

The Initial Mediation Session: An Empirical Examination

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I. Introduction

A. The Traditional Opening Mediation Session

Historically, the standard practice for beginning a mediation was to have a joint opening session where the mediator and all disputing parties met together.¹ Opening statements by the mediator and the parties were considered to be central to the joint opening session and a fundamental part of the mediation process.² The mediator's opening remarks typically included an explanation of the mediation process and its confidentiality, the mediator's impartiality and role, the parties' roles, and the ground rules for the mediation.³ The parties and/or their lawyers

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¹ See, e.g., SARAH R. COLE, CRAIG A. MCEWEN, NANCY H. ROGERS, JAMES R. COBEN & PETER H. THOMPSON, *MEDIATION: LAW, POLICY, AND PRACTICE* 34-37 (2015–2016 ed., 2015); SUSAN NAUSS EXON, *ADVANCED GUIDE FOR MEDIATORS* 7 (2014).

² See, e.g., John T. Blankenship, *The Vitality of the Opening Statement in Mediation: A Jumping-Off Point to Consider the Process of Mediation*, 9 *APPALACHIAN J.L.* 165, 181 (2010) (noting that parties' opening statements were described as "the central part of the opening or joint session in virtually every training program, seminar, instruction manual, model or theory concerning mediation"); COLE ET AL., *supra* note 1, at 35-36.

³ See, e.g., HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING AS A PROBLEM-SOLVER IN ANY COUNTRY OR CULTURE* 98 (2d ed., 2010); JAMES J. ALFINI, SHARON B. PRESS, JEAN R. STERNLIGHT & JOSEPH B. STULBERG, *MEDIATION THEORY AND PRACTICE* 113-118 (1st ed. 2001); EXON, *supra* note 1, at 7; DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION* 134-137 (2d ed. 2012); DWIGHT GOLANN & JAY FOLBERG, *MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL* 147-151 (2006); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 154-162 (1986).

would then present their opening statements directly to the other side and the mediator.⁴ What took place in the initial joint session after the parties' opening statements was more varied, but the mediator would often ask questions and summarize what the parties said, and the parties would begin to discuss the issues and their interests to lay the groundwork for resolving the dispute.⁵ Whether and how long the joint session continued before the mediation moved into separate caucuses depended on how the mediation was proceeding⁶ and on the usual practice of the mediator and the mediation setting.⁷ Historically, however, mediation was "premised on the assumption that the entire process would be conducted in joint session; separate meetings with the parties would be the exception."⁸

The joint opening session was thought to accomplish numerous things considered essential to the quality of the mediation process and its outcomes. The mediator's opening statement would help participants better understand the mediation process and the mediator's role, which in turn would enhance their participation in the process and their sense that the process was fair.⁹ In addition, the mediator would have the opportunity to establish his or her credentials and develop rapport with the parties, helping to set the stage for the rest of the mediation.¹⁰ Moreover, the joint opening session would allow the mediator to model civil communication and set a tone of non-confrontational information sharing and problem solving.¹¹

⁴ See, e.g., ABRAMSON, *supra* note 3, at 95, 98; ALFINI ET AL., *supra* note 3, at 118-119; COLE ET AL., *supra* note 1, at 36; EXON, *supra* note 1, at 7; MOORE, *supra* note 3, at 162-164; FRENKEL & STARK, *supra* note 3, at 141; GOLANN & FOLBERG, *supra* note 3, at 147-148.

⁵ COLE ET AL., *supra* note 1, at 36, 40; GOLANN & FOLBERG, *supra* note 3, at 148, 151; MOORE, *supra* note 3, at 168-171.

⁶ See, e.g., ALFINI ET AL., *supra* note 3, at 131-132; FRENKEL & STARK, *supra* note 3, at 202; MOORE, *supra* note 3, at 263-265; Kelly Browe Olson, *One Crucial Skill: Knowing How, When, and Why to Go into Caucus*, DISP. RESOL. MAG., Winter 2016, at 32, 33-34.

⁷ See, e.g., ABRAMSON, *supra* note 3, at 175-179, 207; ALFINI ET AL., *supra* note 3, at 131; COLE ET AL., *supra* note 1, at 40-42; GOLANN & FOLBERG, *supra* note 3, at 97, 153; Gary Friedman & Jack Himmelstein, *Challenging Conflict: Mediation Through Understanding* xxxi-xxxvii (2006); David A. Hoffman, *Mediation and the Art of Shuttle Diplomacy*, 27 NEGOT. J. 263, 265-266 (2011).

⁸ Jay Folberg, *The Shrinking Joint Session: Survey Results*, DISP. RESOL. MAG., Winter 2016, at 12; see also Lynne S. Bassis, *Face-to-Face Sessions Fade Away: Why Is Mediation's Joint Session Disappearing?*, DISP. RESOL. MAG., Fall 2014, at 30; Blankenship, *supra* note 2, at 178-179; Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH U. L. Q. 787, 809 (2001).

⁹ ABRAMSON, *supra* note 3, at 98; ALFINI ET AL., *supra* note 3, at 113-117; Bassis, *supra* note 8, at 32; Folberg, *supra* note 8, at 20; Eric Galton & Tracy Allen, *Don't Torch the Joint Session*, DISP. RESOL. MAG., Fall 2014, at 25, 26-27; MOORE, *supra* note 3, at 155-162.

¹⁰ ALFINI ET AL., *supra* note 3, at 114-116; Galton & Allen, *supra* note 9, at 27.

¹¹ ABRAMSON, *supra* note 3, at 249-250; Bassis, *supra* note 8, at 32; COLE ET AL., *supra* note 1, at 36; FRENKEL & STARK, *supra* note 3, at 135; MOORE, *supra* note 3, at 170-171.

The disputants' face-to-face communication was thought to confer a number of benefits, including helping to humanize the other party and breaking the spiral of autistic hostility,¹² which could improve the parties' communication during mediation.¹³ And the mediator would be able to observe their communications and interactional dynamics, which would help inform the conduct of the rest of the mediation.¹⁴

The disputants' direct communication through their respective opening statements also was thought to meet their needs to explain their views directly to the other party and to know that they have been heard by the other person, not just by the mediator.¹⁵ Research has found that disputants who feel they have been able to present their views and have received serious consideration are more likely to think the mediation process is fair and procedurally just.¹⁶ And being able to tell their story (or hear their lawyer tell it for them) in the more dignified setting of the joint opening session would contribute to disputants' feeling they had their "day in court."¹⁷ In addition, the initial joint session could give disputants the opportunity to observe the mediator treating each side even-handedly and with respect, which would contribute to their viewing the process as fair and the mediator as impartial.¹⁸

The disputants' opening statements and subsequent joint discussions could also provide a clearer understanding of their perspectives and a more complete picture of the issues and impediments to resolution.¹⁹ Additional benefits cited for the disputants' opening statements

¹² See, e.g., Bassis, *supra* note 8, at 32; FRENKEL & STARK, *supra* note 3, at 202; Theodore M. Newcomb, *Autistic Hostility and Social Reality*, 1 HUMAN RELATIONS 69 (1947); Morton Deutsch, *Cooperation and Competition*, 23, 27-28, in THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE (M. Deutsch, P. T. Coleman, & E. C. Marcus, eds. (2d ed. 2006); John W. Thibaut & John Coules, *The Role of Communication in the Reduction of Interpersonal Hostility*, 47 THE JOURNAL OF ABNORMAL AND SOCIAL PSYCHOLOGY 770 (1952).

¹³ ABRAMSON, *supra* note 3, at 176, 249-250; Bassis, *supra* note 8, at 32; FRENKEL & STARK, *supra* note 3, at 202.

¹⁴ William J. Caplan, *Mediation—Joint Session or No Joint Session? That is the Question*, 15 ASS'N BUS. TRIAL LAW. REP. ORANGE COUNTY 3, 10 (Fall 2013); FRENKEL & STARK, *supra* note 3, at 202; Galton & Allen, *supra* note 9, at 27.

¹⁵ ABRAMSON, *supra* note 3, at 176, 250; Blankenship, *supra* note 2, at 175, 178; Caplan, *supra* note 14, at 10; Galton & Allen, *supra* note 9, at 26; Helaine Golann & Dwight Golann, *Why Is It Hard for Lawyers to Deal with Emotional Issues?*, DISP. RESOL. MAG., Winter 2003, at 26; Hoffman, *supra* note 7, at 304; Welsh, *supra* note 8, at 796, 854.

¹⁶ E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 101-110 (1988); E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953 (1990); Welsh, *supra* note 8, at 817; Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URBAN L. J. 419, 449-452 (2010).

¹⁷ Caplan, *supra* note 14, at 10; Welsh, *supra* note 8, at 853-855; Lind et al., *supra* note 16, at 965-967, 981.

¹⁸ Lind et al., *supra* note 16, at 979-980; Welsh, *supra* note 8, at 852-54.

¹⁹ ABRAMSON, *supra* note 3, at 175-176; AM. BAR ASS'N SECTION OF DISPUTE RESOLUTION, TASK FORCE ON IMPROVING MEDIATION QUALITY (2008) [hereinafter MEDIATION QUALITY] at

include that the parties have control over the content of their message and have direct knowledge of what the other side and the mediator said.²⁰ And hearing the other side's opening statement could provide a better sense of the strength of their arguments and a preview of their trial strategy, as well as making the uncertainty and discomfort of continuing in litigation more real.²¹

B. Reported Changes in the Initial Mediation Session

Over the past decade or two, anecdotal reports and informal surveys suggest that the use of joint opening sessions is declining.²² And when joint opening sessions are held, their structure appears to be changing. Some mediators are said to abbreviate their explanations about the mediation process or do away with their opening statement entirely, instead making pro-forma introductions of those present and a few general remarks before moving into separate caucuses.²³ Party opening statements also are said to have become less common, and when they do take place, often are made by the lawyers instead of the disputants themselves.²⁴

The small handful of studies conducted to date report varying findings. Two surveys of private mediators of primarily business and commercial disputes found that around half regularly begin the first mediation session in joint session.²⁵ Both studies found regional differences in the

12, 34; Bassis, *supra* note 8, at 32; Blankenship, *supra* note 2, at 174; Caplan, *supra* note 14, at 3, 9; Galton & Allen, *supra* note 9, at 26-27; FRENKEL & STARK, *supra* note 3, at 138-139; GOLANN & FOLBERG, *supra* note 3, at 147-148; Welsh, *supra* note 8, at 795, 852.

