

WHAT HAPPENS BEFORE THE FIRST MEDIATION SESSION? AN EMPIRICAL STUDY OF PRE-SESSION COMMUNICATIONS

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ABSTRACT

Mediator, lawyer, and party preparation in advance of the first formal mediation session is widely seen as important for the effectiveness of the mediation. Communications between the mediator and the mediation participants before the first mediation session, along with the submission of case information and documents to the mediator, are two primary means of information exchange to aid preparation. Few studies have looked at what occurs during these early stages, despite their centrality to mediation. The present Article reports the findings of a study of more than 1,000 mediators in different mediation settings and dispute types across eight states that begins to fill the gaps in our empirical knowledge of what happens before the first formal mediation session. The study examines whether and when pre-session communications take place, the case information that the mediators have access to before the first mediation session, the factors that are related to pre-session communications and document submissions, whether the disputants themselves are present and how much they speak, and the specific process and substantive issues that are discussed.

The findings suggest that current practices contravene conventional mediation advice and negatively impact the ability of mediators, lawyers, and disputants to prepare for the first mediation

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session and to customize the mediation process to the needs of the individual case. 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 the case referral source, and by whether the parties do or do not have counsel, among other factors. The present Article helps 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.

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-session³ communications between the mediator and the mediation participants, and party submission of case information and documents to the mediator.⁴

¹ See, e.g., HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS* 161, 187–88 (2d ed. 2010); DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION* 97–98 (3d ed. 2018); R. Wayne Thorpe et al., *Task Force on Improving Mediation Quality* 3, 6–7, 32 (2008) (reporting the survey, interview, and focus group 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).

² See, e.g., SUSAN NAUSS EXON, *ADVANCED GUIDE FOR MEDIATORS* 29–30, 35 (2014); FRENKEL & STARK, *supra* note 1, at 381–86; 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); Thorpe et al., *supra* note 1, at 7, 10, 33.

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, e.g., EXON, *supra* note 2, at 6; CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 32–33 (1986) (describing twelve stages of mediation, with five of them occurring before the first mediation session); IOWA CODE § 20.31 (2016) (stating that mediation begins at the mediator’s receipt of the assignment); 42 PA. CONS. STAT. § 5949(c); JoAnne Donner, *When Does Mediation Really Start?*, *MEDIATE* (Nov. 2010), <https://www.mediate.com/articles/donnerJ1.cfm> [<https://perma.cc/E8A9-SG7W>]. Accordingly, we use the term “pre-session” (i.e., before the first formal mediation session) to more accurately describe the timing.

⁴ See, e.g., ABRAMSON, *supra* note 1, at 95, 97–98, 161; EXON, *supra* note 2, at 6, 42–43; JAY FOLBERG & DWIGHT GOLANN, *LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW* 269–71

The most common goals for pre-session communications are for: (1) the mediator to develop a basic understanding of the dispute;⁵ (2) the mediation participants to gain an understanding of the mediator's approach and the mediation process;⁶ (3) the mediator and the mediation participants to discuss how to structure the mediation process for the particular dispute;⁷ and (4) the mediator and the mediation participants to begin to build rapport and trust.⁸ 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.⁹

To help accomplish these goals, mediators and lawyers generally recommend the following topics be discussed or explored during pre-session communications:¹⁰ (1) the mediation process, the role of the participants, and the mediator's approach;¹¹ (2) the background of the dispute, the main issues to be addressed, the parties' interests, and any non-legal issues;¹² (3) the status of settlement negotiations and the offers that have been exchanged, the obstacles to settlement, whether the parties need additional infor-

(3d ed. 2016); FRENKEL & STARK, *supra* note 1, at 125–26, 378; Thorpe et al., *supra* note 1, at 6–7, 32.

⁵ See, e.g., EXON, *supra* note 2, at 6; FRENKEL & STARK, *supra* note 1, at 127–28.

⁶ See, e.g., ABRAMSON, *supra* note 1, at 97; EXON, *supra* note 2, at 30–31; FRENKEL & STARK, *supra* note 1, at 127; Giovannucci & Largent, *supra* note 2, at 46; Thorpe et al., *supra* note 1, at 8, 10–11; Jill S. Tanz & Martha K. McClintock, *The Physiologic Stress Response During Mediation*, 32 OHIO ST. J. DISP. RESOL. 29, 55–56, 62 (2017).

⁷ See, e.g., ABRAMSON, *supra* note 1, at 320; FOLBERG & GOLANN, *supra* note 4, at 261; FRENKEL & STARK, *supra* note 1, at 127–28; Thorpe et al., *supra* note 1, at 7–9, 12–13; Thomas J. Stipanowich, *Insights on Mediator Practices and Perceptions*, WINTER 2016 DISP. RESOL. MAG. 6, 10 (2016) (reporting the survey responses of 141 private civil and commercial mediators who are members of the International Academy of Mediators, a majority of whom regularly practice in the United States).

⁸ See, e.g., ABRAMSON, *supra* note 1, at 97; FOLBERG & GOLANN, *supra* note 4, at 271; Giovannucci & Largent, *supra* note 2, at 46; Tanz & McClintock, *supra* note 6, at 54–55, 62.

⁹ See, e.g., FRENKEL & STARK, *supra* note 1, at 126; Tanz & McClintock, *supra* note 6, at 53–56, 62.

¹⁰ See Thorpe et al., *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).

¹¹ ABRAMSON, *supra* note 1, at 97, 320; EXON, *supra* note 2, at 31; FRENKEL & STARK, *supra* note 1, at 127; Giovannucci & Largent, *supra* note 2, at 46; Thorpe et al., *supra* note 1, at 8; Tanz & McClintock, *supra* note 6, at 55–56, 62.

