial communications.

⁹⁷ For those mediators who had pre-session discussions at both times, each action was counted only once, even if it occurred at both times. Comparable measures were used, *infra*, for the process actions mediators engaged in at some time during pre-session communications in family cases, as well for the substantive issues mediators discussed at some time during pre-session communications in both civil and family cases.

There were differences in which process actions the mediators engaged in during pre-session communications held prior to versus on the same day as the first session. In cases where pre-session communications occurred both prior to and on the same day as the first session, there were differences between the two times in the frequency with which mediators engaged in each of these actions. Mediators who had pre-session communications at both times were less likely to explain the mediation process, their approach, the ground rules, and mediation confidentiality and assess the parties' capacity to mediate, explore options for how to structure the rest of the mediation after the opening session, and coach on non-adversarial communications during communications held prior to than on the same day as the first session.⁹⁸ Conversely, mediators were more likely to discuss who should or should not attend the mediation, explore options for how the opening session should be structured, explore whether the parties would be okay being together in the same room, and, marginally, assess the participants' ability to communicate civilly during pre-session communications held prior to than on the same day as the first session.⁹⁹

In cases where pre-session communications occurred either prior to or on the same day as the first mediation session, there were differences in fewer process actions between the two times. Mediators were less likely to explain mediation confidentiality and, marginally, to explain the mediation process and the ground rules during communications held prior to than on the same day as the first session.¹⁰⁰ Conversely, mediators were more likely to discuss who should or should not attend the mediation and, marginally, to assess the participants' ability to communicate civilly during pre-session communications held prior to than on the same day as the first session.¹⁰¹

Family Cases. During communications with the parties and/or their lawyers held prior to the day of the first mediation session, between two-thirds and three-fourths of the mediators explained the mediation process, explored whether the parties would be okay being together in the same room, and discussed what information the parties should submit before the first mediation session (*see* Table 5). Between half and two-thirds of the mediators assessed the parties' capacity to mediate (*i.e.*, cognitive ability, violence, coercive control, or intimidation), explained their approach, explained mediation confidentiality, and assessed whether the parties and/or their lawyers could communicate civilly. Just under half of the mediators explained the ground rules and explored who should or should not attend the mediation, and over one-third

⁹⁸ Prior to vs. same day: process, 44% vs. 85% ($t(196) = -9.15, p < .001$); approach, 55% vs. 74% ($t(196) = -3.89, p < .001$); ground rules, 39% vs. 86% ($t(196) = -11.32, p < .001$); confidentiality, 38% vs. 76% ($t(196) = -8.56, p < .001$); capacity, 35% vs. 52% ($t(196) = -3.79, p < .001$); structure rest, 37% vs. 51% ($t(196) = -3.01, p < .01$); coach, 26% vs. 38% ($t(196) = -2.82, p < .01$).

⁹⁹ Prior to vs. same day: attend: 79% vs. 10% ($t(196) = 19.75, p < .001$); structure opening, 64% vs. 41% ($t(196) = 4.61, p < .001$); okay together, 61% vs. 49% ($t(196) = 2.29, p < .05$); civilly (62% vs. 53%, $t(196) = 1.92, p = .06$).

¹⁰⁰ Prior to vs. same day: confidentiality, 33% vs. 57% ($t(200) = -2.77, p < .01$); process, 42% vs. 60% ($t(200) = -1.96, p = .052$); ground rules, 39% vs. 54% ($t(200) = -1.71, p = .09$).

¹⁰¹ Prior to versus same day: attend, 60% vs. 16% ($t(200) = 5.10, p < .001$); civilly, 47% vs. 30% ($t(200) = 1.88, p = .06$). There was no difference in the other actions (p 's ranged from .18 to .99).

explored options for how to structure the opening session. Around one-fourth of the mediators explored options for structuring the rest of the mediation session and coached the parties and/or their lawyers on non-adversarial communications.

	<i>Prior To</i>	<i>Same Day</i>	<i>At One or Both Times</i>
Explained the process/mediator's role	76%	85%	90%
Explained my approach	58%	65%	75%
Explained the ground rules	47%	76%	71%
Explained mediation confidentiality	58%	79%	76%
Discussed what information to submit	67%	--	67%
Explored who should or should not attend mediation	46%	12%	43%
Assessed participants' ability to communicate civilly	52%	62%	66%
Assessed the parties' capacity to mediate	62%	61%	75%
Explored whether parties would be okay together	72%	64%	82%
Explored options for structuring the opening session	37%	46%	50%
Coached on non-adversarial communications	22%	44%	37%
Explored options for structuring the rest of mediation	25%	46%	42%
Other	2%	3%	--
None of the above	2%	1%	--
<i>Total Ns</i>	<i>100</i>	<i>72</i>	<i>--</i>

During pre-session communications held on the same day as the first session, a majority of the mediators engaged in most of these actions; almost half explored how to structure the opening session and the rest of the mediation and coached on non-adversarial communications; and few explored who should or should not attend the mediation (*see* Table 5).

At some time during pre-session discussions, between two-thirds and 90% of the mediators in family cases engaged in most of these process actions (*see* the final column in Table 5). Broadly speaking between one-third and half of the mediators explored options for how to structure the opening session and the rest of the mediation, discussed who should or should not attend the mediation, and coached the parties and/or their lawyers on non-adversarial communications.