²⁰ ABRAMSON, *supra* note 3, at 176-177, 250; Bassis, *supra* note 8, at 32; MEDIATION QUALITY, *supra* note 19, at 34.

²¹ ABRAMSON, *supra* note 3, at 250; Caplan, *supra* note 14, at 3, 9; Galton & Allen, *supra* note 9, at 26-27; MEDIATION QUALITY, *supra* note 19, at 34.

²² Bassis, *supra* note 8, at 30 (based on conversations with 23 advocates and mediators nationwide about joint sessions generally); Debra Berman & James Alfini, *Lawyer Colonization of Family Mediation: Consequences and Implications*, 95 MARQ. L. REV. 887, 895, 920-921 (2012) (finding that family mediators interviewed in three states separated the parties from the beginning); EXON, *supra* note 1, at 7; Galton & Allen, *supra* note 9, at 25-26, 29 (based on an informal survey of highly experienced mediators in Los Angeles, California about joint sessions generally).

²³ Folberg, *supra* note 8, at 17, 19.

²⁴ Blankenship, *supra* note 2, at 166; Ralph Peebles, Catherine Harris, & Thomas Metzloff, *Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases*, 2007 J. DISP. RESOL. 101, 110-111 (2007) (based on observations of 50 medical malpractice mediation sessions in North Carolina, *id.*, at 103-104).

²⁵ Folberg, *supra* note 8, at 14-15 (reporting that 45% of the mediators regularly began the first mediation session jointly at the time of the survey, compared to 80% saying they regularly began mediation in joint session when they started their mediation practice). These findings are based on the survey responses of 205 mediators with JAMS, a nationwide private ADR provider; almost two-thirds of the respondents were full-time neutrals for six or more years and almost two-thirds had been a judge. Virtually all mediate civil cases, with the single largest civil case category (almost half) being business/commercial; only 3% mediate family cases. *Id.* at 12-13. See also Thomas J. Stipanowich, *Insights on Mediator Practices and Perceptions*, DISP. RESOL.

use of joint opening sessions, with lower use in the western United States.²⁶ A study of private mediation in tort, contract, and complex business cases, however, found that at least three-fourths of the mediations began in joint session.²⁷ And two older studies of court-connected mediation in medical malpractice and other civil cases found that almost every case they observed began in joint opening session.²⁸

As to what occurs during joint opening sessions, one study found that mediators usually described the mediation process during the opening session.²⁹ Across several studies which primarily involved court-connected mediation in civil cases, party opening statements were made in around half to virtually all of the mediations.³⁰ In one of those studies, there appeared to be

MAG., Winter 2016, at 6, 7 (reporting that 55% of the mediators practicing in the US begin the first mediation session in caucus never or sometimes). These findings are based on survey responses from 130 mediators (94 of whom regularly practice in United States) who are members of the International Academy of Mediators (IAM), whose mediators typically have more than 20 years' experience and mediate more than 50 cases per year. *Id.* at 6. IAM is an invitation-only "professional membership organization consisting of the most successful commercial mediators." See <https://iamed.org/>.

²⁶ Folberg, *supra* note 8, at 15 (finding that JAMS mediators in the JAMS' Southwest and Northwest regions were less likely to regularly use an initial joint session (24% and 34%, respectively) than were mediators in the East/Central region (68%); Stipanowich, *supra* note 25, at 7 (finding that IAM mediators who practiced in California were less likely to regularly begin mediation in joint session than were mediators who practiced elsewhere in the US).

²⁷ DWIGHT GOLANN, WHY DO LAWYERS USE MEDIATION SO DIFFERENTLY? AN EMPIRICAL INQUIRY AND ITS IMPLICATIONS, unpublished manuscript, Feb. 4, 2020, at 4 (with permission of author). The findings are based on lawyers' reports in cases drawn from a Boston-area Superior Court docket. *Id.* at 1, 3. Seventy-four percent of the mediations started in a substantive joint session; an additional, unspecified number had a joint session limited to introductions or the mediator's opening statement. *Id.* at 4.

²⁸ Elizabeth Ellen Gordon, *Attorneys' Negotiation Strategies in Mediation: Business as Usual?*, MEDIATION Q., Summer 2000, at 377, 378, 382, 389 (nothing that all participants in 31 observed court-connected mediations of "large-dollar-amount nondomestic civil suits" in North Carolina met together before moving into separate caucuses); Peebles et al., *supra* note 24, at 109.

²⁹ Peebles et al., *supra* note 24, at 110.

³⁰ Gordon, *supra* note 28, at 382 (noting that participants explained their positions during joint opening sessions); Bobbi McAdoo, *Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLIN L. REV. 401, 403, 411, 435 (2001-2002) (finding that 49% of surveyed Minnesota civil litigators said that the mediator frequently or always asked both sides to make opening statements during court-connected mediations); Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473, 479, 588 (2002) (finding that 85% of surveyed Missouri civil litigators said that their court-connected mediations usually or always involved party opening statements); MEDIATION QUALITY, *supra* note 19, at 13 (reporting that mediators and lawyers said that opening statements were expected in most jurisdictions); Peebles et al., *supra* note 24, at 110-

little discussion of the dispute beyond the opening statements: the mediator did not ask any questions about the case, and the lawyers did not ask questions of the other side, during the joint opening session in virtually all cases, and the disputants themselves spoke little or not at all.³¹

Relatedly, the mediators' purposes for holding a joint opening session appear to be changing. In one survey, the purpose that showed the largest decline over time -- by 20% -- was allowing the parties to be heard by the other side.³² Establishing the mediator's neutrality and discussing the mediation process, confidentiality, ground rules, the mediator's qualifications, facts of the case, legal theories, and the procedural status of the litigation also declined as reasons for having a joint opening session, but to a smaller degree (by 5% to 11%).³³ Three reasons for beginning in joint session, however, showed little or no change: exploring the parties' needs and interests, determining the negotiation or settlement status of the case, and beginning negotiations.³⁴

Finally, the asserted decline in joint opening sessions is said to be taking place in the broader context of a decline in joint sessions at any time during the mediation.³⁵ Study findings on the frequency of later joint sessions are mixed, from occurring in virtually no cases to a majority of cases.³⁶

111 (reporting that opening statements were made in all joint sessions for which information was available).

³¹ Peebles et al., *supra* note 24, at 109-111.

³² Folberg, *supra* note 8, at 13-15. Mediators indicated for which purposes they usually use an initial joint session, both at the time of the survey and, retrospectively, when they had started mediating (which was more than six years earlier for a majority of the respondents). *Id.* For each purpose, we calculated the difference between the percentages at the two times. Data for "providing opportunity to assess parties and attorneys" were not reported for both times. *Id.*

³³ *Id.* Explaining the mediation process and explaining confidentiality were the only two purposes that a majority of mediators cited as reasons for using a joint opening session at both times.

³⁴ *Id.* Mediators in JAMS' Southwest and Northwest regions were less likely to cite "substantive" purposes for holding a joint opening session at the time of the survey than were those in the East/Central region. *Id.* at 15.

³⁵ COLE ET AL, *supra* note 1, at 42-43; Galton & Allen, *supra* note 9, at 25-26; Welsh, *supra* note 8, at 809-810.

³⁶ Folberg, *supra* note 8, at 15 (reporting that 52% of the mediators who do not begin in joint session said they seldom or almost never have a later joint session, while only 10% said they regularly have a subsequent joint session); JOHN LANDE, DATA FROM SURVEY OF NEW HAMPSHIRE MEDIATION TRAINING PARTICIPANTS (2017) at 2-4, <https://seureservercdn.net/45.40.149.159/gb8.254.myftpupload.com/wp-content/uploads/NH-training-survey-data.pdf> (finding that 68% of mediators and 52% of lawyers in primarily civil and family cases said there was a substantial joint session about other than process issues at some point during mediation in more than half of their recent cases, based on the survey responses of 87 mediators and lawyers); Stanley A. Leasure, *Arkansas Mediators: A Search for Mediation Success*, ARK. LAW., Fall 2016, at 34, 34-35, 41 (reporting that 70% of mediators who primarily mediate domestic relations and/or civil cases said they have a joint session at some point in

C. The Present Study

Mediators, lawyers, and frequent mediation users regularly debate these two approaches and their implications for the mediation process and its outcomes. To date, there are more assertions about what does and should happen during the initial mediation session than there is empirical evidence to inform the discussion.³⁷ Only a handful of studies have looked at whether the initial session begins jointly or in separate caucuses; fewer have examined what takes place during initial joint sessions; and none have examined what takes place during initial caucuses.³⁸ And the studies have largely examined mediations in civil and commercial cases.³⁹

The present Article reports the findings of a study that begins to fill the gaps in our knowledge about the initial mediation session by taking a more systematic and comprehensive look at how frequently joint opening sessions are held and what happens in both initial joint sessions and initial caucuses. Part II describes the survey procedure, the mediators who responded to the survey, and the mediated disputes that form the basis of the mediators' responses. Part III presents the survey findings regarding the initial mediation session, including how frequently mediation begins in joint session versus in separate caucuses; what process and substantive issues are discussed; whether the parties or their lawyers make opening statements and interact with the mediator and the other side; and whether there are joint sessions later in the mediation. Part IV discusses the findings and their implications for mediation practice, and Part V summarizes the key conclusions.

mediation in more than three-fourths of their cases, based on a survey of 49 certified Arkansas mediators, a majority of whom had been mediating over six years and spend one-fourth or less of their time mediating); McAdoo & Hinshaw, *supra* note 30, at 588 (finding that 62% of civil litigators said that mediators usually or always used caucuses almost exclusively in their mediations); Peebles et al., *supra* note 24, at 109 (reporting that every observed case went into separate caucuses, apparently for the rest of the mediation, after an initial joint session); Stipanowich, *supra* note 25, at 8 (finding that 29% of the mediators said they never use caucuses during the entire mediation, while 25% said they always or usually do, with greater use of all-caucus mediation in California). Hoffman cited an unpublished 2009 survey by Roberta Horton that found that most commercial mediators spent more than half of the mediation in caucus, while over half of family mediators spent less than one-third of the mediation in caucus. See Hoffman, *supra* note 7 at 267.