¹² See, e.g., ABRAMSON, *supra* note 1, at 320; Brian Farkas & Donna Erez Navot, *First Impressions: Drafting Effective Mediation Statements*, 22 LEWIS & CLARK L. REV. 157, 183 (2018) (reporting the survey responses of 180 primarily commercial and labor/employment mediators in New York and across the United States; *id.* at 166); FRENKEL & STARK, *supra* note 1, at 127–28; Giovannucci & Largent, *supra* note 2, at 46; Thorpe et al., *supra* note 1, at 8, 32.

mation, and possible settlement options;¹³ (4) the procedural status of the case;¹⁴ (5) the parties' personalities and emotional dynamics, issues of violence or coercion, who should or should not attend the mediation, and the specifics of 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);¹⁵ (6) giving the parties a chance to vent and work through emotions before the formal mediation session;¹⁶ (7) establishing the ground rules, encouraging a civil tone, and coaching on more productive opening presentations and communications;¹⁷ and (8) the particular documents that should be submitted to the mediator before the first session and whether these documents should be exchanged between the parties.¹⁸

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, and whether written case information has been or will be submitted.¹⁹ These communications can take place prior to or on the same day as the first mediation session.²⁰ Pre-session communications are often said to take place between the mediator and the lawyers, without the disputants.²¹

The submission of case information and documents to the mediator is another aspect of preparation for the first mediation session.²² Whether mediators request pre-session submissions and what types of documents they want to receive is said to depend on

¹³ See, e.g., ABRAMSON, *supra* note 1, at 97, 320; Farkas & Erez Navot, *supra* note 12, at 182; FOLBERG & GOLANN, *supra* note 4, at 270–71; Thorpe et al., *supra* note 1, at 8–9.

¹⁴ See, e.g., Thorpe et al., *supra* note 1, at 9.

¹⁵ See, e.g., ABRAMSON, *supra* note 1, at 97, 320; Farkas & Erez Navot, *supra* note 12, at 183; FRENKEL & STARK, *supra* note 1, at 127; Giovannucci & Largent, *supra* note 2, at 46; Thorpe et al., *supra* note 1, at 9, 12–13, 32–34; Kelly Browe Olson, *Screening for Intimate Partner Violence in Mediation*, 20 DISP. RESOL. MAG. 25, 27 (2013).

¹⁶ See, e.g., FOLBERG & GOLANN, *supra* note 4, at 271; Giovannucci & Largent, *supra* note 2, at 46; Tanz & McClintock, *supra* note 6, at 60.

¹⁷ See, e.g., ABRAMSON, *supra* note 1, at 320; FRENKEL & STARK, *supra* note 1, at 128; Thorpe et al., *supra* note 1, at 9, 13, 32; Tanz & McClintock, *supra* note 6, at 70–71.

¹⁸ See, e.g., ABRAMSON, *supra* note 1, at 319; FRENKEL & STARK, *supra* note 1, at 128; Thorpe et al., *supra* note 1, at 9, 32.

¹⁹ See, e.g., ABRAMSON, *supra* note 1, at 97; Thorpe et al., *supra* note 1, at 8.

²⁰ See, e.g., Michael Geigerman, *New Beginnings in Commercial Mediations: The Advantages of Caucusing Before the Joint Session*, 19 DISP. RESOL. MAG. 27, 29 (2012); Tanz & McClintock, *supra* note 6, at 55.

²¹ See, e.g., ABRAMSON, *supra* note 1, at 319; Geigerman, *supra* note 20, at 29; Thorpe et al., *supra* note 1, at 6–7, 11 (reporting also that the lawyers preferred that the parties not be present during pre-session communications).

²² See *supra* text accompanying note 4.

the mediator, the complexity of the issues in the case, the amount at stake, and other factors.²³ 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.²⁴

Much of what has been written about the use of pre-session communications and 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.²⁵ Studies that involved more varied case types and mediation settings (both private and court-connected) showed mixed findings. One study found that 81% of surveyed commercial and labor/employment mediators said they usually or always require the pre-session submission of mediation statements,²⁶ while another study found that 46% of the mediators and 62% of the lawyers said that all parties had submitted a statement to the mediator in more than half of their recent civil and family cases.²⁷ In the second survey, fewer than 20% of the surveyed mediators and lawyers said they had a substantial pre-session discussion about the mediation in

²³ See, e.g., ABRAMSON, *supra* note 1, at 97, 271; Farkas & Erez Navot, *supra* note 12, at 166–74; Thorpe et al., *supra* note 1, at 8, 12. There appears to be more consensus among mediators and lawyers on the importance of submitting mediation memos and “relevant exhibits” than on submitting pleadings, discovery, and expert reports. See Farkas & Erez Navot, *supra* note 12, at 166–68; Thorpe et al., *supra* note 1, at 12.

²⁴ See, e.g., ABRAMSON, *supra* note 1, at 411–14; Farkas & Erez Navot, *supra* note 12, at 178–81; FOLBERG & GOLANN, *supra* note 4, at 270. If the information will be submitted confidentially to only the mediator and will not be 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., Farkas & Erez Navot, *supra* note 12, at 181–83.

²⁵ See ABRAMSON, *supra* note 1, at 97; Jay Folberg, *The Shrinking Joint Session: Survey Results*, 22 DISP. RESOL. MAG. 12, 19 (2016) (reporting the survey responses of 205 private civil and commercial JAMS mediators across the United States); Thorpe et al., *supra* note 1, at 6, 12 (finding that “many” mediators said they have pre-session discussions as part of their regular practice, and a majority of mediators and lawyers think it is important to submit a memo to the mediator); Stipanowich, *supra* note 7, at 10.

²⁶ Farkas & Erez Navot, *supra* note 12, at 166–68.

²⁷ John Lande, *Analysis of Data from New Hampshire Mediation Trainings*, INDISPUTABLY (Dec. 10, 2017), at 6–7, <https://secureservercdn.net/45.40.149.159/gb8.254.myftpupload.com/wp-content/uploads/Analysis-NH-training-data.pdf> [<https://perma.cc/HRJ9-J7U4>] (reporting the responses of a total of 87 mediators and lawyers surveyed regarding their recent civil and family cases; *id.* at 1–3).

more than half of their recent civil and family cases.²⁸ Some have noted that in smaller-stakes cases and court mediation settings, pre-session communications and submissions might be barred or “logistically impossible or cost prohibitive.”²⁹

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.³⁰ None of these studies has examined the factors that contributed to whether pre-session communications and document submissions occurred. Nor have they examined the specific process or substantive matters that 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 by taking a more systematic and comprehensive look at pre-session communications and document submissions in a wider range of mediation settings and dispute types across the United States. Section II describes the survey procedure, the mediators who responded to the survey, and the mediated disputes that form the basis of the mediators’ responses. Section 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, the case information the mediators had access to before the first mediation session, the factors that were related to pre-session communications and document submissions, whether the disputants themselves were present and how much they spoke, and the specific process and substantive issues that were discussed. Section IV discusses the findings and their implications for mediation practice, and Section V summarizes the key conclusions.