The mediators were less likely to engage in some of the process actions during pre-session communications held prior to versus on the same day as the first session. In cases where pre-session communications occurred both prior to and on the same day as the first session, mediators were less likely to explain the ground rules, explain confidentiality, explore options for structuring the rest of the mediation after the opening session, and coach on non-adversarial communications during pre-session communications held prior to the day of the first session than

on the same day as the first session.¹⁰² However, mediators were more likely to explore who should or should not attend the mediation during communications held prior to than on the same day as the first session.¹⁰³ In cases where pre-session communications occurred at one time or the other, mediators were less likely to explain the ground rules, coach on non-adversarial communications and, marginally, explore how to structure the rest of the mediation after the opening session during communications held prior to than on the same day as the first session.¹⁰⁴

Differences between Civil and Family Cases. During pre-session communications held prior to the day of the first session, mediators in civil cases were less likely than those in family cases to explain the mediation process, explain mediation confidentiality, assess the parties' capacity to mediate, and explore whether the parties would be okay being together in the same room (*compare* Tables 4 and 5).¹⁰⁵ By contrast, mediators in civil cases were more likely than those in family cases to explore who should or should not attend the mediation, explore options for how the opening session might be structured, and, marginally, discuss what information to submit before the first session.¹⁰⁶ During pre-session communications held on the same day as the first mediation session, there were differences between civil and family cases in only three process actions: Mediators in civil cases were less likely than those in family cases to assess the participants' ability to communicate civilly, assess the parties' capacity to mediate, and explore whether the parties would be okay being together in the same room.¹⁰⁷

Differences by Whether the Parties Were Present.¹⁰⁸ In civil cases, mediators were more likely to engage in some of the process actions when one or both parties were present than when neither party was present. During communications held prior to the day of the first mediation session, mediators were more likely to explain the process, the ground rules, and

¹⁰² Prior to vs. same day: ground rules, 40% vs. 77% ($t(46) = -4.10, p < .001$); confidentiality, 51% vs. 73% ($t(46) = -3.68, p < .01$); structure rest, 21% vs. 47% ($t(46) = -3.59, p < .01$); coach, 30% vs. 49% ($t(46) = -2.44, p < .05$).

¹⁰³ Prior to vs. same day: attend, 60% vs. 11% ($t(46) = 6.64, p < .001$). There were no differences in the other actions (p 's ranged from .24 to .84).

¹⁰⁴ Prior to vs. same day: ground rules, 49% vs. 81% ($t(64) = -2.55, p < .05$); coach, 13% vs. 38% ($t(64) = -2.35, p < .05$); structure rest, 24% vs. 48% ($t(64) = -1.91, p = .06$). There were no differences in the other actions (p 's ranged from .22 to 1.00).

¹⁰⁵ Civil vs. family: process, 43% vs. 76% ($\chi^2(1) = 35.39, p < .001, V = .27$); confidentiality, 36% vs. 58% ($\chi^2(1) = 16.09, p < .001, V = .18$); capacity, 26% vs. 62% ($\chi^2(1) = 45.20, p < .001, V = .30$); okay together, 52% vs. 72% ($\chi^2(1) = 13.31, p < .001, V = .16$).

¹⁰⁶ Civil vs. family: attend, 69% vs. 46% ($\chi^2(1) = 17.84, p < .001, V = .19$); structure opening, 57% vs. 37% ($\chi^2(1) = 12.23, p < .001, V = .16$); information, 76% vs. 67% ($\chi^2(1) = 3.13, p = .08, V = .08$). There were no differences in the other actions (p 's ranged from .10 to .71).

¹⁰⁷ Civil vs. family: civilly, 49% vs. 62% ($\chi^2(1) = 4.20, p < .05, V = .11$); capacity, 47% vs. 61% ($\chi^2(1) = 4.32, p < .05, V = .12$); okay together, 49% vs. 64% ($\chi^2(1) = 4.84, p < .05, V = .12$). There were no differences in the other actions (p 's ranged from .10 to .98).

¹⁰⁸ Because the parties' presence was related to whether they had counsel in both civil and family cases, *see supra* notes 91 and 92 and accompanying text, we did not also examine whether there were differences in what was discussed by whether the parties had counsel.

mediation confidentiality, and were more likely to assess the parties' capacity to mediate and coach the participants on non-adversarial communications, when one or both parties were present than when neither party was present.¹⁰⁹ A largely similar pattern was seen for pre-session communications held on the same day as the first mediation session: Mediators were more likely to explain the process, the ground rules, mediation confidentiality, and their approach, and were more likely to assess the parties' capacity to mediate, when one or both parties were present than when neither party was present.¹¹⁰

In family cases, during pre-session communications held prior to the day of the first session, mediators were more likely to engage in most of the process actions when one or both parties were present than when neither party was present. When one or both parties were present, mediators were more likely to explain the mediation process, their approach, the ground rules, or confidentiality; assess the parties' capacity to mediate and whether the parties' and/or their lawyers could communicate civilly; and explore whether the parties would be okay being together in the same room, options for how the opening session might be structured, and who should or should not attend the mediation.¹¹¹ By contrast, during pre-session communications held on the same day as the first session, there were no differences in the mediators' actions depending on whether the parties were or were not present.¹¹²

Differences by the Mediators' Background. There were few differences between mediators who had only a law background and those who had a non-law background (instead of or in addition to a law background) in which process actions they engaged. In civil cases, during pre-session communications held prior to the day of the first session, mediators who had only a law background were less likely than those who had a non-law background to explore whether the parties would be okay being together in the same room and, marginally, to coach the parties

¹⁰⁹ One or both parties present vs. neither party present: process, 54% vs. 39% ($\chi^2(1) = 6.37, p < .05, V = .13$); ground rules, 53% vs. 35% ($\chi^2(1) = 8.75, p < .01, V = .16$); confidentiality, 54% vs. 30% ($\chi^2(1) = 17.06, p < .001, V = .22$); capacity, 37% vs. 23% ($\chi^2(1) = 6.96, p < .01, V = .14$); coach, 30% vs. 18% ($\chi^2(1) = 6.18, p < .05, V = .13$). There were no differences in the other actions (p 's ranged from .14 to .85).