³⁷ Folberg, *supra* note 8, at 12 (“[T]here is little empirical evidence to inform us about what happens behind closed mediation doors”); Stipanowich, *supra* note 25, at 6 (“Our understanding of what mediators do -- and how, when, and why they do it -- rests heavily on anecdote.”)

³⁸ See Folberg, *supra* note 8, at 18 (noting that the survey did not ask “more detailed questions regarding the specifics of how joint sessions are conducted and how mediators accomplish similar purposes when they do not have a joint session”).

³⁹ See *MEDIATION QUALITY*, *supra* note 19, at 18-19 (stating that research needs to expand to case types other than civil and commercial because there are many differences among different mediation contexts, as well as “severe limitations” trying to extrapolate findings from one to another); Folberg, *supra* note 8, at 18 (noting that the mediators in this survey are “not necessarily representative of the general population of mediators”).

II. Survey Procedure and Respondents

We selected two states in four regions of the United States for the survey: 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. 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.⁴⁰

We sent a personalized email invitation to each mediator identified by this approach, asking them to participate in an online survey and providing them a unique code to access the survey. When the mediators logged in, they were first asked two screening questions to limit participation to those who had mediated (1) a non-appellate level civil or family dispute (other than small claims or probate) involving only two named parties (2) within the United States in the prior four months.⁴¹

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.⁴² Moreover, this

⁴⁰ 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.

⁴¹ 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).

⁴² *See, e.g.,* American Association of Opinion Research (AAOR), *Response Rates – An Overview*, at <https://www.aapor.org/Education-Resources/For-Researchers/Poll-Survey-FAQ/Response-Rates-An-Overview.aspx> (last accessed August 3, 2020); Weimiao Fan & Zheng Yan, *Factors Affecting Response Rates of the Web Survey: A Systematic Review*, 26 *COMPUTERS IN HUMAN BEHAVIOR* 132, 133-134, 136 (2010); Mirta Galesic & Michael Bosnjak, *Effects of Questionnaire Length on Participation and Indicators of Response Quality in a Web Survey*, 73 *PUBLIC OPINION QUARTERLY* 349 (Summer 2009); Bennett Porter, *Tips and Tricks to Improve Survey Response Rate*, at (<https://www.surveymonkey.com/curiosity/improve-survey-response-rate/>) (last accessed August 3, 2020); Tse-Hua Shih and Xitao Fan, *Comparing Response Rates in Email and Paper Surveys: A Meta-Analysis*, 4 *EDUCATIONAL RESEARCH REVIEW* 26, 36-37 (2009). Moreover, the response rate is not necessarily an indicator of the quality of the survey findings. *See* AAOR, *supra*; Colleen Cook, Fred Heath, & Russel L. Thompson, *A Meta-Analysis of Response Rates in Web- or Internet-Based Surveys*, 60 *EDUCATIONAL AND PSYCHOLOGICAL MEASUREMENT* 821 (2000).

figure is conservative because an unknown number of emails that were not returned as “undeliverable” might not have reached their intended recipients⁴³ due to outdated email addresses, spam filters, or other reasons.⁴⁴

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).⁴⁵ 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 (67%), while one-third most frequently mediate family cases (33%). Three-fourths of the mediators had been mediating for eight or more years and typically mediate two or more cases per month.⁴⁶ A majority of both civil and family mediators (88% and 68%, respectively) had only a law background, and a minority had only a non-law background (3% and 21%, respectively).⁴⁷

⁴³ See also Donna Shestowsky, *How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study*, 49 U.C. DAVIS L. REV. 793, 807, n.55 (2015-2016) (explaining that the 10% response rate in that study was conservative for a similar reason: due to uncertainty about address accuracy, one could not tell whether a non-response to the mailed survey was because the survey did not reach the intended recipient or because that person chose not to participate).

⁴⁴ 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.

⁴⁵ The conventional level of probability for determining the statistical significance of findings is the .05 level (*i.e.*, $p < .05$). Findings of $p < .10$ are considered “marginally significant” -- the difference is not statistically significant but is worth mentioning -- and those are noted as such. Cramer's *V* provides a measure of the strength of the effect for chi-square (χ^2) analyses. See RICHARD P. RUNYON & AUDREY HABER, *FUNDAMENTALS OF BEHAVIORAL STATISTICS* 140-142, 230, 278–80 (5th ed. 1984). As a rough guide to interpreting the size of effects, .10 is considered a small effect; .30, a medium effect; and .50, a large effect. ROBERT ROSENTHAL & RALPH L. ROSNOW, *ESSENTIALS OF BEHAVIORAL RESEARCH* 361 (1984).

⁴⁶ Civil mediators had mediated, on average, three years longer than family mediators (means of 16 years vs. 13 years; $t(944) = -3.58$, $p < .001$). Civil mediators mediate, on average, one fewer case per month than family mediators (means of 5 vs. 6 cases per month, $t(940) = 3.28$, $p < .01$).

⁴⁷ Civil mediators were more likely than family mediators to have only a law background and were less likely to have only a non-law background ($\chi^2(2) = 82.10$, $p < .001$, $V = .29$). Eight percent of civil mediators and 11% of family mediators had both a law and non-law background. The most common non-law backgrounds included mental health fields, business, construction or engineering, accounting, and conflict resolution.

When responding to most of the questions in the survey, the mediators were asked to focus on their most recently concluded mediation that involved a civil or family dispute with only two named parties. Focusing on a single recent case provides more accurate information⁴⁸ and enables us to examine relationships among case characteristics and what took place during the mediation.⁴⁹

Approximately two-thirds of the mediators' most recent mediations were civil cases (68%) and one-third were family cases (32%). The four substantive areas accounting for most of the civil cases were tort (30%), contract (27%), employment (21%), and property/real estate (10%). Over half of the family cases involved two or more types of divorce-related issues (58%); roughly equal proportions of the remaining family cases involved only custody/visitation issues (22%) or only financial issues (19%). One or both parties did not have legal counsel in relatively few civil cases (11%) but in over one-third of family cases (37%).⁵⁰ A majority of parties in both civil and family cases had no prior mediation experience (63% to 75%), with the exception of responding parties in civil cases (34%).⁵¹

In both civil and family cases, the two most common referral sources were court mediation programs/judges (42% and 39%, respectively) and the lawyers (43% and 30%, respectively); few civil cases but almost one-fourth of family cases were referred directly 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.⁵² In almost three-fourths of the civil cases (73%) and almost half of the family cases (47%), there were no time limits or pressures on the mediation.⁵³

⁴⁸ *See, e.g.*, CLAIRE SELTZ, LAWRENCE S. WRIGHTSMAN, & STUART W. COOK, RESEARCH METHODS IN SOCIAL RELATIONS 307 (3d ed. 1976); DONNA STIENSTRA, RULES OF THUMB FOR DESIGNING AND ADMINISTERING MAILED QUESTIONNAIRES (RESEARCH DIVISION, FEDERAL JUDICIAL CENTER, March 2000) at 4.

⁴⁹ SELTZ ET AL., *supra* note 48, at 307.

⁵⁰ 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 ($\chi^2(2) = 101.18$, $p < .001$, $V = .31$).

⁵¹ 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: $\chi^2(3) = 182.63$, $p < .001$, $V = .44$).

⁵² Civil cases were more likely than family cases to be referred from federal courts/judges or the lawyers, and were less likely to be referred from state courts/judges or the parties ($\chi^2(4) = 170.62$, $p < .001$, $V = .41$). Some civil and family cases “directly referred” from the parties or the lawyers might nonetheless have been in a court-connected mediation program because, in some programs, the parties or their lawyers directly contact the mediator. *See, e.g.*, C.D. CAL., Gen. Order 11-10 §7.1(a); UTAH CODE JUD. ADMIN. Rule 4-510.05(4)(E); MICHIGAN COURT RULES 2.411(B)(1) (civil), 3.216(F)(2)(e) (family); THE SUPREME COURT OF NORTH CAROLINA, RULES FOR MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS, Rule 2.A.

⁵³ These included time limits set by the mediator, the parties, or the mediation program, as well as possible pressures because the mediator served pro bono or for a reduced fee for a set number

The proportion of cases mediated in each state was as follows: California (20%), Florida (16%), New York (16%), North Carolina (12%), Maryland (11%), Michigan (10%), Illinois (8%), Utah (6%), and several other, mostly adjoining states (2%). Two states (New York and California) accounted for almost half of the civil case mediations, and three states (Florida, Illinois, and Maryland) accounted for just over half of the family case mediations.⁵⁴

III. What Took Place During the Initial Mediation Session

A. How the Initial Mediation Session Began

The first formal mediation session started jointly, with both parties and their lawyers (if applicable) together in person or by phone, in a majority of both civil and family cases (*see* Table 1). The first session started in separate caucuses with each side in a minority of cases; only a few started with opposing counsel together but opposing parties apart. Civil cases were more likely than family cases to begin with both parties together and were less likely to begin with each side apart.⁵⁵

	<i>Civil Cases</i>	<i>Family Cases</i>
Both parties together	71%	64%
Each side apart	26%	33%
Opposing parties apart but lawyers together	3%	3%
Other	0.2%	0
<i>Total Ns</i>	<i>664</i>	<i>324</i>

Throughout this Article, we use these two main categories -- both parties were together or each side was apart -- to indicate initial joint sessions and initial caucuses, respectively, in analyses of the ways in which the two opening structures differ.⁵⁶

of hours. Mediators in civil cases were more likely than those in family cases to report no time limits or pressures ($\chi^2(2) = 59.47, p < .001, V = .25$).

⁵⁴ 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.

⁵⁵ $\chi^2(2) = 5.36, p < .05, V = .08$.

⁵⁶ The “parties apart/lawyers together” category does not have enough cases to use in subsequent analyses as a separate category. And the cases in this category cannot be combined with those in the two main categories because they do not fit clearly into either -- they are an initial joint session from the perspective of the lawyers, but not from the perspective of the parties. Thus, the cases in this category are not used in any further analyses in this Article.