²⁸ Lande, *supra* note 27, at 6.

²⁹ Thorpe et al., *supra* note 1, at 19. *See also* Lande, *supra* note 27, at 6; EXON, *supra* note 2, at 6; FRENKEL & STARK, *supra* note 1, at 125; Geigerman, *supra* note 20, at 29; Tanz & McClintock, *supra* note 6, at 55.

³⁰ *See* Lande, *supra* note 27, at 6–7 (noting that it “would involve a change in the practice culture” for the mediators to regularly have pre-session communications); Thorpe et al., *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”).

II. SURVEY PROCEDURE AND RESPONDENTS

We selected mediators from eight states across four regions of the United States for the survey.³¹ 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.³²

We then 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.³³

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.³⁴ Moreover, this figure is conservative because an unknown

³¹ 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.

³² 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.

³³ Experience was limited to the prior four months so that respondents would be more likely to remember the mediation and report it accurately. See FLOYD J. FOWLER, JR., *SURVEY RESEARCH METHODS* 93–94 (2d ed. 1988); CLAIRE SELTZ ET AL., *RESEARCH METHODS IN SOCIAL RELATIONS* 156, 159 (4th ed. 1981).

³⁴ See, e.g., *Response Rates – An Overview*, AAPOR, <https://www.aapor.org/Education-Resources/For-Researchers/Poll-Survey-FAQ/Response-Rates-An-Overview.aspx> [<https://perma.cc/ASW5-2HXB>] (last visited Aug. 3, 2020); Weimiao Fan & Zheng Yan, *Factors Affecting Response Rates of the Web Survey: A Systematic Review*, 26 *COMPUT. HUM. BEHAV.* 132, 133–34, 36 (2010); Mirta Galesic & Michael Bosnjak, *Effects of Questionnaire Length on Participation and Indicators of Response Quality in a Web Survey*, 73 *PUB. OP. Q.* 349, 358 (2009); Bennett Porter, *Tips and Tricks to Improve Survey Response Rate*, MOMENTIVE, <https://www.surveymonkey.com/curiosity/improve-survey-response-rate/> [<https://perma.cc/2PFJ-8TWJ>] (last visited Aug. 3,

number of emails that were not returned as “undeliverable” might not have reached their intended recipients³⁵ due to outdated email addresses, spam filters, or other reasons.³⁶

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).³⁷ Thus, throughout the article, any “differences” or “relationships” reported are statistically significant differences or relationships, while “no differences” or “no relationships” indicate there were no statistically significant differences or relationships.

Two-thirds of the mediators who responded to the survey most frequently mediate civil cases, while one-third most frequently mediate family cases. Three-fourths of the mediators had been mediating for more than eight years and typically mediate more than two cases per month.³⁸ A majority of both civil and family

2020); Tse-Hua Shih & Xitao Fan, *Comparing Response Rates in E-mail and Paper Surveys: A Meta-Analysis*, 4 EDUC. RSCH. REV. 26, 36–37 (2009). Moreover, the response rate is not necessarily an indicator of the quality of the survey findings. See Response Rates – An Overview, *supra*; Colleen Cook et al., *A Meta-Analysis of Response Rates in Web- or Internet-Based Surveys*, 60 EDUC. & PSYCH. MEASUREMENT 821, 821 (2000).

³⁵ See Donna Shestowsky, *How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study*, 49 U.C. DAVIS L. REV. 793, 807 n.55 (2016) (explaining that the 10% response rate in that study was conservative for a similar reason: due to uncertainty about address accuracy, one could not tell whether a non-response to the mailed survey was because the survey did not reach the intended recipient or because that person chose not to participate).

³⁶ 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.

³⁷ The tests of statistical significance used in this Article are t-tests and chi-square (+²) tests. See RICHARD P. RUNYON & AUDREY HABER, *FUNDAMENTALS OF BEHAVIORAL STATISTICS* 278–80, 363–67 (5th ed. 1984). The conventional level of probability for determining the statistical significance of findings is the .05 level (i.e., $p < .05$). *Id.* at 230, 278–80. Findings of $p > .05$ and $p < .10$ are considered “marginally significant”—the difference is not statistically significant but is worth mentioning in exploratory research—and those are noted as such. See Anton Olsson-Collentine, Marcel A. L. M. van Assen & Chris H. J. Hartgerink, *The Prevalence of Marginally Significant Results in Psychology Over Time*, 30 PSYCHOL. SCI. 576 (2019). Cramer’s *V* provides a measure of the strength of the effect for chi-square (+²) analyses. As a guide to interpreting the size of effects, .10 is considered a small effect; .30, a medium effect; and .50, a large effect. See, e.g., Charles Zaiontz, *Effect Size for Chi-square Test*, REAL STAT. USING EXCEL, <https://www.real-statistics.com/chi-square-and-f-distributions/effect-size-chi-square/> [https://perma.cc/K7VQ-AVS9] (last accessed Nov. 4, 2021).

³⁸ 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,

mediators (88% and 68%, respectively) had only a legal background, and a minority had only a non-legal background (3% and 21%, respectively).³⁹ Over two-thirds of the mediators who usually mediate civil cases (68%) and almost half of those who usually mediate family cases (47%) have served regularly as a neutral in one or more non-mediator roles where they make a formal decision, recommendation, or evaluation to resolve disputes.⁴⁰

When responding to most of the questions in the survey, the mediators were asked to focus on their most recently concluded mediation that involved a civil or family dispute with only two named parties. Focusing on a single recent case provides more precise and accurate information⁴¹ and enables us to examine relationships between case characteristics and what took place before the first mediation session.

