

The Initial Mediation Session: An Empirical Examination

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Abstract

Historically, the first mediation session was a joint session with the mediator and all disputing parties together, during which the mediator and the parties made opening statements and then began to discuss the issues in dispute. This practice is reported to be on the decline, with mediations instead beginning in separate caucuses and the parties often never being together during the mediation. Mediators, lawyers, and frequent mediation users regularly debate these two approaches and their implications for the mediation process and its outcomes. To date, however, there are more assertions about what does and should happen during the initial mediation session than there is empirical evidence to inform the discussion.

This Article reports the findings of the first comprehensive study of the current use of initial joint sessions, including comparisons to traditional joint opening sessions and to what currently takes place during initial caucuses, based on a survey of more than 1,000 mediators in civil and family cases across eight states. The findings suggest that joint opening sessions are still held in a majority of civil and family cases, but that much of what occurs during them diverges from traditional practice. And substantive discussions are more likely to take place during initial caucuses than during initial joint sessions. Thus, current joint opening sessions often are a shadow of their traditional selves. And given the many differences in what takes place between initial joint sessions and initial caucuses, as well as between civil and family cases, blanket assertions about what “typically” occurs during the initial mediation session cannot be made.