B. What Mediators Discussed Regarding the Mediation Process

We asked the mediators to indicate whether they engaged in a number of actions regarding the mediation process itself during the initial mediation session.⁵⁷ From those individual items, we created three scales that consisted of conceptually similar process actions in order to see how many actions within each of these three groupings the mediators engaged in during the initial mediation session, separately for initial joint sessions and initial caucuses.

Civil Cases. In both initial joint sessions and initial caucuses, most of the mediators explained the mediation process and the mediator’s role, mediation confidentiality, the ground rules for the mediation, and their approach (*see* Table 2). In both initial joint sessions and initial caucuses, most of the mediators (91% and 82%, respectively) explained three or four of these items; virtually none of the mediators did not explain any of them (1% and 2% respectively).⁵⁸ Mediators were more likely to explain the ground rules, the mediation process, and confidentiality,⁵⁹ and explained more of these items,⁶⁰ when mediation started in joint session than in separate caucuses.

Table 2. What Mediators Discussed Regarding the Mediation Process in Civil Cases		
	Joint	Caucus
Explained the mediation process	96%	90%
Explained my approach	78%	78%
Explained the ground rules	89%	73%
Explained mediation confidentiality	95%	90%
Assessed the participants’ ability to communicate civilly	61%	61%
Assessed the parties’ capacity to mediate	43%	44%
Explored options for how to proceed after mediator’s remarks (joint) / Explored if parties would be okay together (caucus)	54%	43%
Explored options for structuring the rest of the mediation	48%	51%
Coached participants on non-adversarial communications	--	19%
Other	2%	1%
None of the above	0.2%	1%
<i>Total Ns</i>	<i>463</i>	<i>166</i>

⁵⁷ Very few mediators in both civil and family cases, and in both initial joint sessions and initial caucuses, engaged in actions about the mediation process other than those listed or did not engage in any of the listed items (*see* Tables 2 and 3).

⁵⁸ Cronbach’s alpha for the scale that consists of these four items was .52 (joint) and .61 (caucus); the inter-item correlations ranged from .16 to .38 (joint) and .11 to .43 (caucus). Cronbach’s alpha, which ranges from .00 to 1.00, measures the internal consistency of a scale and reflects the inter-item correlations and the number of items in the scale. *See* EDWARD G. CARMINES AND RICHARD A. ZELLER, RELIABILITY AND VALIDITY ASSESSMENT (1979) at 44-46.

⁵⁹ Ground rules: $\chi^2(1) = 23.62, p < .001, V = .19$; process: $\chi^2(1) = 9.67, p < .01, V = .12$; confidentiality: $\chi^2(1) = 5.13, p < .05, V = .09$. There was no difference in whether they explained their approach, $p = .97$.

⁶⁰ $t(627) = 3.59, p < .001$.

In both initial joint sessions and initial caucuses, a majority of the mediators in civil cases assessed the parties' and their lawyers' ability to communicate civilly, but fewer than half assessed the parties' capacity to mediate (*e.g.*, cognitive ability, violence, coercive control, harassment, or other intimidation) (*see* Table 2). In both initial joint sessions and initial caucuses, fewer than half of the mediators assessed the participants on both dimensions (40% and 39%, respectively); almost as many did not assess the participants on either dimension (36% and 34%, respectively).⁶¹ There were no differences between initial joint sessions and initial caucuses in whether mediators assessed the participants on either individual dimension⁶² or how many of these dimensions the mediators assessed.⁶³

Broadly speaking, around half of the mediators in civil cases explored options for how the opening session might proceed after the mediator's opening remarks, whether the parties would be okay being together in the same room,⁶⁴ and options for how the rest of the mediation might be structured (*see* Table 2). During initial caucuses, approximately one-fifth of the mediators coached the parties and/or their lawyers on non-adversarial communications in preparation for subsequent joint sessions. There was no difference between initial joint sessions and initial caucuses in whether mediators explored options for structuring the rest of the mediation.⁶⁵ Two different scales were created with different subsets of these items, one for cases that began in joint session⁶⁶ and the other for cases that began in initial caucuses.⁶⁷ During initial joint sessions, 41% of the mediators explored how to structure both the opening session and the rest of the mediation; a similar proportion (40%) explored neither. During initial caucuses, 32% of the mediators engaged in two or three of these actions; the same proportion engaged in none of them.

Family Cases. In both initial joint sessions and initial caucuses, most mediators explained the mediation process and the mediator's role, mediation confidentiality, the ground rules for the mediation, and their approach (*see* Table 3). In both initial joint sessions and initial caucuses, most of the mediators (88% and 91%, respectively) explained three or four of these

⁶¹ Initial joint sessions: Cronbach's alpha = .72; inter-item correlation = .57. Initial caucuses: Cronbach's alpha = .68; inter-item correlation = .51.

⁶² *p*'s = .82, .95.

⁶³ *p* = .93.

⁶⁴ Exploring options for how the session would proceed after the mediators' opening remarks was asked only in cases with an initial joint session; exploring whether the parties would be okay being together in the same room was asked only in cases with initial caucuses.

⁶⁵ *p* = .50. Differences between initial joint sessions and initial caucuses on the other items, *supra*, and on the overall scales, *infra*, could not be assessed because these items were not asked in both sets of cases.

⁶⁶ The scale for initial joint sessions, which includes exploring how to structure the opening session after the mediator's remarks and how to structure the rest of the mediation, had a Cronbach's alpha of .76; the correlation between these two items was .62.

⁶⁷ The scale for initial caucuses, which includes the three actions of exploring whether the parties would be okay together in the same room, exploring how to structure the rest of the mediation after the opening session, and coaching the participants on non-adversarial communications, had a Cronbach's alpha of .52; the inter-item correlations ranged from .20 to .29.

items; virtually none of the mediators did not explain any of them (3% and 5%, respectively).⁶⁸ There were no differences between initial joint sessions and initial caucuses in whether mediators explained any of these four individual items⁶⁹ or in how many of these items they explained.⁷⁰

	Joint	Caucus
Explained the mediation process	95%	95%
Explained my approach	76%	68%
Explained the ground rules	82%	86%
Explained mediation confidentiality	95%	95%
Assessed the participants' ability to communicate civilly	62%	64%
Assessed the parties' capacity to mediate	62%	75%
Explored options for how to proceed after mediator's remarks (joint) / Explored if parties would be okay together (caucus)	54%	53%
Explored options for structuring the rest of the mediation	49%	46%
Coached participants on non-adversarial communications	--	21%
Other	2%	3%
None of the above	0.5%	1%
<i>Total Ns</i>	<i>189</i>	<i>104</i>

In both initial joint sessions and initial caucuses, a majority of the mediators in family cases assessed the parties' and their lawyers' ability to communicate civilly and assessed the parties' capacity to mediate (*e.g.*, cognitive ability, violence, coercive control, harassment, or other intimidation) (*see* Table 3). In both initial joint sessions and initial caucuses, just over half of the mediators assessed the parties on both dimensions (53% and 56%, respectively); a minority (29% and 17%, respectively) did not assess participants on either dimension.⁷¹ Mediators were less likely to assess the parties' capacity to mediate during initial joint sessions than during initial caucuses; there was no difference in whether they assessed the participants' civility.⁷² And there was no difference between initial joint sessions and initial caucuses in how many of these dimensions the mediators assessed.⁷³

Around half of the mediators in family cases explored options for how the opening session might proceed after the mediator's opening remarks, whether the parties would be okay

⁶⁸ Cronbach's alpha for the scale that consists of these four items was .62 (joint) and .69 (caucus); the inter-item correlations ranged from .26 to .61 (joint) and .25 to 1.00 (caucus).

⁶⁹ *p*'s ranged from .14 to .99.

⁷⁰ *p* = .76.

⁷¹ Initial joint sessions: Cronbach's alpha = .76; inter-item correlation = .61. Initial caucuses: Cronbach's alpha = .56; inter-item correlation = .39.

⁷² Capacity: $\chi^2(1) = 4.78$, *p* < .05, *V* = .13; civility: *p* = .79.

⁷³ *p* = .17.

being together in the same room,⁷⁴ and options for how the rest of the mediation might be structured (*see* Table 3). During initial caucuses, approximately one-fifth of the mediators coached the parties and/or their lawyers on non-adversarial communications in preparation for subsequent joint sessions. There was no difference between initial joint sessions and initial caucuses in whether mediators explored options for structuring the rest of the mediation.⁷⁵ Two different scales were created with different subsets of these items, one for cases that began in joint session⁷⁶ and the other for cases that began in initial caucuses.⁷⁷ During initial joint sessions, 40% of the mediators explored how to structure both the opening session and the rest of the mediation; 36% explored neither. During initial caucuses, 42% of the mediators engaged in two or three of these actions; 35% engaged in none of them.

Comparing Civil and Family Cases. There were few differences between civil and family cases in what mediators did regarding the mediation process (*compare* Tables 2 and 3). In cases that had an initial joint session, mediators in civil cases were less likely than those in family cases to assess the parties' capacity to mediate (43% vs. 62%), but they were more likely to explain the ground rules (89% vs. 82%).⁷⁸ In cases that had initial caucuses, mediators in civil cases were less likely than those in family cases to assess the parties' capacity to mediate (44% vs. 75%) and to explain the ground rules (73% vs. 86%), but they were marginally more likely to explain their approach (78% vs. 68%).⁷⁹

C. What Mediators Discussed Regarding the Substance of the Dispute

We asked the mediators to indicate whether they discussed a number of aspects of the substance of the dispute during the initial mediation session.⁸⁰ From those individual items, we created three scales that consisted of conceptually similar substantive items in order to see how

⁷⁴ Exploring options for how the session would proceed after the mediators' opening remarks was asked only in cases with an initial joint session; exploring whether the parties would be okay being together in the same room was asked only in cases with initial caucuses.

⁷⁵ $p = .62$. Differences between initial joint sessions and initial caucuses on the other items, *supra*, and on the overall scales, *infra*, could not be assessed because these items were not asked in both sets of cases.