Approximately two-thirds of the mediators' most recent mediations were civil cases (68%) and one-third were family cases (32%).⁴² 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%) and in over one-third of family cases (37%).⁴³ A majority of parties in both civil and family cases had no prior mediation experi-

on average, one fewer case per month than the family mediators (means of five cases vs. six cases per month, $t(940) = 3.28$, $p < .01$).

³⁹ The civil mediators were more likely than the family mediators to have only a legal background and were less likely to have only a non-legal background ($\chi^2(2) = 82.10$, $p < .001$, $V = .29$). Eight percent of the civil mediators and 11% of the family mediators had both legal and non-legal backgrounds. The most common non-legal backgrounds included mental health fields, business, construction or engineering, accounting, and conflict resolution.

⁴⁰ These roles included judge, arbitrator, case or neutral evaluator, and a role that involved making recommendations to the court about the children in family cases. The civil mediators were less likely than the family mediators to have *not* served regularly in any role where they make a formal decision, recommendation, or evaluation (32% vs. 53%; $\chi^2(1) = 37.03$, $p < .001$, $V = .20$).

⁴¹ See, e.g., SELLTIZ ET AL., *supra* note 33, at 158–59; Donna Stienstra, *Rules of Thumb for Designing and Administering Mailed Questionnaires*, FED. JUD. CTR. (Aug. 1, 1996), <https://www.fjc.gov/sites/default/files/2015/0027.pdf> [<https://perma.cc/Z28Z-4ME4>].

⁴² For almost all mediators, the general type of case (civil or family) they most recently mediated was the same as the type they usually mediate.

⁴³ 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 ($\chi^2(2) = 101.18$, $p < .001$, $V = .31$).

ence (63% to 75%), with the exception of the responding parties in civil cases (34%).⁴⁴

In both civil and family cases, the two most common case 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.⁴⁵ Some civil and family cases “directly referred” from the parties or the lawyers might nonetheless have been in a court-connected mediation program because, in some programs, the parties or their lawyers choose and directly contact the mediator.⁴⁶

The proportion of cases mediated in each state was as follows: California (20%), Florida (16%), New York (16%), North Carolina (12%), Maryland (11%), Michigan (10%), Illinois (8%), Utah (6%), and several other, mostly adjoining states (2%). Two states (New York and California) accounted for almost half of the civil mediations, and three states (Florida, Illinois, and Maryland) accounted for just over half of the family mediations. 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,⁴⁷ in part because of the different rosters from which

⁴⁴ 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: $\chi^2(3) = 182.63$, $p < .001$, $V = .44$).

⁴⁵ Civil cases were more likely to be referred from federal courts/judges or the lawyers and were less likely to be referred from state courts/judges or the parties than were family cases ($\chi^2(4) = 170.62$, $p < .001$, $V = .41$).

⁴⁶ See, e.g., C.D. Cal. R. 11-10 §7.1(a); Utah Code Jud. Admin. R. 4-510.05(4)(E); S.D. Fla. R. 16.2(d)(1)(B); Mich. Ct. R. 2.411(B)(1); Mich. Ct. R. 3.216(F)(2)(e); Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions, 373 N.C. Admin. Code 2(a) (2020).

⁴⁷ 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%.

mediators' contact information was obtained in each state. Due to this and other differences related to the case referral sources,⁴⁸ 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 was a sufficient number 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 the particular types of case information the mediators 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.⁴⁹ 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

⁴⁸ 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 whether the parties had counsel (civil, $\chi^2(3) = 38.16$, $p < .001$, $V = .24$; family, $\chi^2(3) = 100.81$, $p < .001$, $V = .56$). Some of the relationship between referral source and having counsel is inevitable: cases referred from the lawyers would involve counsel, and cases referred from the parties generally would not.

⁴⁹ 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 ($\chi^2(1) = 65.52$, $p < .001$, $V = .25$).

35%, respectively); and the rest had pre-session communications only on the same day as the first session (9% and 18%, respectively).⁵⁰

B. *Constraints on or Requirements to Hold Pre-Session Communications*

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).⁵¹

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).⁵² 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).⁵³

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

⁵⁰ 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 ($\chi^2(2) = 8.84, p < .05, V = .12$).

⁵¹ 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 ($\chi^2(3) = 59.67, p < .001, V = .24$).

⁵² $\chi^2(9) = 139.27, p < .001, V = .27$. Pre-session communications were most likely to be unfeasible in cases referred from state courts and most likely to be required in cases referred from federal courts. See *supra* text accompanying note 46 for a caveat regarding cases “directly referred” from the parties or the lawyers.

⁵³ $\chi^2(9) = 29.82, p < .001, V = .18$. Pre-session communications were most likely to be unfeasible in cases referred from state courts or from mediation organizations and most likely to be required in cases referred from mediation organizations.

or constraints,⁵⁴ we examined inter-state differences in requirements for, or constraints on, pre-session discussions while controlling for the referral source.⁵⁵ 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.⁵⁶ 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.⁵⁷

C. Factors Related to Holding Pre-Session Communications

When pre-session communications were *not* required, prohibited, or unfeasible, they took place in 73% of civil cases and 51% of family cases.⁵⁸ 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.⁵⁹

The factor that was by far the most strongly related to whether mediators held pre-session communications in their most recent

⁵⁴ See *supra* notes 47, 52–53, and accompanying text.

⁵⁵ 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 unfeasible), given the small numbers of cases in some of those categories in some states.

⁵⁶ 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%. Illinois and Maryland 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. R. Med. 10.400. This suggests that informal policies, judge-specific rules, or the unfeasibility of having pre-session communications might instead have contributed to the observed differences in “constraints” among the states.

⁵⁷ Lawyers: $p = .46$; state courts: $p = .10$.

⁵⁸ Mediators in civil cases were more likely than those in family cases to have pre-session communications when there were no constraints or requirements ($\chi^2(1) = 30.34$, $p < .001$, $V = .21$).