¹¹⁰ One or both parties present vs. neither party present: process, 85% vs. 50% ($\chi^2(1) = 21.20, p < .001, V = .30$); ground rules, 83% vs. 60% ($\chi^2(1) = 8.66, p < .01, V = .19$); confidentiality, 75% vs. 53% ($\chi^2(1) = 6.08, p < .05, V = .16$); approach, 74% vs. 57% ($\chi^2(1) = 4.12, p < .05, V = .13$); capacity, 50% vs. 27% ($\chi^2(1) = 5.63, p < .05, V = .15$). There were no differences in the other actions (p 's ranged from .14 to .94).

¹¹¹ One or both parties present vs. neither party present: process, 89% vs. 38% ($\chi^2(1) = 23.99, p < .001, V = .51$); approach, 74% vs. 10% ($\chi^2(1) = 27.63, p < .001, V = .54$); ground rules, 56% vs. 19% ($\chi^2(1) = 8.69, p < .01, V = .31$); confidentiality, 65% vs. 29% ($\chi^2(1) = 8.94, p < .01, V = .31$); capacity, 72% vs. 33% ($\chi^2(1) = 10.60, p < .01, V = .34$); civilly, 64% vs. 24% ($\chi^2(1) = 10.54, p < .01, V = .34$); okay together, 83% vs. 48% ($\chi^2(1) = 11.14, p < .01, V = .35$); opening structure, 43% vs. 19% ($\chi^2(1) = 3.99, p < .05, V = .21$); attend, 53% vs. 19% ($\chi^2(1) = 7.47, p < .01, V = .28$). There were no differences in the other actions (p 's ranged from .30 to .99).

¹¹² p 's ranged from .26 to .99.

and/or their lawyers on non-adversarial communications.¹¹³ During pre-session communications held on the same day as the first session in civil cases, there were no differences between mediators with law versus non-law backgrounds in any process actions.¹¹⁴ In family cases, during pre-session communications held prior to the day of the first session, mediators who had only a law background were less likely than those who had a non-law background to explain the mediation process and to coach on non-adversarial communications, and were marginally less likely to explain their approach.¹¹⁵ During communications held on the same day as the first session, mediators who had only a law background were less likely than those who had a non-law background to explore options for how the opening session might be structured.¹¹⁶

E. Aspects of the Substance of the Dispute the Mediators Discussed

This section describes the substantive aspects of the dispute the mediators discussed during pre-session communications held prior to and on the same day as the first mediation session. We examine whether the mediators discussed different substantive items at the two times and in civil versus family cases. We also examine whether the items discussed varied depending on whether the parties were or were not present for pre-session communications and on the mediator's professional background.

Civil Cases. During pre-session communications held prior to the day of the first mediation session, a majority of the mediators in civil cases explored which issues needed to be addressed in the mediation, the procedural or litigation status of the case, the status of settlement negotiations, and the parties' legal theories and surrounding facts (*see* Table 6). Around half of the mediators explored the parties' interests, their goals for the mediation, and the obstacles to settlement. One-third of the mediators developed the agenda and around one-fifth explored the costs and risks of litigation and new settlement proposals for the parties to consider. During pre-session communications held on the same day as the first mediation session, broadly speaking between half and two-thirds of the mediators discussed all but one of these substantive matters; only 40% developed the agenda (*see* Table 6).

¹¹³ Law only vs. all other backgrounds: okay together, 50% vs. 67% ($\chi^2(1) = 4.46$, $p < .05$, $V = .11$); coach, 19% vs. 30% ($\chi^2(1) = 2.80$, $p = .09$, $V = .09$). There were no differences in the other actions (p 's ranged from .10 to .95).

¹¹⁴ p 's ranged from .17 to .93.

¹¹⁵ Law only vs. all other backgrounds: process, 69% vs. 87% ($\chi^2(1) = 4.38$, $p < .05$, $V = .22$); coach, 14% vs. 32% ($\chi^2(1) = 4.05$, $p < .05$, $V = .21$); approach, 52% vs. 71% ($\chi^2(1) = 3.15$, $p = .08$, $V = .18$). There were no differences in the other items (p 's ranged from .16 to .86).

¹¹⁶ Law only vs. all other backgrounds: structure opening, 36% vs. 71% ($\chi^2(1) = 5.97$, $p < .05$, $V = .30$). There were no differences in the other items (p 's ranged from .20 to .92).