⁷⁶ The scale for initial joint sessions, which includes exploring how to structure the opening session after the mediator's remarks and how to structure the rest of the mediation, had a Cronbach's alpha of .70; the correlation between these two items was .54.

⁷⁷ The scale for initial caucuses, which includes the three actions of exploring whether the parties would be okay together in the same room, exploring how to structure the rest of the mediation after the opening session, and coaching the participants on non-adversarial communications, had a Cronbach's alpha of .61; the inter-item correlations ranged from .19 to .42.

⁷⁸ Capacity: $\chi^2(1) = 20.33$, $p < .001$, $V = .18$; ground rules: $\chi^2(1) = 6.16$, $p < .05$, $V = .10$. There were no differences in the other actions, p 's ranged from .43 to .96.

⁷⁹ Capacity: $\chi^2(1) = 24.97$, $p < .001$, $V = .30$; ground rules: $\chi^2(1) = 5.95$, $p < .05$, $V = .15$; approach: $\chi^2(1) = 3.39$, $p = .07$, $V = .11$. There were no differences in the other actions, p 's ranged from .11 to .67.

⁸⁰ Few mediators in both civil and family cases, and in both initial joint sessions and initial caucuses, discussed something else about the substance of the dispute or did not discuss any of the listed items (*see* Tables 4 and 5).

many items within each of these three groupings the mediators had discussed during the initial mediation session, separately for initial joint sessions and initial caucuses.

Civil Cases. During initial joint sessions, a majority of the mediators explored which issues needed to be addressed, around half explored the parties' interests and goals for the mediation, and around one-third developed the agenda (*see* Table 4). During initial caucuses, a majority of the mediators explored which issues needed to be addressed, the parties' interests and their goals for the mediation; around one-third developed the agenda. During initial joint sessions, 42% of the mediators discussed three or four of these items; 20% did not discuss any of them.⁸¹ During initial caucuses, 61% of the mediators discussed three or four of these items; only 7% did not discuss any of them.⁸² Mediators were less likely to explore the issues and the parties' interests and goals,⁸³ and explored fewer of these items,⁸⁴ during initial joint sessions than during initial caucuses.

	Joint	Caucus
Explored which issues needed to be addressed	66%	84%
Developed the agenda	35%	30%
Explored the parties' interests	48%	72%
Explored the parties' goals for the mediation	49%	76%
Explored the procedural/litigation status of the dispute	59%	75%
Explored the parties' legal theories and surrounding facts	51%	84%
Explored the status of settlement negotiations	58%	84%
Explored the obstacles to settlement	33%	70%
Explored new substantive settlement proposals	22%	46%
Explored the costs/risks of litigation	44%	54%
Other	1%	4%
None of the above	9%	2%
<i>Total Ns</i>	<i>454</i>	<i>166</i>

During both initial joint sessions and initial caucuses, a majority of the mediators in civil cases explored the procedural or litigation status of the case, the parties' legal theories and facts, and the status of settlement negotiations and/or what substantive offers or proposals had been exchanged (*see* Table 4). During initial joint sessions, 57% of the mediators discussed two or three of these items; 23% did not discuss any of them.⁸⁵ During initial caucuses, 86% of the

⁸¹ Cronbach's alpha = .69; inter-item correlations ranged from .20 to .60.

⁸² Cronbach's alpha = .63; inter-item correlations ranged from .24 to .44.

⁸³ Issues: $\chi^2(1) = 19.26$, $p < .001$, $V = .18$; interests: $\chi^2(1) = 28.37$, $p < .001$, $V = .21$; goals: $\chi^2(1) = 34.89$, $p < .001$, $V = .24$. There was no difference in whether they developed the agenda, $p = .20$.

⁸⁴ $t(618) = -5.17$, $p < .001$.

⁸⁵ Cronbach's alpha = .68; inter-item correlations ranged from .39 to .44.

mediators discussed two or three of these items; only 4% did not discuss any of them.⁸⁶ Mediators were less likely to discuss each of these items,⁸⁷ and discussed fewer of them,⁸⁸ during initial joint sessions than during initial caucuses.

During initial joint sessions, a minority of the mediators in civil cases explored the obstacles to settlement (informational, interpersonal, or substantive), new substantive settlement proposals for the parties to consider, or the costs and risks of litigation (*see* Table 4). During initial caucuses, a majority of the mediators explored the obstacles to settlement, and around half explored new substantive settlement proposals or the costs and risks of litigation. During initial joint sessions, 30% of the mediators discussed two or three of these items; almost half (44%) did not discuss any of them.⁸⁹ During initial caucuses, 60% of the mediators discussed two or three of these items; 18% did not discuss any of them.⁹⁰ Mediators were less likely to discuss each of these items,⁹¹ and discussed fewer of them,⁹² during initial joint sessions than during initial caucuses.

Family Cases. During both initial joint sessions and initial caucuses, a majority of the mediators explored which issues needed to be addressed, the parties' interests, and the parties' goals for the mediation, and around half developed the agenda (*see* Table 5). During both initial joint sessions and initial caucuses, almost three-fourths of the mediators (71% and 74%, respectively) discussed three or four of these items; only 4% in each group did not discuss any of them.⁹³ Mediators were marginally more likely to develop the agenda during initial joint sessions than during initial caucuses, but there were no differences in whether the mediators explored the other items⁹⁴ nor in how many of these items the mediators explored.⁹⁵

⁸⁶ Cronbach's alpha = .62; inter-item correlations ranged from .21 to .31.

⁸⁷ Procedural status: $\chi^2(1) = 12.50$, $p < .001$, $V = .14$; theories: $\chi^2(1) = 53.87$, $p < .001$, $V = .30$; negotiation status: $\chi^2(1) = 38.35$, $p < .001$, $V = .25$.

⁸⁸ $t(618) = -7.63$, $p < .001$.

⁸⁹ Cronbach's alpha = .63; inter-item correlations ranged from .32 to .46.

⁹⁰ Cronbach's alpha = .58; inter-item correlations ranged from .25 to .42.

⁹¹ Obstacles: $\chi^2(1) = 71.28$, $p < .001$, $V = .34$; proposals: $\chi^2(1) = 36.90$, $p < .001$, $V = .24$; costs/risks: $\chi^2(1) = 5.27$, $p < .05$, $V = .09$.

⁹² $t(618) = -7.63$, $p < .001$.

⁹³ Initial joint sessions: Cronbach's alpha = .64; inter-item correlations ranged from .24 to .51. Initial caucuses: Cronbach's alpha = .57; inter-item correlations ranged from .08 to .45.

⁹⁴ Agenda: $\chi^2(1) = 3.15$, $p = .08$, $V = .10$; other items, p 's ranged from .16 to .91.

⁹⁵ $p = .98$.

	Joint	Caucus
Explored which issues needed to be addressed	91%	91%
Developed the agenda	57%	46%
Explored the parties' interests	73%	77%
Explored the parties' goals for the mediation	76%	83%
Explored the procedural/litigation status of the dispute	50%	72%
Explored the parties' legal theories and surrounding facts	22%	55%
Explored the status of settlement negotiations	50%	76%
Explored the obstacles to settlement	46%	73%
Explored new substantive settlement proposals	43%	58%
Explored the costs/risks of litigation	28%	60%
Other	3%	3%
None of the above	3%	2%
<i>Total Ns</i>	<i>186</i>	<i>100</i>

During initial joint sessions, half of the mediators in family cases explored the procedural or litigation status of the dispute and the status of negotiations, while almost one-fourth explored the parties' legal theories and facts (*see* Table 5). During initial caucuses, a majority of the mediators explored the procedural status, the negotiation status, and the parties' legal theories and facts. During initial joint sessions, 39% of the mediators discussed two or three of these items; 34% did not discuss any of them.⁹⁶ During initial caucuses, 73% of the mediators discussed two or three of these items; only 12% did not discuss any of them.⁹⁷ Mediators were less likely to discuss each of these three items,⁹⁸ and discussed fewer of them,⁹⁹ during initial joint sessions than during initial caucuses.

During initial joint sessions, fewer than half of the mediators in family cases explored the obstacles to settlement (informational, interpersonal, or substantive) and new substantive settlement proposals for the parties to consider, while around one-fourth explored the costs and risks of litigation (*see* Table 5). During initial caucuses, a majority of the mediators explored obstacles to settlement, new settlement proposals, and litigation costs and risks. During initial joint sessions, 39% of the mediators discussed two or three of these items; almost as many (37%) discussed none of them.¹⁰⁰ During initial caucuses, 65% of the mediators discussed two or three of these items; only 10% did not discuss any of them.¹⁰¹ Mediators were less likely to discuss

⁹⁶ Cronbach's alpha = .66 ; inter-item correlations ranged from .38 to .43.

⁹⁷ Cronbach's alpha = .60; inter-item correlations ranged from .24 to .43.

⁹⁸ Procedural status: $\chi^2(1) = 12.30, p < .001, V = .21$; theories: $\chi^2(1) = 31.68, p < .001, V = .33$; negotiations: $\chi^2(1) = 18.90, p < .001, V = .26$.

⁹⁹ $t(284) = -6.07, p < .001$.

¹⁰⁰ Cronbach's alpha = .61; inter-item correlations ranged from .23 to .49.

¹⁰¹ Cronbach's alpha = .48; inter-item correlations ranged from .10 to .35.

each of these three items,¹⁰² and discussed fewer of them,¹⁰³ in initial joint sessions than in initial caucuses.