⁵⁹ 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).

case was the mediators' usual practice regarding the use of pre-session communications. In both civil and family cases, mediators who usually or always hold pre-session communications in their mediations were more likely to hold pre-session communications in the instant case than were mediators who never or seldom hold pre-session communications as part of their usual mediation practice.⁶⁰ Other mediator practice⁶¹ 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 had *not* served regularly in any non-mediation evaluative or decision-making role than if they had served in one or more of those roles.⁶² In both civil and family cases, whether mediators held pre-session communications was not related to whether they had only a legal background, only a non-legal background, or both backgrounds.⁶³

Several case characteristics,⁶⁴ in addition to the general type of case (i.e., civil or family case),⁶⁵ 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 sub-

⁶⁰ 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.

⁶¹ 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).

⁶² Civil: 64% vs. 76% ($\chi^2(1) = 7.14, p < .01, V = .13$); family, $p = .70$. With regard to specific roles, mediators in civil cases were more likely to have pre-session communications if they had 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 had served as a judge ($p = .73$). In family cases, there was no relationship between any of the specific roles and pre-session communications (p 's ranged from .28 to .83).

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

⁶⁴ 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.

⁶⁵ See *supra* note 58 and accompanying text.

types.⁶⁶ In civil cases, pre-session discussions were more likely to occur when one or both parties had counsel than when neither party had counsel; there was no difference in family cases.⁶⁷ 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.⁶⁸ In both civil and family cases, the case referral source was related to whether pre-session discussions were held.⁶⁹ In civil cases referred directly from the lawyers, there were differences among the states in the use of pre-session communications.⁷⁰

D. *Case Information That Mediators Had Access to Before the First Mediation Session*

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).⁷¹ In civil cases, over three-fourths of the mediators had party mediation state-

⁶⁶ 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: $p = .92$.

⁶⁷ One or both parties had counsel vs. neither had counsel: civil, 74% vs. 42% ($\chi^2(1) = 9.69, p < .01, V = .14$); family: $p = .42$.

⁶⁸ Civil: p 's = .23 and .70. Family: responding party, $r(163) = .16, p < .05$; complaining party, $p = .14$.

⁶⁹ 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%) ($\chi^2(3) = 7.35, p = .06, V = .21$).

⁷⁰ In civil cases referred from the lawyers, pre-session communications 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.

⁷¹ 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 ($\chi^2(1) = 96.94, p < .001, V = .31$).

ments or memos, around half had the pleadings and/or motions, and almost one-fourth had other case documents (e.g., financial statements, medical records, or contracts). In family cases, almost one-third of the mediators had the pleadings and/or motions; fewer than one-fifth had either mediation statements or other case documents.⁷² Few civil or family mediators had access to the results of intimate partner violence screenings before the first mediation session.⁷³

TABLE 1. CASE INFORMATION THAT 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>Number of respondents</i>	<i>679</i>	<i>321</i>

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 dispute,⁷⁴ and were less likely to have the pleadings and/

⁷² 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 ($\chi^2(1) = 9.50, p < .01, V = .10$).

⁷³ 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 ($\chi^2(1) = 71.10, p < .001, V = .27$).

⁷⁴ Neither party had counsel vs. both had counsel: civil, 54% vs. 13% ($\chi^2(1) = 50.15, p < .001, V = .28$); family, 60% vs. 40% ($\chi^2(1) = 8.68, p < .01, V = .18$). In this set of analyses, we compared

or motions,⁷⁵ than when both parties had counsel. And mediators in civil cases were less likely to have mediation memos when neither party had counsel than when both parties had counsel; there was no difference in family cases.⁷⁶ Whether the mediators themselves had a legal background (i.e., legal only or legal in addition to a non-legal background) compared to only a non-legal background was related to the specific types of case information they had before the first mediation session in civil cases but not in family cases.⁷⁷

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.⁷⁸ 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.⁷⁹ 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.⁸⁰ 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

cases where neither party had counsel versus where both parties had counsel, and excluded cases where only one party had counsel, to be able to assess the effect of counsel more clearly. This applies to similar analyses throughout the rest of the Article.

⁷⁵ Neither party had counsel vs. both had counsel: civil, 12% vs. 55% ($\chi^2(1) = 27.60$, $p < .001$, $V = .21$); family, 14% vs. 38% ($\chi^2(1) = 14.38$, $p < .001$, $V = .23$).

⁷⁶ Neither party had counsel 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).

⁷⁷ In civil cases, mediators who had a legal 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-legal background. There were no differences in family cases (p 's ranged from .22 to .97).

⁷⁸ 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% ($\chi^2(3) = 40.95$, $p < .001$, $V = .25$).

⁷⁹ Federal courts, 89%; other sources, 36% to 49% ($\chi^2(3) = 74.00$, $p < .001$, $V = .34$).

⁸⁰ Parties, 10%; other sources, 35% to 44% ($\chi^2(3) = 25.37$, $p < .001$, $V = .28$).

mediation organizations.⁸¹ Whether mediators in family cases had *no* information of any kind was not related to the case referral source.⁸²

E. *Parties' Presence and Participation in Pre-Session Communications*

For mediation communications that took place *prior to* the day of the first session,⁸³ 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 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.⁸⁴ For pre-session communications held on the *same day as* the first mediation session,⁸⁵ in both civil and family cases, neither party was present in relatively few cases and both parties were present in around half of the cases (*see* Table 2).⁸⁶ Parties generally were less likely to be present for pre-session discussions held prior to the day

⁸¹ Parties, 14%; state courts, 16%; lawyers, 26%; organizations, 33% ($\chi^2(3) = 7.35$, $p = .06$, $V = .15$).

⁸² $p = .16$.

⁸³ 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 to similar analyses throughout the rest of the Article.

⁸⁴ 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 ($\chi^2(2) = 97.97$, $p < .001$, $V = .45$).

⁸⁵ 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 to similar analyses throughout the rest of the Article.

⁸⁶ 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 ($p = .19$).

of the first session than on the same day as the first session⁸⁷ in both civil and family cases.⁸⁸

TABLE 2. WHETHER THE PARTIES THEMSELVES WERE PRESENT FOR PRE-SESSION COMMUNICATIONS

	Civil Cases		Family Cases	
	<i>Prior To</i>	<i>Same Day</i>	<i>Prior To</i>	<i>Same Day</i>
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>Number of respondents</i>	385	263	96	72

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.⁸⁹ When both parties had

⁸⁷ This comparison required separate analyses to be conducted for (1) cases where pre-session communications were held at both times and (2) 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 to similar analyses throughout the rest of the Article.