Table 6. Aspects of the Substance of the Dispute the Mediators Discussed in Civil Cases			
	<i>Prior To</i>	<i>Same Day</i>	<i>At One or Both Times</i>
Explored which issues needed to be addressed	75%	64%	81%
Developed the agenda	33%	40%	46%
Explored the parties' interests	50%	66%	67%
Explored the parties' goals for the mediation	52%	60%	67%
Explored the procedural/litigation status	73%	56%	80%
Explored the parties' legal theories/facts	62%	60%	72%
Explored the status of settlement negotiations or proposals exchanged	75%	65%	82%
Explored the obstacles to settlement	54%	62%	68%
Explored new settlement proposals for parties to consider	18%	59%	44%
Explored the costs and risks of litigation	20%	68%	50%
Other	1%	0.4%	--
None of the above	6%	5%	--
<i>Total Ns</i>	387	241	--

At some time during pre-session communications, two-thirds or more of the mediators in civil cases discussed most of the items regarding the substance of the dispute (*see* the final column in Table 6). Half or somewhat fewer of the mediators explored new settlement proposals, discussed the costs and risks of litigation, and developed the agenda.

There were several differences in which substantive items the mediators discussed during pre-session communications held prior to versus on the same day as the first session. In cases where pre-session communications took place at both times, mediators were less likely to explore the parties' interests and their goals for the mediation as well as the costs and risks of litigation and new settlement proposals during communications held prior to than on the same day as the first session.¹¹⁷ But mediators were more likely to explore the issues that needed to be addressed, the procedural status of the case, and the status of settlement negotiations during communications held prior to than on the same day as the first session.¹¹⁸ By contrast, in cases where pre-session communications occurred at one time or the other, there were only two differences in what mediators discussed at the two times: Mediators were less likely to discuss the costs and risks of litigation but they were marginally more likely to discuss the parties' legal

¹¹⁷ Prior to vs. same day: interests, 59% vs. 73% ($t(190) = -2.88, p < .001$); goals, 54% vs. 67% ($t(190) = -2.57, p < .05$); costs/risks, 22% vs. 76% ($t(190) = -13.80, p < .001$); proposals, 20% vs. 70% ($t(190) = -12.13, p < .001$). There were no differences in the other items (p 's ranged from .35 to .75).

¹¹⁸ Prior to vs. same day: issues, 79% vs. 62% ($t(190) = 3.70, p < .001$); procedural status, 78% vs. 54% ($t(190) = 5.16, p < .001$); negotiation status, 80% vs. 65% ($t(190) = 3.15, p < .01$).

theories and surrounding facts during communications held prior to than on the same day as the first session.¹¹⁹

Family Cases. During pre-session communications held prior to the day of the first session, two-thirds of the mediators explored which issues needed to be addressed in the mediation and almost half of the mediators explored the procedural or litigation status of the case and the parties' interests and their goals for the mediation (*see* Table 7). Around one-third of the mediators explored the status of settlement negotiations and the obstacles to settlement, while approximately one-fourth developed the agenda. Fewer than one-fifth of the mediators explored the parties' legal theories and surrounding facts or discussed the costs and risks of litigation; even fewer explored new settlement proposals for the parties to consider. During pre-session communications held on the same day as the first mediation session, a majority of the mediators in family cases explored the issues to be addressed in the mediation and the parties' interests and goals for the mediation (*see* Table 7). Broadly speaking around half of the mediators explored the status of settlement negotiations, the obstacles for settlement, new settlement proposals for the parties to consider, the costs and risks of litigation, the procedural or litigation status of the case, and developed the agenda. Fewer than one-third explored the parties' legal theories and surrounding facts.

	<i>Prior To</i>	<i>Same Day</i>	<i>At One or Both Times</i>
Explored which issues needed to be addressed	66%	71%	71%
Developed the agenda	24%	44%	42%
Explored the parties' interests	42%	62%	58%
Explored the parties' goals for the mediation	48%	60%	62%
Explored the procedural/litigation status	49%	48%	60%
Explored the parties' legal theories/facts	17%	29%	28%
Explored the status of settlement negotiations or proposals exchanged	31%	53%	49%
Explored the obstacles to settlement	32%	50%	47%
Explored new settlement proposals for parties to consider	6%	47%	30%
Explored the costs and risks of litigation	17%	48%	38%
Other	0	0	--
None of the above	14%	13%	--
<i>Total Ns</i>	<i>94</i>	<i>68</i>	<i>--</i>

At some time during pre-session communications, a majority of the mediators in family cases discussed the issues that needed to be addressed in the mediation, the parties' interests and

¹¹⁹ Prior to vs. same day: costs/risks, 18% vs. 37% ($t(250) = -2.52, p < .05$); theories, 56% vs. 40% ($t(250) = 1.86, p = .06$). There were no differences in the other items (p 's ranged from .14 to .99).

their goals for the mediation, and the procedural or litigation status of the case (*see* the final column in Table 7). Broadly speaking between one-fourth and half of the mediators discussed the rest of the substantive items.

In cases where pre-session communications occurred at both times, mediators were less likely to explore the parties' interests and their goals for the mediation, the status of negotiations, the obstacles to settlement, the costs and risks of litigation, and new settlement proposals during communications held prior to than on the same day as the first session.¹²⁰ In cases where pre-session communications took place at one time or the other, there were only two differences in what mediators discussed at the two times: Mediators were less likely to explore new settlement proposals and were marginally less likely to develop the agenda during communications held prior to than on the same day as the first session.¹²¹

Differences between Civil and Family Cases. During pre-session communications held prior to the day of the first session, mediators in civil cases were more likely than those in family cases to discuss a majority of the substantive items (*compare* Tables 6 and 7). Specifically, mediators in civil cases were more likely than those in family cases to explore the status of settlement negotiations, the parties' legal theories and facts, the procedural or litigation status of the case, the obstacles to settlement, new settlement proposals and, marginally, which issues needed to be addressed in the mediation.¹²² During pre-session communications held on the same day as the first session, mediators in civil cases were more likely than those in family cases to explore the parties' legal theories, the costs and risks of litigation and, marginally, the status of settlement negotiations, the obstacles to settlement, and new settlement proposals.¹²³