Comparing Civil and Family Cases. When the first mediation session began jointly, there were differences between civil cases and family cases on each of the substantive items discussed (*compare* Tables 4 and 5). Mediators in civil cases were less likely than those in family cases to develop the agenda (35% vs. 57%) and to explore which issues needed to be addressed (66% vs. 91%), the parties' interests (48% vs. 73%), their goals (49% vs. 76%), the obstacles to settlement (33% vs. 46%), and new substantive settlement proposals (22% vs. 43%).¹⁰⁴ But mediators in civil cases were more likely than those in family cases to explore the parties' legal theories and facts (51% vs. 22%), litigation costs and risks (44% vs. 28%), the procedural status of the case (59% vs. 50%), and, marginally, the status of negotiations (58% vs. 50%) during initial joint sessions.¹⁰⁵

When the first mediation session began in separate caucuses, there were fewer differences between what mediators in civil and family cases discussed regarding the substance of the dispute. Mediators in civil cases were less likely than those in family cases to develop the agenda (30% vs. 46%) and were marginally less likely to explore new substantive settlement proposals (46% vs. 58%) (*compare* Tables 4 and 5).¹⁰⁶ But mediators in civil cases were more likely than those in family cases to explore the parties' legal theories and facts (84% vs. 55%) and were marginally more likely to explore the negotiation status of the case (84% vs. 76%) during initial caucuses.¹⁰⁷

D. The Actions and Interactions of the Mediation Participants

In this section, we examine what the mediation participants -- the parties (*i.e.*, the disputants themselves), the lawyers, and the insurance company representatives -- did during the initial mediation session, such as whether they made an opening statement, responded to the other side, or discussed substantive settlement proposals. First for civil cases and then for family cases, we report the parties' actions and the lawyers' actions. We also compare the actions of the parties and lawyers in the same case, as well as the actions of parties in cases where neither had counsel versus where both had counsel. We then compare the actions of the parties and lawyers

¹⁰² Obstacles: $\chi^2(1) = 19.60$, $p < .001$, $V = .26$; proposals: $\chi^2(1) = 5.85$, $p < .05$, $V = .14$; costs/risks: $\chi^2(1) = 27.01$, $p < .001$, $V = .31$.

¹⁰³ $t(284) = -5.62$, $p < .001$.

¹⁰⁴ Agenda: $\chi^2(1) = 26.24$, $p < .001$, $V = .20$; issues: $\chi^2(1) = 42.77$, $p < .001$, $V = .26$; interests: $\chi^2(1) = 33.07$, $p < .001$, $V = .23$; goals: $\chi^2(1) = 37.72$, $p < .001$, $V = .24$; obstacles: $\chi^2(1) = 9.78$, $p < .01$, $V = .12$; proposals: $\chi^2(1) = 30.17$, $p < .001$, $V = .22$.

¹⁰⁵ Theories: $\chi^2(1) = 45.55$, $p < .001$, $V = .27$; costs/risks: $\chi^2(1) = 13.00$, $p < .001$, $V = .14$; procedural status: $\chi^2(1) = 4.08$, $p < .05$, $V = .08$; negotiation status: $\chi^2(1) = 3.44$, $p = .06$, $V = .07$.

¹⁰⁶ Agenda: $\chi^2(1) = 7.38$, $p < .01$, $V = .17$; proposals: $\chi^2(1) = 3.37$, $p = .07$, $V = .11$.

¹⁰⁷ Theories: $\chi^2(1) = 26.10$, $p < .001$, $V = .31$; negotiations: $\chi^2(1) = 2.84$, $p = .09$, $V = .10$. There were no differences in other actions, p 's ranged from .12 to .91.

in civil cases to those in family cases. Finally, we report the actions of insurance representatives, who appeared only in civil cases.

The Parties' and Lawyers' Actions in Civil Cases. Looking first at the actions of the parties (*i.e.*, the disputants themselves), in civil cases that began in initial joint sessions, one or both parties made an opening statement or added details or context to another's opening presentation in fewer than half of the cases (*see* Table 6). In a majority of the cases, one or both parties responded to questions or statements from the mediator. One or both parties asked questions of or responded to questions or statements from the other side in fewer than half of the cases, and they exchanged substantive settlement offers or proposals with the other side in one-fifth of the cases. The parties engaged in none of these actions in fewer than one-fifth of the cases.¹⁰⁸

In civil cases that began in initial caucuses, one or both parties made an opening statement or added to another's opening presentation in fewer than one-fifth of the cases (*see* Table 6). One or both parties responded to the mediator in virtually all cases. In over half of the cases, one or both parties asked questions of or responded to the other side through the mediator or discussed settlement proposals with the mediator.¹⁰⁹ Few parties engaged in none of the above actions. Thus, parties were more likely to make an opening statement or add to another's opening presentation in initial joint sessions than in initial caucuses, but they were less likely to respond to the mediator and the other side and to discuss settlement proposals.¹¹⁰

¹⁰⁸ The initial joint session in these cases might have consisted solely of an exchange of introductions or the mediator's opening statement.

¹⁰⁹ These questions were worded slightly differently for initial caucuses than for initial joint sessions.

¹¹⁰ Opening: $\chi^2(1) = 37.15$, $p < .001$, $V = .29$; added: $\chi^2(1) = 22.14$, $p < .001$, $V = .22$; respond to mediator: $\chi^2(1) = 28.92$, $p < .001$, $V = .25$; respond to other: $\chi^2(1) = 9.32$, $p < .01$, $V = .14$; proposals: $\chi^2(1) = 75.75$, $p < .001$, $V = .41$. Too few parties in initial caucuses engaged in none of these actions to be able to statistically compare them to joint opening sessions.

	<i>One or Both Parties</i>		<i>One or Both Lawyers</i>	
	Joint	Caucus	Joint	Caucus
Made an opening statement or presentation	41%	12%	71%	24%
Added to another's opening presentation	41%	18%	40%	20%
Responded to the mediator	68%	91%	71%	88%
Asked/responded to the other side (joint) / Did so through the mediator (caucus)	41%	56%	40%	65%
Exchanged settlement offers with the other side (joint) / Discussed settlement proposals with the mediator (caucus)	20%	61%	19%	74%
Other	1%	1%	0	0
None of the above	16%	3%	12%	2%
<i>Total Ns</i>	<i>315</i>	<i>139</i>	<i>341</i>	<i>138</i>

Looking at the lawyers' actions, in civil cases that began in initial joint sessions, one or both lawyers made an opening statement or presentation in a majority of the cases and added to another's opening presentation in fewer than half of the cases (*see* Table 6). In a majority of the cases, one or both lawyers responded to questions or statements from the mediator. One or both lawyers asked questions of or responded to questions or statements from the other side in fewer than half of the cases, and they exchanged substantive settlement offers or proposals with the other side in approximately one-fifth of the cases. The lawyers engaged in none of these actions in relatively few cases.

In civil cases that began in initial caucuses, one or both lawyers made an opening statement or added to another's opening presentation in fewer than one-fourth of the cases (*see* Table 6). Lawyers in most cases responded to the mediator. In a majority of the cases, one or both lawyers asked questions of or responded to the other side through the mediator or discussed settlement proposals with the mediator. Few lawyers engaged in none of these actions. Thus, lawyers were more likely to make an opening statement or add to another's opening presentation in initial joint sessions than in initial caucuses, but they were less likely to respond to the mediator and the other side and to discuss settlement proposals.¹¹¹

Next, we compared the actions of parties and lawyers in the same case.¹¹² In both initial joint sessions and initial caucuses, parties were less likely than lawyers in the same case to make

¹¹¹ Opening: $\chi^2(1) = 90.98$, $p < .001$, $V = .44$; added: $\chi^2(1) = 18.24$, $p < .001$, $V = .20$; respond to the mediator: $\chi^2(1) = 14.64$, $p < .001$, $V = .18$; respond to other: $\chi^2(1) = 25.64$, $p < .001$, $V = .23$; proposals: $\chi^2(1) = 131.42$, $p < .001$, $V = .52$. Too few lawyers in initial caucuses engaged in none of these actions to be able to statistically compare them to joint opening sessions.

¹¹² Because the questions asked whether one or both parties and one or both lawyers engaged in each of these actions, we could not compare the actions of each party directly to that of their respective counsel. Instead, these comparisons were conducted at the level of the case. The percentages here do not match the percentages in the prior table or text because these

an opening statement, respond to questions or statements from the mediator and from the other side, or discuss settlement proposals.¹¹³ There was no difference between parties and lawyers in whether they added to another's opening presentation in either initial joint sessions or initial caucuses.¹¹⁴ The only action that showed a different pattern in initial joint sessions versus in initial caucuses was responding to the mediator: during initial joint sessions, parties were less likely than lawyers in the same case to respond to the mediator, but parties were more likely than lawyers to respond to the mediator during initial caucuses.¹¹⁵

Given the immediately preceding findings, the parties might have less opportunity to participate in the initial mediation session if their lawyers talked instead of or in addition to the parties themselves.¹¹⁶ Accordingly, we conducted additional analyses to compare parties' actions during initial joint sessions in cases where neither party had counsel versus where both parties had counsel.¹¹⁷ And indeed, parties were more likely to engage in each of these actions during initial joint sessions in cases where neither party was represented than in cases where both were represented. In cases where neither party was represented, parties were more likely to make an opening statement (83% vs. 33%), add to another's opening (67% vs. 37%), respond to questions or statements from the mediator (90% vs. 63%), ask questions of or respond to the other side (70% vs. 34%), and exchange substantive settlement proposals with the other side (57% vs. 14%) than were parties in cases where both were represented.¹¹⁸

The Parties' and Lawyers' Actions in Family Cases. Looking first at the actions of the parties (*i.e.*, the disputants themselves), in family cases that began in initial joint sessions, one or both parties made an opening statement or added details or context to another's opening presentation in fewer than half of the cases (*see* Table 7). One or both parties responded to questions or statements from the mediator in most cases. One or both parties asked questions of or responded to questions or statements from the other side in a majority of the cases, but exchanged substantive settlement offers or proposals with the other side in fewer than half of the cases. The parties engaged in none of these actions in few cases.

percentages refer only to the subset of cases where the parties had counsel, while the prior percentages include all cases.

¹¹³ Initial joint session: opening, 25% vs. 63%, $t(205) = -9.95$, $p < .001$; respond to other, 37% vs. 46%, $t(205) = -2.76$, $p < .01$; proposals, 14% vs. 21%, $t(205) = -3.06$, $p < .01$. Initial caucuses: opening, 10% vs. 21%, $t(114) = -3.11$, $p < .01$; respond to other, 56% vs. 67%, $t(114) = -3.52$, $p < .01$; proposals, 61% vs. 74%, $t(114) = -4.14$, $p < .001$.

¹¹⁴ p 's of .45 and .11, respectively.

¹¹⁵ Initial joint session: 62% vs. 68%, $t(205) = -2.00$, $p < .05$. Initial caucuses: 92% vs. 87%, $t(114) = 2.16$, $p < .05$.