⁸⁸ 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 ($p = .92$).

⁸⁹ 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.

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.⁹⁰ 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%).⁹¹

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).⁹² The parties did not talk at all in approximately one-fourth to one-third of civil cases but in few family cases. In both civil and family cases, there was no difference in how much the parties talked during communications held prior to versus on the same day as the first session.⁹³

⁹⁰ 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.

⁹¹ Civil: $p = .36$; family: $\chi^2(1) = 5.56$, $p < .05$, $V = .30$. We could not examine the relationship between the mediators' background and parties' presence because there were too few cases in which the parties were present and the mediators had a non-legal background.

⁹² Parties in civil cases spoke 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.

⁹³ 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 spoke (civil: $p = .41$; family: $p = .14$). There were too few cases where communications were held at both times and the parties were present at both times to analyze differences in that set of cases.

TABLE 3. HOW MUCH THE PARTIES THEMSELVES TALKED DURING PRE-SESSION COMMUNICATIONS

	Civil Cases		Family Cases	
	<i>Prior To</i>	<i>Same Day</i>	<i>Prior To</i>	<i>Same Day</i>
Not at all	32%	26%	7%	7%
A little	34%	35%	28%	33%
A considerable amount	33%	38%	65%	60%
<i>Number of respondents</i>	87	221	68	55

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.⁹⁴ 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.⁹⁵

F. *Actions the Mediators Engaged in Regarding the Mediation Process Itself*

This section describes the process actions the mediators engaged in during pre-session communications held prior to and on the same day as the first mediation session, first for civil cases and then for family cases. 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

⁹⁴ 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.

⁹⁵ Civil: $p = .31$; family: $p = .36$. We could not examine the relationship between the mediators’ background and parties’ participation because there were too few cases in which the parties were present and the mediators had a non-legal background.

communications and on whether the mediators had a legal background.

i. 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 the 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 her or his 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 following 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.

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 participants 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>Number of respondents</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 his or her 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 com-

munications; 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.⁹⁶ 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 *at some time* during pre-session communications.

There were differences in the process actions that the mediators engaged in during pre-session communications held prior to the day of the first session compared to those held 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 engage in the following actions during communications held prior to than on the same day as the first session: explain the mediation process, her or his approach, the ground rules, and mediation confidentiality; assess the parties' capacity to mediate; explore options for how to structure the rest of the mediation after the opening session; and coach the participants on non-adversarial communications.⁹⁷ Conversely, mediators were more likely to engage in the following actions during pre-session communications held prior to than on the same day as the first session: discuss who should or should not attend the mediation, explore options for how

⁹⁶ 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 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. *See infra* Sections III(F)(ii), (G).

⁹⁷ 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% ($t(196) = -2.82, p < .01$).

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.⁹⁸

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.⁹⁹ 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.¹⁰⁰

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

⁹⁸ 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%, $t(196) = 1.92, p = .06$).

⁹⁹ 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% ($t(200) = -1.71, p = .09$).

¹⁰⁰ 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).

TABLE 5. ACTIONS MEDIATORS ENGAGED IN REGARDING THE MEDIATION PROCESS ITSELF IN FAMILY CASES

	<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 participants 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>Number of respondents</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 the participants 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. Mediators who had pre-session communications at *both* times were less likely to engage in the following actions during communications held prior to than on the same day as the first session: explain the ground rules, explain confidentiality, explore options for structuring the rest of the mediation after the opening session, and coach the participants on non-adversarial communications.¹⁰¹ 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.¹⁰² Mediators who had pre-session communications *at one time or the other* were less likely during communications held prior to than on the same day as the first session to explain the ground rules, coach the participants on non-adversarial communications and, marginally, explore how to structure the rest of the mediation after the opening session.¹⁰³

iii. 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).¹⁰⁴ 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

¹⁰¹ 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% ($t(46) = -2.44, p < .05$).

¹⁰² 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).

¹⁰³ 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).

¹⁰⁴ 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% ($\chi^2(1) = 13.31, p < .001, V = .16$).

the information that should be submitted before the first session.¹⁰⁵ 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.¹⁰⁶

iv. Differences Depending on Whether the Parties Were Present¹⁰⁷

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 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.¹⁰⁸ 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, ground rules, mediation confidentiality, and her or his 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.¹⁰⁹

¹⁰⁵ 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).

¹⁰⁶ 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).

¹⁰⁷ Because the parties' presence was related to whether they had counsel in both civil and family cases, *see supra* notes 89–91 and accompanying text, we did not examine whether there were differences in what was discussed depending on whether the parties had counsel.

¹⁰⁸ 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).

¹⁰⁹ 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).

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 compared to when neither party was present, mediators were more likely to: explain the mediation process, her or his approach, the ground rules, and 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.¹¹⁰ By contrast, during pre-session communications held on the *same day as* the first session, there were no differences in any of the mediators' actions when one or both parties were present versus when neither party was present.¹¹¹

v. Differences Depending on Whether the Mediators Had a Legal Background

There were few differences between mediators who had only a legal background and those who had a non-legal background (instead of or in addition to a legal background) in the process actions in which they engaged. In civil cases, during pre-session communications held *prior* to the day of the first session, mediators who had only a legal background were less likely than those who had a non-legal background to explore whether the parties would be okay being together in the same room and, marginally, to coach the parties and/or their lawyers on non-adversarial communications.¹¹² During pre-session communications held on the *same day as* the first session in civil cases, there were no differences between mediators with legal versus non-legal backgrounds in any process actions.¹¹³

In family cases, during pre-session communications held *prior* to the day of the first session, mediators who had only a legal back-

¹¹⁰ 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).

¹¹¹ p 's ranged from .26 to .99.

¹¹² Legal 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).

¹¹³ p 's ranged from .17 to .93.

ground were less likely than those who had a non-legal background to explain the mediation process, coach the participants on non-adversarial communications, and, marginally, explain his or her approach.¹¹⁴ During communications held on the *same day as* the first session, mediators who had only a legal background were less likely than those who had a non-legal background to explore options for how the opening session might be structured.¹¹⁵

G. *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, first for civil cases and then for family cases. We examine whether the mediators discussed different substantive items at the two times, as well as 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, as well as on whether the mediators had a legal background.

i. 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 the issues that 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, the parties' goals for the mediation, and the obstacles to settlement. One-third of the mediators developed the agenda and around one-fifth explored new settlement proposals for the parties to consider and the costs and risks of litigation. 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).