Differences by Whether the Parties Were Present. In civil cases, during communications held prior to the day of the first mediation session, mediators were more likely to explore the parties' interests, new settlement proposals, and, marginally, the costs and risks of

¹²⁰ Prior to vs. same day: interests, 43% vs. 73% ($t(39) = -3.12, p < .01$); goals, 35% vs. 68% ($t(39) = -3.91, p < .001$); negotiation status, 25% vs. 58% ($t(39) = -3.91, p < .001$); obstacles: 33% vs. 53% ($t(39) = -2.73, p < .05$); costs/risks, 28% vs. 55% ($t(39) = -2.72, p < .05$); proposals, 10% vs. 53% ($t(39) = -5.37, p < .001$). There were no differences in the other items (p 's ranged from .10 to .38).

¹²¹ Prior to vs. same day: proposals: 2% vs. 24% ($t(63) = -2.95, p < .01$); agenda, 18% vs. 38% ($t(63) = -1.76, p = .08$). There were no differences in the other items (p 's ranged from .11 to .95).

¹²² Civil vs. family cases: negotiation status, 75% vs. 31% ($\chi^2(1) = 64.84, p < .001, V = .37$); legal theories, 62% vs. 17% ($\chi^2(1) = 60.76, p < .001, V = .36$); procedural status, 73% vs. 49% ($\chi^2(1) = 20.99, p < .001, V = .21$); obstacles, 54% vs. 32% ($\chi^2(1) = 15.11, p < .001, V = .18$); proposals: 18% vs. 6% ($\chi^2(1) = 7.53, p < .01, V = .12$); issues: 75% civil vs. 66% family, $\chi^2(1) = 2.92, p = .09, V = .08$. There were no differences in the other items (p 's ranged from .12 to .53).

¹²³ Civil vs. family cases: legal theories, 60% vs. 29% ($\chi^2(1) = 20.16, p < .001, V = .26$); costs/risks, 68% vs. 48% ($\chi^2(1) = 8.74, p < .01, V = .17$); negotiation status, 65% vs. 53% ($\chi^2(1) = 3.37, p = .07, V = .10$); obstacles: 62% vs. 50% ($\chi^2(1) = 3.30, p = .07, V = .10$); proposals: 59% vs. 47% ($\chi^2(1) = 3.03, p = .08, V = .10$). There were no differences in the other items (p 's ranged from .25 to .98).

litigation when one or both parties were present than when neither party was present.¹²⁴ During pre-session communications held on the same day as the first mediation session in civil cases, mediators were more likely to explore the parties' interests, new settlement proposals, the costs and risks of litigation, and, marginally, the parties' goals for the mediation when one or both parties were present than when neither party was present.¹²⁵ In family cases, during pre-session communications held prior to the day of the first session, the parties' presence was related to only one item: mediators were more likely to explore the parties' goals for the mediation when one or both parties were present than when neither party was present.¹²⁶ During pre-session communications held on the same day as the first mediation session, mediators in family cases were more likely to explore the parties' interests, develop the agenda, and were marginally more likely to explore the issues that needed to be addressed and the parties' goals for the mediation, when one or both parties were present than when neither party was present.¹²⁷

Differences by the Mediators' Background. In civil cases, during pre-session communications held prior to the day of the first session, mediators who had only a law background were less likely than mediators who had a non-law background (instead of or in addition to a law background) to explore the parties' interests and their goals for the mediation and, marginally, to explore the obstacles to settlement.¹²⁸ During pre-session communications held on the same day as the first session, mediators who had only a law background were more likely than those who had a non-law background to explore which issues needed to be addressed in mediation and were marginally more likely to explore the procedural or litigation status of the case.¹²⁹ But mediators with only a law background were less likely than mediators who had a non-law background to explore the costs and risks of litigation and were marginally less likely to explore new settlement proposals during pre-session communications held on the same day as

¹²⁴ One or both parties present vs. neither party present: interests: 61% vs. 47% ($\chi^2(1) = 5.53$, $p < .05$, $V = .12$); proposals, 28% vs. 15% ($\chi^2(1) = 7.80$, $p < .01$, $V = .15$); costs/risks: 27% vs. 18% ($\chi^2(1) = 3.51$, $p = .06$, $V = .10$). There were no differences in the other items (p 's ranged from .15 to .81).

¹²⁵ One or both parties present vs. neither party present: interests, 70% vs. 48% ($\chi^2(1) = 5.58$, $p < .05$, $V = .16$); proposals, 63% vs. 32% ($\chi^2(1) = 10.71$, $p < .01$, $V = .22$); costs/risks: 71% vs. 45% ($\chi^2(1) = 8.06$, $p < .01$, $V = .19$); goals, 63% vs. 45% ($\chi^2(1) = 3.50$, $p = .06$, $V = .12$). There were no differences in the other items (p 's ranged from .33 to .88).

¹²⁶ One or both parties present vs. neither party present: 56% vs. 25% ($\chi^2(1) = 6.16$, $p < .05$, $V = .26$). There were no differences in the other items (p 's ranged from .19 to .99).