¹¹⁶ Other studies have found that represented parties talk less than unrepresented parties during mediation sessions. *See, e.g.*, Wissler, *supra* note 16, at 444-446.

¹¹⁷ These analyses exclude cases where only one party had counsel. We could not conduct comparable analyses of parties' actions in initial caucuses because there were too few cases in which neither party had counsel.

¹¹⁸ Opening: $\chi^2(1) = 28.71$, $p < .001$, $V = .32$; added: $\chi^2(1) = 9.87$, $p < .01$, $V = .18$; respond to mediator: $\chi^2(1) = 8.69$, $p < .01$, $V = .17$; respond to other: $\chi^2(1) = 14.96$, $p < .001$, $V = .23$; proposals: $\chi^2(1) = 31.42$, $p < .001$, $V = .33$.

In family cases that began in initial caucuses, one or both parties made an opening statement and added to another's opening presentation in around one-third of the cases (*see* Table 7). One or both parties responded to questions or statements from the mediator in most cases. In a majority of the cases, one or both parties asked questions of or responded to the other side through the mediator and discussed settlement proposals with the mediator. The parties engaged in none of these actions in almost none of the cases. There were only two differences between initial joint sessions and initial caucuses: parties were less likely to discuss substantive settlement proposals in initial joint sessions than in initial caucuses, but they were marginally more likely to add to another's opening presentation.¹¹⁹

Table 7. What Parties and Lawyers Did in Family Cases				
	<i>One or Both Parties</i>		<i>One or Both Lawyers</i>	
	Joint	Caucus	Joint	Caucus
Made an opening statement or presentation	45%	34%	37%	55%
Added to another's opening presentation	42%	29%	29%	35%
Responded to the mediator	85%	90%	71%	92%
Asked/responded to the other side (joint) / Did so through the mediator (caucus)	73%	72%	53%	68%
Exchanged settlement offers with the other side (joint) / Discussed settlement proposals with the mediator (caucus)	47%	79%	26%	84%
Other	1%	0	0	0
None of the above	6%	1%	11%	0
<i>Total Ns</i>	176	82	37	74

Looking at the lawyers' actions, in family cases that began in initial joint sessions, one or both lawyers made an opening statement or added to another's opening presentation in a minority of the cases (*see* Table 7). In a majority of the cases, one or both lawyers responded to questions or statements from the mediator. One or both lawyers asked questions of or responded to questions or statements from the other side in over half of the cases and exchanged substantive settlement offers or proposals with the other side in approximately one-fourth of the cases. The lawyers engaged in none of these actions in few cases.

In family cases that began in initial caucuses, one or both lawyers made an opening statement in over half of the cases and added to another's opening presentation in around one-third of the cases (*see* Table 7). One or both lawyers responded to the mediator in most cases. In a majority of the cases, one or both lawyers asked questions of or responded to the other side through the mediator and discussed settlement proposals with the mediator. None of the lawyers engaged in none of these actions. There were three differences between initial joint sessions and initial caucuses: lawyers were less likely to respond to the mediator, discuss substantive

¹¹⁹ Proposals: $\chi^2(1) = 24.37$, $p < .001$, $V = .31$; added: $\chi^2(1) = 3.55$, $p = .06$, $V = .12$. There were no differences in the other actions, p 's ranged from .10 to .90. Too few parties in initial caucuses engaged in none of these actions to be able to statistically compare them to joint opening sessions.

settlement proposals with the mediator, and, marginally, make an opening presentation in initial joint sessions than in initial caucuses.¹²⁰

Next, we compared the actions of parties and lawyers in the same case.¹²¹ During initial joint sessions, parties and lawyers in the same case did not differ on any of these actions.¹²² During initial caucuses, there was only one difference: parties were less likely than lawyers in the same case to make an opening statement.¹²³

We conducted additional analyses to compare parties' actions during initial joint sessions in cases where neither party had counsel versus where both parties had counsel.¹²⁴ In cases where neither party had counsel, parties were more likely to make an opening statement (57% vs. 35%) and exchange substantive settlement proposals (57% vs. 40%) than were parties in cases where both had counsel.¹²⁵

Comparing Civil and Family Cases. Looking first at the parties' actions, there were several differences between civil and family cases. During initial joint sessions, parties in civil cases were less likely than parties in family cases to respond to the mediator (68% vs. 85%) and to the other side (41% vs. 73%) and to exchange settlement proposals (20% vs. 47%) (*compare* Tables 6 and 7).¹²⁶ There were no differences between civil and family cases in whether parties made an opening statement or added to another's opening during initial joint sessions.¹²⁷ During initial caucuses, parties in civil cases were less likely than parties in family cases to make an opening statement (12% vs. 34%), respond to the other side through the mediator (56% vs. 72%), discuss settlement proposals with the mediator (61% vs. 79%), and, marginally, to add to another's opening statement (18% vs. 29%).¹²⁸ There was no difference between civil and family cases in whether parties responded to the mediator during initial caucuses.¹²⁹

It is possible that parties in civil cases were less likely than parties in family cases to engage in these actions during the initial mediation session because parties in civil cases were more likely than parties in family cases to have legal counsel, and parties with counsel were less

¹²⁰ Respond to mediator: $\chi^2(1) = 8.47$, $p < .01$, $V = .28$; proposals: $\chi^2(1) = 36.12$, $p < .001$, $V = .57$; opening: $\chi^2(1) = 3.46$, $p = .06$, $V = .18$. There were no differences in the other actions, p 's ranged from .22 to .63.

¹²¹ See *supra* note 112.

¹²² p 's ranged from .16 to .77.

¹²³ Opening statement: 34% vs. 54%, $t(60) = -3.01$, $p < .01$; other actions, p 's ranged from .20 to .71.

¹²⁴ See *supra* note 117.

¹²⁵ Opening: $\chi^2(1) = 6.66$, $p < .05$, $V = .21$; proposals: $\chi^2(1) = 4.09$, $p < .05$, $V = .17$. There were no differences in the other actions, p 's ranged from .10 to .65.

¹²⁶ Respond to mediator: $\chi^2(1) = 16.93$, $p < .001$, $V = .19$; respond to other: $\chi^2(1) = 46.60$, $p < .001$, $V = .31$; proposals: $\chi^2(1) = 39.44$, $p < .001$, $V = .28$.

¹²⁷ p 's of .44 and .86, respectively.

¹²⁸ Opening statement: $\chi^2(1) = 15.28$, $p < .001$, $V = .26$; respond to other: $\chi^2(1) = 5.49$, $p < .05$, $V = .16$; proposals: $\chi^2(1) = 7.76$, $p < .01$, $V = .19$; added: $\chi^2(1) = 3.80$, $p = .051$, $V = .13$.

¹²⁹ $p = .78$.

likely than those who did not have counsel to engage in each action during initial joint sessions in civil cases.¹³⁰ Accordingly, we repeated the prior analyses examining differences between civil and family cases, this time separately for cases where neither party had counsel and cases where both parties had counsel. When looking at cases where both parties had counsel, largely the same patterns as in the preceding paragraph appeared in both initial joint sessions and initial caucuses.¹³¹ But when looking at cases where neither party had counsel, the pattern changed. In initial joint sessions when neither party had counsel, parties in civil cases were more likely than parties in family cases to make an opening statement (83% vs. 57%) and add to another's opening presentation (67% vs. 43%); there were no other differences.¹³² Taken together, these findings suggest that the differences between civil and family cases in parties' actions during initial joint sessions are to some extent related to differences between those two groups of cases in whether the parties had counsel.

Looking next at the lawyers' actions, there were only a few differences between civil and family cases. During initial joint sessions, the only difference was that lawyers in civil cases were more likely than lawyers in family cases to make an opening statement (71% vs. 37%) (*compare* Tables 6 and 7).¹³³ During initial caucuses, there were difference in only two actions: lawyers in civil cases were less likely than lawyers in family cases to make an opening statement (24% vs. 55%) and to add to another's opening presentation (20% vs. 35%).¹³⁴

Insurance Representatives' Actions. Insurance representatives, who were involved only in civil cases, made an opening statement or added to another's opening presentation in fewer than one-fifth of the cases in both initial joint sessions and initial caucuses (*see* Table 8). In both initial joint sessions and initial caucuses, insurance representatives responded to questions or statements from the mediator in a majority of the cases. In fewer than half of the cases, insurance representatives asked or responded to questions or statements from the other side, directly in joint session or through the mediator in caucus.¹³⁵ Insurance representatives discussed substantive settlement proposals directly with the other side in fewer than one-fifth of the cases during initial joint sessions, but they discussed settlement proposals with the mediator in most cases during initial caucuses; this is the only action that differed between initial joint sessions

¹³⁰ *See supra* notes 50, 118 and accompanying text.

¹³¹ *See supra* notes 126-129 and accompanying text. Initial joint session: respond to mediator: $\chi^2(1) = 11.98$, $p < .01$, $V = .19$ (63% civil vs. 83% family); respond to other: $\chi^2(1) = 27.65$, $p < .001$, $V = .28$ (34% vs. 66%); proposals: $\chi^2(1) = 25.56$, $p < .001$, $V = .27$ (14% vs. 40%). There were no differences in the other actions, p 's ranged from .71 to .77. Initial caucuses: opening statement: $\chi^2(1) = 12.05$, $p < .01$, $V = .25$ (12% vs. 33%); respond to other: $\chi^2(1) = 5.51$, $p < .05$, $V = .17$ (56% vs. 73%); proposals: $\chi^2(1) = 6.10$, $p < .05$, $V = .18$ (62% vs. 80%). There were no differences in the other actions, p 's ranged from .33 to .55.

¹³² Opening statement: $\chi^2(1) = 6.30$, $p < .05$, $V = .26$; added: $\chi^2(1) = 4.36$, $p < .05$, $V = .22$; other actions, p 's ranged from .10 to .74. We could not conduct comparable analyses in cases that had initial caucuses because there were too few cases in which neither party had counsel.

¹³³ Opening statement: $\chi^2(1) = 18.83$, $p < .001$, $V = .21$; other actions, p 's ranged from .12 to .99.