¹¹⁴ Legal 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).

¹¹⁵ Legal 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	75%	65%	82%
Explored the obstacles to settlement	54%	62%	68%
Explored new settlement proposals	18%	59%	44%
Explored the costs and risks of litigation	20%	68%	50%
Other	1%	0.4%	--
None of the above	6%	5%	--
<i>Number of respondents</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 discussed the costs and risks of litigation, developed the agenda, and explored new settlement proposals.

There were several differences in the specific 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 during communications held prior to than on the same day as the first session to explore the parties' interests, the parties' goals for the mediation, the costs and risks of litigation,

and new settlement proposals.¹¹⁶ But mediators were more likely during communications held prior to than on the same day as the first session to explore the issues that needed to be addressed, the procedural status of the case, and the status of settlement negotiations.¹¹⁷ 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 theories and surrounding facts, during communications held prior to than on the same day as the first session.¹¹⁸

ii. Family Cases

During pre-session communications held *prior to* the day of the first session, two-thirds of the mediators explored the issues that needed to be addressed in the mediation, and almost half of the mediators explored the procedural or litigation status of the case, the parties' interests, and the parties' goals for the mediation (*see* Table 7). Around one-third of the mediators explored the obstacles to settlement and the status of settlement negotiations, 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 that needed to be addressed in the mediation, the parties' interests, and the parties' goals for the mediation (*see* Table 7). Broadly speaking, around half of the mediators developed the agenda and explored the status of settlement negotiations, the obstacles for settlement, the procedural or litigation status of the case, the costs and risks of litigation, and new settlement proposals for the parties to consider. Fewer than one-third explored the parties' legal theories and surrounding facts.

¹¹⁶ 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).

¹¹⁷ 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% ($t(190) = 3.15, p < .01$).

¹¹⁸ 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).

TABLE 7. ASPECTS OF THE SUBSTANCE OF THE DISPUTE THE MEDIATORS DISCUSSED IN FAMILY CASES

	<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	31%	53%	49%
Explored the obstacles to settlement	32%	50%	47%
Explored new settlement proposals	6%	47%	30%
Explored the costs and risks of litigation	17%	48%	38%
Other	0	0	--
None of the above	14%	13%	--
<i>Number of respondents</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, the parties' 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 during communications held prior to than on the same day as the first session to explore the parties' interests, the parties' goals for the mediation, the status of negotiations, the obstacles to settlement, the costs and risks of litigation, and new settlement proposals.¹¹⁹ In cases where pre-session com-

¹¹⁹ 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%

munications 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 during communications held prior to than on the same day as the first session to explore new settlement proposals and, marginally, to develop the agenda.¹²⁰

iii. 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, the issues that needed to be addressed in the mediation.¹²¹ 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.¹²²

iv. Differences Depending on Whether the Parties Were Present

In civil cases, during communications held *prior to* the day of the first mediation session, mediators were more likely when one or both parties were present than when neither party was present to explore the parties' interests, new settlement proposals, and,

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).

¹²⁰ 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).

¹²¹ Civil vs. family: 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% vs. 66%, $\chi^2(1) = 2.92$, $p = .09$, $V = .08$. There were no differences in the other items (p 's ranged from .12 to .53).

¹²² Civil vs. family: 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).

marginally, the costs and risks of litigation.¹²³ During pre-session communications held on the *same day as* the first mediation session in civil cases, mediators were more likely when one or both parties were present than when neither party was present to explore the parties' interests, new settlement proposals, the costs and risks of litigation, and, marginally, the parties' goals for the mediation.¹²⁴

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 when one or both parties were present than when neither party was present to explore the parties' goals for the mediation.¹²⁵ During pre-session communications held on the *same day as* the first mediation session, mediators in family cases were more likely when one or both parties were present than when neither party was present to explore the parties' interests, develop the agenda, and, marginally, explore the issues that needed to be addressed and the parties' goals for the mediation.¹²⁶

v. Differences Depending on Whether the Mediators Had a Legal Background

In civil cases, during pre-session communications held *prior to* the day of the first session, mediators who had only a legal background were less likely than mediators who had a non-legal background (instead of or in addition to a legal background) to explore the parties' interests, the parties' goals for the mediation, and, marginally, the obstacles to settlement.¹²⁷ During pre-session communications held on the *same day as* the first session, mediators who had only a legal background were more likely than those who had

¹²³ 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).

¹²⁴ 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).

¹²⁵ 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).

¹²⁶ 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).

¹²⁷ Legal 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).

a non-legal background to explore the issues that needed to be addressed in the mediation and, marginally, the procedural or litigation status of the case.¹²⁸ But mediators with only a legal background were less likely than mediators who had a non-legal background to explore the costs and risks of litigation and, marginally, new settlement proposals during pre-session communications held on the same day as the first session in civil cases.¹²⁹ In family cases, there were no differences between mediators with a legal and a non-legal background in the substantive matters discussed at either time.¹³⁰

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 unfeasible. 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 unfeasible was how frequently the mediators usually held such 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 with regard to holding pre-session communications, which might in part reflect

¹²⁸ Legal only vs. all other backgrounds: issues, 66% vs. 42% ($\chi^2(1) = 5.32, p < .05, V = .15$); procedural status, 58% vs. 38% ($\chi^2(1) = 3.78, p = .052, V = .13$).

¹²⁹ Legal 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).

¹³⁰ Prior to: *p*'s ranged from .18 to .98; same day: *p*'s ranged from .20 to .85.

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; how much the parties talked during same-day communications was similar to how much they talked 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 quite 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 or trust with the disputants themselves before the first mediation session—one of the four main goals for holding pre-session communications.¹³¹ 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 process¹³²—a majority of the mediators in both civil and family cases explained her or his approach, the mediation process, confidentiality, and the ground rules at some time during pre-session communications.¹³³ The mediators generally were more likely to explain aspects of the mediation process when the parties were

¹³¹ See *supra* text accompanying note 8.