¹²⁷ One or both parties present vs. neither party present: interests, 72% vs. 11% ($\chi^2(1) = 12.10$, $p < .01$, $V = .44$); agenda: 51% vs. 11% ($\chi^2(1) = 4.93$, $p < .05$, $V = .28$); issues: 74% vs. 44% ($\chi^2(1) = 3.07$, $p = .08$, $V = .22$); goals: 66% vs. 33% ($\chi^2(1) = 3.47$, $p = .06$, $V = .24$). There were no differences in the other items (p 's ranged from .20 to .94.)

¹²⁸ Law only vs. all other backgrounds: interests, 48% vs. 70% ($\chi^2(1) = 7.10$, $p < .01$, $V = .14$); goals, 49% vs. 72% ($\chi^2(1) = 7.84$, $p < .01$, $V = .15$); obstacles, 53% vs. 67% ($\chi^2(1) = 3.16$, $p = .08$, $V = .09$). There were no differences in the other items (p 's ranged from .17 to .75).

¹²⁹ Law only vs. all other backgrounds: issues, 66% vs. 42% ($\chi^2(1) = 5.32$, $p < .05$, $V = .15$); procedural status, 58% vs. 38% ($\chi^2(1) = 3.78$, $p = .052$, $V = .13$).

the first session in civil cases.¹³⁰ In family cases, there were no differences by the mediator's background in the substantive matters discussed at either time.¹³¹

IV. Discussion and Implications for Mediation Practice

The present study shows that a sizeable number of mediators do not have communications with the mediation participants or do not have access to case documents before the first formal mediation session, especially in family cases. Pre-session communications were not held in roughly one-third of civil cases and two-thirds of family cases. In some instances, including in almost one-third of family cases, these communications were prohibited or infeasible. In addition, mediators did not have access to any case documents before the first formal mediation session in fewer than one-fifth of civil cases but in almost half of family cases. Thus, it cannot be assumed that mediators and mediation participants have the benefit of pre-session discussions or document submissions to help them prepare for the first mediation session.

The factor that was most strongly related to whether pre-session communications took place when they were not required, prohibited, or infeasible was how frequently the mediator usually holds those communications. Other mediator practice and background characteristics, as well as case characteristics that mediators were likely to be aware of early in mediation, generally had smaller or no relationships with whether pre-session communications took place. Thus, the mediators' usual personal practice, which might in part reflect the common practice in the local mediation or legal culture, appears to play a larger role in whether pre-session discussions are held than do the features of the individual case.

During pre-session communications held prior to the day of the first mediation session, neither party (*i.e.*, the disputants themselves) was present in approximately three-fourths of civil cases and one-fourth of family cases. And when the parties were present, they did not talk at all in around one-third of civil cases but in only a few family cases; they talked a considerable amount in one-third of civil cases and almost two-thirds of family cases. During pre-session communications held on the same day as the first mediation session, neither party was present in fewer than one-fifth of civil and family cases; the amount the parties talked was similar to that seen during communications held prior to the day of the first session.

The lack of the disputants' presence and participation during pre-session communications, especially in civil cases prior to the day of the first session, indicates that the exchange of information directly between the mediators and the disputants themselves is limited, as will be discussed in more detail below. And that lack of direct personal contact with the disputants in civil cases means that many mediators are unable to develop rapport and trust with the disputants themselves before the first mediation session, one of the four main goals for

¹³⁰ Law only vs. all other backgrounds: costs/risks, 65% vs. 88% ($\chi^2(1) = 4.87, p < .05, V = .15$); proposals: 56% vs. 75% ($\chi^2(1) = 3.07, p = .08, V = .12$). There were no differences in the other items (*p*'s ranged from .11 to .83).

¹³¹ Prior to: *p*'s ranged from .18 to .98; same day: *p*'s ranged from .20 to .85.

holding pre-session communications.¹³² Similarly, the lack of any pre-session discussions in a majority of family cases suggests that most family mediators do not have the opportunity to develop rapport with the disputants or their lawyers before the first mediation session.

Consistent with another of the main goals for pre-session communications -- helping the mediation participants gain an understanding of the mediator's approach and the mediation process¹³³ -- a majority of the mediators in both civil and family cases explained their approach, the mediation process, confidentiality, and the ground rules at some time during pre-session communications.¹³⁴ The mediators generally were more likely to explain aspects of the mediation process when the parties were present for these communications than when they were not present. But because a majority of parties in civil cases were not present during communications held prior to the first day of the session, and pre-session communications were not held in a majority of family cases, many disputants might arrive at the first mediation session uninformed about the mediation process. Represented parties might (or might not) receive a clear explanation of what to expect during mediation from their lawyers.¹³⁵ This would suggest that, despite some arguments to the contrary,¹³⁶ mediators' inclusion of an explanation of the mediation process and their approach in their opening statements during the first formal mediation session could be the first time many disputants are truly informed about the process.

During pre-session communications, a majority of the mediators in both civil and family cases explored whether the parties would be okay being together in the same room and whether they and/or their lawyers could communicate civilly; fewer than half of the mediators in civil cases but a majority in family cases assessed the parties' capacity to mediate (including cognitive ability, coercive control, and violence). A majority of the mediators in civil cases and half in family cases explored options for how the first mediation session could be structured; fewer than half of the mediators in both civil and family cases explored options for how the rest of the mediation after the opening session might be structured or coached the parties and/or their lawyers on non-adversarial communications. A majority of the mediators in both civil and family cases discussed what information to submit before the first mediation session; a majority of the

¹³² See *supra* note 9 and accompanying text.