¹³² See *supra* text accompanying note 6.

¹³³ 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(F)–(G).

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.¹³⁴ This would suggest that, despite some arguments to the contrary,¹³⁵ mediators' inclusion of an explanation of the mediation process and her or his approach in their opening statements during the first formal mediation session could be the first time many disputants are truly informed about the process.

At some time 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 opening 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 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 the information to submit before the first mediation session; a majority of the 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

¹³⁴ See, e.g., Folberg, *supra* note 25, at 19 (saying that the lawyer has "probably" educated the client about the process); Thorpe et al., *supra* note 1, at 11, 18, 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 counsel have a clear understanding of the process in order to explain it to their clients); Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 *FORDHAM URB. L. J.* 419, 432 (2010) (reporting that studies have found that represented parties often had misconceptions about the goals of mediation or did not know what to expect).

¹³⁵ See, e.g., Folberg, *supra* note 25, at 19–20.

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.¹³⁶ 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 obtain this information from the lawyers' perspective, which might be vastly different than that of their clients.¹³⁷ And many family mediators would not be able to make informed suggestions or decisions for customizing the mediation process because a majority did not have pre-session communications or the domestic violence screening report before the first mediation session. 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,¹³⁸ an approach that is recommended by many in the field and one that mediation users say they want.¹³⁹ In cases where the parties have counsel, the tasks of considering the best approach for their client

¹³⁶ See *supra* text accompanying note 7.

¹³⁷ For example, lawyers tend to view settlement as the goal of mediation and often underestimate the importance that disputants place on additional goals. See, e.g., John T. Blankenship, *The Viability of the Opening Statement in Mediation: A Jumping-Off Point to Consider the Process of Mediation*, 9 APPALACHIAN J. L. 165, 172–75 (2010); Thorpe et al., *supra* note 1, at 7–8; TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION 130–31 (Cambridge University Press 2009).

¹³⁸ For instance, mediators might not know whether the dispute involves violence, intimidation or coercion, or unusually strong emotions, cases in which many recommend that joint opening sessions be avoided—or that the mediation not proceed. See, e.g., ABRAMSON, *supra* note 1, at 251; David A. Hoffman, *Mediation and the Art of Shuttle Diplomacy*, 27 NEGOT. J. 263, 275–76 (2011); Olson, *supra* note 15, at 26, 29; Kelly Browe Olson, *One Crucial Skill: Knowing How, When, and Why to Go into Caucus*, 22 DISP. RESOL. MAG. 25, 32, 33–34 (2016).

¹³⁹ See, e.g., Lynne S. Bassis, *Face-to-Face Sessions Fade Away: Why Is Mediation's Joint Session Disappearing?*, 21 DISP. RESOL. MAG. 30, 32–33 (2014); Blankenship, *supra* note 137, at 186–87; Folberg, *supra* note 25, at 19–20; Eric Galton & Tracy Allen, *Don't Torch the Joint Session*, 21 DISP. RESOL. MAG. 25, 28 (2014); Hoffman, *supra* note 138, at 303–04; Thorpe et al., *supra* note 1, at 3, 8–9, 12–13.

and coaching them on non-adversarial communications would fall to the lawyers, who may or may not perform these tasks.¹⁴⁰

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.¹⁴¹ Mediators generally were more likely to discuss the parties' interests and 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, and instead would hear it from the lawyers' perspectives.¹⁴² 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 status of negotiations, the parties' legal theories, and the obstacles to settlement in fewer than half of the cases. Most mediators in civil cases had access to some case information or documents and a majority had mediation

¹⁴⁰ See, e.g., Geigerman, *supra* note 20, at 29; Wissler, *supra* note 134, at 432 (noting that research findings are mixed with regard to whether and how extensively lawyers prepare their clients for mediation).

¹⁴¹ See *supra* text accompanying notes 5 and 7. 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 139, at 32; Folberg, *supra* note 25, at 19; FOLBERG & GOLANN, *supra* note 4, at 268.

¹⁴² Lawyers might not have a clear understanding of the disputants' interests. See e.g., Tamara Relis, "It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims, 68 UNIV. PITT. L. REV. 701, 718-32 (2007); RELIS, *supra* note 137, at 130-36.

memos before the first mediation session; in family cases, by contrast, only about half had some 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, while many mediators in family cases did not. This suggests that, despite arguments to the contrary,¹⁴³ 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 almost 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. However, they were more likely to discuss the 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 unfeasible and, regardless of any constraints, were less likely to take place in cases referred from state courts than from other sources. And mediators generally 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 com-

¹⁴³ See, e.g., Bassis, *supra* note 139, at 31; Folberg, *supra* note 25, at 19; Galton & Allen, *supra* note 139, at 25; Thorpe et al., *supra* note 1, at 33.

munications and document submissions than were cases referred from non-court sources.

Whether the parties had counsel was also related to differences in pre-session practices. When the parties in civil cases had counsel, pre-session communications were more likely to take place, but the parties themselves were less likely to be present and also 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. When parties in family cases had counsel, they were less likely to be present during pre-session communications held prior to and on the same day as the first mediation session, but there was no difference at either time in how much they talked. When the parties had counsel, mediators in both civil and family cases were more likely to have access to case documents before the first mediation session. In addition, in both civil and family cases, whether the parties were present for pre-session communications was related to the specific process actions the mediators engaged in and the particular substantive issues they discussed. And whether the mediators had a legal or non-legal background was not related to whether pre-session communications took place, but it was related to the specific process actions the mediators engaged in and the particular 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 that involved a limited number of case types and mediation contexts. The findings show that, 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 informed about the disputants or the dispute, and disputants do not necessarily enter the first session with an understanding of the mediation process. This is contrary to conventional mediation thinking and advice that stresses the importance of preparing for mediation.¹⁴⁴ In addition, the lack of

¹⁴⁴ See *supra* text accompanying notes 1 and 2.

pre-session information negatively impacts the ability of mediators and mediation participants to customize the mediation process to the needs of the individual case, which is considered to be one of mediation's advantages.¹⁴⁵ 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* text accompanying note 139.