¹³³ See *supra* note 7 and accompanying text.

¹³⁴ This summary of both the process and substantive information the mediators discussed is a simplified overview of the findings and does not fully reflect their many nuances, such as differences in what was discussed in civil versus family cases and in communications that took place prior to versus on the same day as the first mediation session. For more details, see *supra* Sections III.D & E.

¹³⁵ See, e.g., Jay Folberg, *The Shrinking Joint Session: Survey Results*, DISP. RESOL. MAG., Winter 2016, at 19 (saying that the lawyer has "probably" educated the client about the process); MEDIATION QUALITY, *supra* note 1, at 8, 10-11, 33 (stressing the importance that all participants have a clear understanding of the mediation process, including the lawyers, who need to explain it to their clients); Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URBAN L. J. 419, 432 (2010) (reporting studies that found that represented parties often had misconceptions about the goals of mediation or did not know what to expect).

¹³⁶ See, e.g., Folberg, *supra* note 135, at 19.

mediators in civil cases but fewer than half in family cases discussed who should or should not attend the mediation. The mediators generally were more likely to assess the parties' capacity to mediate when the disputants themselves were present. And in family cases, the mediators also were more likely to assess the parties on other dimensions and to explore options for structuring the opening session when the disputants were present during pre-session communications held prior to the day of the first session.

These findings demonstrate that some mediators explored issues that could help them work with the mediation participants to customize the mediation process to the needs of the individual case, another goal of pre-session communications.¹³⁷ However, because a majority of the disputants in civil cases were not present and did not actively participate during pre-session communications held prior to the day of the first session, many civil mediators were not able to assess the disputants directly, get their input on how the initial mediation session should be structured and who should attend, or coach them on a less adversarial presentation and tone for the mediation. Instead, mediators in civil cases would largely get this information from the lawyers' perspectives.¹³⁸ And because a majority of the mediators in family cases did not have pre-session communications or the domestic violence screening report before the first mediation session, many family mediators would not be able to make informed suggestions or decisions for customizing the mediation process. Overall, the findings suggest that a sizeable number of mediators do not have sufficient information and input from the mediation participants (especially the disputants themselves) when considering how to customize the mediation process to the particular dispute,¹³⁹ an approach that is recommended by many in the field and that mediation users say they want.¹⁴⁰ In cases where the parties have counsel, the tasks of

¹³⁷ See *supra* note 8 and accompanying text.

¹³⁸ Research suggests that lawyers may underestimate the importance that disputants place on being able to present (or hear their lawyer present) their views and know they have been heard by the other party. 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, 174-175 (2010); MEDIATION QUALITY, *supra* note 1, at 7-8 (finding that party representatives were less likely than mediators to list as goals for mediation giving the parties a chance to tell their stories and feel heard (43% vs. 92%) or promoting communication between the parties (52% vs. 85%)).

¹³⁹ For instance, mediators and lawyers recommend that joint opening sessions be avoided, or that appropriate safeguards be used, in disputes that involve actual or threatened violence, intimidation or coercion, unusually strong emotions, or litigants with no prior mediation experience. See FOLBERG & GOLANN, *supra* note 4, at 261; Geigerman, *supra* note 20, at 30; Olson, *supra* note 16, at 27; MEDIATION QUALITY, *supra* note 1, at 12. Ultimately, many say that decisions about joint opening sessions should be made in consultation with the disputants, as they are best situated to know whether such communications might be productive. See, e.g., MEDIATION QUALITY, *supra* note 1, at 13.

¹⁴⁰ See MEDIATION QUALITY, *supra* note 1, at 8, 12-13, 33; Lynne S. Bassis, *Face-to-Face Sessions Fade Away: Why Is Mediation's Joint Session Disappearing?*, DISP. RESOL. MAG., Fall 2014, at 30, 32-33; Blankenship, *supra* note 138, at 186-187; Folberg, *supra* note 135, at 19; Eric Galton & Tracy Allen, *Don't Torch the Joint Session*, DISP. RESOL. MAG., Fall 2014, at 25, 28;

considering the best approach for their client and coaching them on non-adversarial communications and would fall to the lawyers, who might or might not perform these tasks.¹⁴¹

With regard to the substantive aspects of the dispute that the mediators discussed at some time during pre-session communications, a majority of the mediators in both civil and family cases explored the issues that needed to be addressed in the mediation, the parties' interests, and the parties' goals for the mediation. Thus, most mediators explored matters that could help them develop a basic understanding of the dispute, another goal of pre-session communications, and consider how to most effectively tailor the mediation process to the parties' interests and goals.¹⁴² Mediators generally were more likely to discuss the parties' interests and their goals for the mediation when the parties were present than when they were not present. However, because a majority of the disputants in civil cases were not present and did not actively participate during pre-session communications held prior to the first day of the session, civil mediators were largely unable to obtain this information directly from the disputants, but instead would hear it from their lawyers' perspectives.¹⁴³ And many mediators in family cases would not learn any of this information before the first mediation session because pre-session communications did not take place in a majority of cases.

Looking at the other substantive issues discussed at some time during pre-session communications, mediators in a majority of civil cases explored the procedural or litigation status of the case, the status of settlement negotiations and the proposals exchanged, the parties' legal theories and facts, and the obstacles to settlement. In family cases, mediators explored the procedural or litigation status in a majority of cases, but they explored the rest of these items in

David A. Hoffman, *Mediation and the Art of Shuttle Diplomacy*, 27 NEGOT. J. 263, 303-304 (2011) (discussing potential variants of joint sessions for different case types).

¹⁴¹ Geigerman, *supra* note 20, at 29; Wissler, *supra* note 135, at 432 (noting that research findings are mixed with regard to whether and how extensively lawyers prepare their clients for mediation, ranging from no preparation, to a brief discussion just before the first session, to considerable preparation).

¹⁴² See *supra* notes 6 and 8 and accompanying text. For example, some mediators and lawyers recommend using a joint opening session if the disputants have shared interests that need to be addressed, if they are seeking an interest-based solution, or if relationship issues or goals are central to the dispute. See, e.g., Bassis, *supra* note 140, at 32; FOLBERG & GOLANN, *supra* note 4, at 261.

¹⁴³ Lawyers might have a different view of the disputants' interests and goals than do the mediator or the disputants themselves. See Bassis, *supra* note 140, at 33; Blankenship, *supra* note 138, at 172-175; Elizabeth Ellen Gordon, *Attorneys' Negotiation Strategies in Mediation: Business as Usual?*, MEDIATION Q., Summer 2000, at 377, 384, 397 (finding that 56% of surveyed lawyers felt that litigants in civil litigation were "concerned about money" and not necessarily seeking "to satisfy some sense of justice," while mediators were less likely to think disputants were focused on the money and were "more likely to emphasize aspects that reflect the ideals of traditional mediation"); MEDIATION QUALITY, *supra* note 1, at 7-8; Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITTSBURGH L. REV. at 341, 342, 358-365 (2006).

fewer than half of the cases. Most mediators in civil cases had access to some case information or documents and a majority had mediation memos before the first mediation session; in family cases, by contrast, over half did not have any case information and relatively few had mediation memos. Thus, between the pre-session communications and document submissions, many mediators in civil cases appeared to have information about the case to help them prepare for the first mediation session, but many mediators in family cases did not. This suggests that, despite arguments to the contrary,¹⁴⁴ party opening statements during the first formal mediation session are still likely to provide some mediators and mediation participants with new information, especially in family cases.

As is clear from the above findings, there were many differences between civil and family cases in what took place during the early stages of mediation. There were fewer constraints on holding pre-session communications in civil cases than in family cases; even when there were no constraints, pre-session communications were more likely to take place in civil cases. However, the parties were less likely to be present and talked less in civil cases than in family cases. Mediators were more likely to have access to all types of case information before the first mediation session in civil cases than in family cases. During pre-session communications, mediators in civil cases were less likely than those in family cases to explain some aspects of the mediation process and to assess the parties on some dimensions, but they were more likely to discuss what information to submit before the first session, who should or should not attend the mediation, and how the opening session should be structured. And mediators in civil cases were more likely than those in family cases to discuss some aspects of the substance of the dispute.

There also were differences in pre-session communications and document submissions depending on the case referral source. For example, in both civil and family cases, pre-session communications generally were more likely to be infeasible and, regardless of any constraints, were less likely to take place in cases referred from state courts than from other sources. And mediators were less likely to receive case information before the first session in cases referred from state courts than from most other sources. These differences, however, cannot be attributed to something about “court referrals” more broadly; civil cases referred from federal courts were as or more likely to have pre-session communications and document submissions than were cases referred from non-court sources.

Whether the parties had counsel also was related to differences in pre-session practices. In civil cases, when the parties had counsel, pre-session communications were more likely to take place, but the parties themselves were less likely to be present and talked less during communications held prior to the day of the first session. In family cases, whether parties had counsel was not related to whether pre-session communications were held. Parties in family cases were less likely to be present when they had counsel, but there was no difference in how much they talked. In both civil and family cases, mediators were more likely to have access to case documents before the first mediation session when the parties had counsel. And whether the parties were present for pre-session communications was related to which process actions the

¹⁴⁴ See, e.g., Bassis, *supra* note 140, at 31; Folberg, *supra* note 135, at 19.

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mediators engaged in and which substantive issues they discussed. Whether the mediators had a law or non-law background was not related to whether pre-session communications took place, but it was related to which process actions the mediators engaged in and which substantive issues they discussed.

V. Conclusion

The present study advances our knowledge of the early stages of mediation far beyond anecdotal reports and the few prior studies involving a limited number of case types and mediation contexts. Before the first mediation session, a sizeable number of mediators do not have communications with the mediation participants or do not have case documents, and many disputants themselves do not participate in pre-session discussions. Accordingly, mediators often do not begin the first formal mediation session well informed about the disputants and the dispute, and disputants do not necessarily enter the first session with a good understanding of the mediation process, contrary to conventional mediation thinking and advice.¹⁴⁵ In addition, the lack of pre-session information negatively impacts the ability of mediators and mediation participants to customize the mediation process to the needs of the individual case, considered to be one of mediation's advantages.¹⁴⁶ Moreover, blanket assertions cannot be made about what "typically" occurs before the first mediation session, as what takes place varies between civil and family cases, by whether the parties do or do not have counsel, and by the case referral source, among other factors. The present study's findings help lay the groundwork for future empirical research that can deepen our understanding of how mediators and mediation participants can most effectively use pre-session communications and document submissions to prepare for mediation and enhance the quality of the mediation process and its outcomes.

¹⁴⁵ See *supra* notes 1 and 2 and accompanying text.

¹⁴⁶ See *supra* notes 8 and 140 and accompanying text.