¹³⁴ Opening statement: $\chi^2(1) = 21.02$, $p < .001$, $V = .32$; added: $\chi^2(1) = 6.23$, $p < .05$, $V = .17$; other actions, p 's ranged from .10 to .73.

¹³⁵ The question wording differed slightly for initial joint sessions and initial caucuses.

and initial caucuses.¹³⁶ Insurance representatives did none of the above actions in over one-fourth of the cases during initial joint sessions, but in none of the cases during initial caucuses.

Table 8. What Insurance Representatives Did in Civil Cases			
	Joint		Caucus
Made an opening statement or presentation	16%		5%
Added to another's opening presentation	16%		14%
Responded to the mediator	60%		73%
Asked/responded to the other side (joint) / Did so through the mediator (caucus)	30%		46%
Exchanged settlement offers with the other side (joint) / Discussed settlement proposals with the mediator (caucus)	16%		86%
Other	0		0
None of the above	28%		0
<i>Total Ns</i>	<i>50</i>		<i>37</i>

E. The Use of Joint Sessions Later in the Mediation

The mediators were asked whether, after the initial mediation session (and regardless of whether that was a joint session or separate caucuses), there were any joint sessions later in the mediation, in person or by phone. In almost one-third of civil cases and over half of family cases, there was a later joint session where both parties (*i.e.*, the disputants themselves) were together (*see* Table 9). In approximately one-fifth of both civil and family cases, the mediator met jointly with opposing counsel but not with the parties. There were no later joint sessions of any kind in almost half of civil cases and one-fourth of family cases.¹³⁷ When combining the two categories where the parties themselves were not together later in the mediation, the parties were not together later in the mediation in a majority of civil cases (68%) and in almost half of family cases (43%).¹³⁸

¹³⁶ Proposals: $\chi^2(1) = 42.54$, $p < .001$, $V = .70$; other actions, p 's ranged from .13 to .75.

¹³⁷ Mediators in civil cases were less likely than those in family cases to meet jointly with the parties later in the mediation and were more likely to have no later joint sessions ($\chi^2(3) = 173.16$, $p < .001$, $V = .43$, with "other" excluded). Some of the few mediators who chose "other" met jointly with both parties and their lawyers as well as met jointly with both lawyers without their clients.

¹³⁸ The parties were more likely to not be together later in the mediation in civil cases than in family cases ($\chi^2(1) = 60.38$, $p < .001$, $V = .25$).

	<i>Civil Cases</i>	<i>Family Cases</i>
Mediator met jointly with both parties later in the mediation	30%	57%
Mediator met jointly with the lawyers for both sides later in the mediation but not the parties	21%	18%
There were no joint sessions later in the mediation	47%	25%
Other	2%	1%
<i>Total Ns</i>	653	307

Using a different measure that takes into consideration both the opening session and subsequent sessions, the parties were together for at least some of the mediation in a majority of both civil and family cases, but they were never together in around one-fourth of the cases (see Table 10).¹³⁹ The parties were together during both the initial session and for some time later in the mediation in over one-fourth of civil cases and over half of family cases.¹⁴⁰ The parties were together during only the initial session in almost half of civil cases and relatively few family cases; they were together only later in the mediation in few cases.¹⁴¹

	<i>Civil Cases</i>	<i>Family Cases</i>
Joint opening and later joint session	28%	54%
Joint opening, no later joint session	46%	12%
Caucus opening and later joint session	3%	5%
Caucus opening, no later joint session	23%	29%
<i>Total Ns</i>	619	296

The parties were more likely to be together later in the mediation if the parties were together during the initial mediation session than if the parties were initially in separate caucuses in both civil cases (38% initial joint vs. 12% initial caucus) and family cases (82% initial joint vs. 14% initial caucus).¹⁴²

¹³⁹ When looking only at whether the parties were never together or were together at some point during the mediation, parties in civil cases were marginally less likely than those in family cases to never be together ($\chi^2(1) = 3.48, p = .06, V = .06$).

¹⁴⁰ Mediators in a smaller proportion of cases (6% of civil cases and 40% of family cases) said that the entire mediation was spent in joint session.

¹⁴¹ When using this measure with all four categories, there were differences between civil and family cases ($\chi^2(3) = 107.42, p < .001, V = .34$), primarily because parties in civil cases were more likely than parties in family cases to be together only during the opening session and were less likely to be together during both the opening session and later in the mediation.

¹⁴² Civil: $\chi^2(1) = 37.63, p < .001, V = .25$; family: $\chi^2(1) = 125.48, p < .001, V = .65$.

IV. Discussion and Implications of the Findings¹⁴³

The present study examined the current use and nature of joint opening sessions and drew comparisons to traditional joint opening sessions¹⁴⁴ as well as to current practices in initial caucuses. With regard to the frequency with which joint opening sessions are used, we found the initial mediation session began with both parties together in a majority of both civil and family cases. Thus, although the joint opening session is not as ubiquitous as it had been historically, its use has not disappeared, as some commentators have claimed.

We next explored whether mediators explained aspects of the mediation process that typically would have been part of their traditional opening statement. During initial joint sessions, almost all mediators in both civil and family cases explained the mediation process and mediation confidentiality, and most explained their approach and the ground rules for the mediation. During initial caucuses, a majority of the mediators also explained each of these four items; in civil cases, however, mediators were less likely to do so than during initial joint sessions. Thus, during the first mediation session, most mediators still carry out the educational function of a traditional opening statement, especially when the session begins jointly.

Party opening statements are not as central to the initial mediation session as they once had been. During initial joint sessions, the disputants themselves made an opening statement in fewer than half of both civil and family cases. The lawyers made an opening statement during initial joint sessions in a majority of civil cases but in a minority of family cases. During initial caucuses, the parties and the lawyers in civil cases made an opening statement in fewer than one-fourth of the cases, less frequently than during initial joint sessions. In family cases, there was no difference between initial joint sessions and initial caucuses in whether the parties made an opening statement; the lawyers, however, were more likely to make an opening statement in initial caucuses, doing so in over half of the cases. In both initial joint sessions and initial caucuses, the parties in civil cases were less likely to make opening statements than were the lawyers in the same case. In family cases, the parties were less likely than the lawyers to make an opening statement during initial caucuses, but there was no difference during initial joint sessions.

Thus, during initial joint sessions, there is less chance for each side to explain its positions and perspective directly to the other party and to hear the other's views unfiltered by the mediator, especially as expressed by the disputants themselves, than would have been the case historically. And during both initial joint sessions and initial caucuses, the absence of party or lawyer opening statements deprives the mediator of information about the dispute and the parties' views that mediators do not necessarily have prior to the first mediation session.¹⁴⁵ Thus, the potential to achieve many of the benefits ascribed to parties' direct communication via opening statements in traditional initial joint sessions -- both informational benefits as well as the

¹⁴³ The summary in this section of what took place during the initial mediation session is a simplified overview of the main findings. For more details, *see supra* Sections III.B.-D.

¹⁴⁴ *See supra* Section I.A.

¹⁴⁵ *See* Roselle L. Wissler and Art Hinshaw, *Pre-Session Mediation Communications: An Empirical Study*, submitted for publication, at 31.

psychological benefits of the parties' explaining to and being heard by the other party and feeling they have had their day in court -- is reduced.

In traditional initial joint sessions, discussions between the mediator and the parties to clarify and elaborate on the parties' opening statements often would take place before moving into separate caucuses. In the present study, a majority of parties and lawyers in both civil and family cases responded to questions or statements from the mediator during initial joint sessions; they were even more likely to do so during initial caucuses. In civil cases, the parties were less likely than the lawyers in the same case to respond to the mediator during initial joint sessions; that pattern was reversed during initial caucuses. In family cases, there was no difference between the parties and the lawyers in whether they responded to the mediator during either initial joint sessions or initial caucuses. Thus, there is some discussion between the mediator and the parties and/or their lawyers in a majority of cases during joint opening sessions, though such discussions are even more likely during initial caucuses.

We explored what the mediator and the parties discussed during the initial session that could help inform how to conduct the rest of the mediation. During initial joint sessions, a majority of the mediators in both civil and family cases assessed the parties' and lawyers' ability to communicate civilly, and around half explored options for structuring the remainder of the opening session and the rest of the mediation. Fewer than half of the mediators in civil cases, but a majority of the mediators in family cases, assessed the parties' capacity to mediate, including issues of violence and coercive control, during initial joint sessions. The only difference between initial joint sessions and initial caucuses was that mediators in family cases were more likely to assess the parties' capacity to mediate in caucus than in joint session. During initial caucuses, around half of the mediators in both civil and family cases explored whether the parties would be okay being together in the same room, and around one-fifth coached the mediation participants on non-adversarial communications in preparation for subsequent joint sessions. In sum, a substantial proportion of mediators do not use the initial mediation session to explore whether or how to adapt the mediation's structure to the parties' needs or dynamics.

With regard to what information about the substance of the dispute the mediator discussed with the mediation participants during initial sessions, there were many differences between civil and family cases, as well as between initial joint sessions and initial caucuses. During initial joint sessions, broadly speaking, between half and two-thirds of the mediators in civil cases explored the issues that needed to be addressed, the procedural and the negotiation status of the case, the parties' legal theories and facts, the parties' interests and goals, and the costs and risks of litigation. Between one-fourth and one-third of the mediators in civil cases developed the agenda and explored the obstacles to settlement and new substantive settlement proposals. Mediators in civil cases were more likely to discuss all but one of these substantive items, the agenda, during initial caucuses than during initial joint sessions; a majority discussed most of these items during initial caucuses. During initial joint sessions in family cases, the mediators explored most of these substantive items in half or more of the cases, broadly speaking; they explored the parties' legal theories and facts and the costs and risks of litigation in around one-fourth of the cases. Mediators in family cases were more likely to discuss a majority of these items during initial caucuses than during initial joint sessions; but they were less likely

to develop the agenda during initial caucuses, and there were no differences in whether they discussed the issues or the parties' interests or goals.

Thus, in a sizable proportion of cases, mediators do not discuss many of the central substantive aspects of the dispute during initial joint sessions, especially in civil cases; instead, they are more likely to discuss substantive matters during initial caucuses. As a result, there is less chance during initial joint sessions for the mediator or the parties to learn new information about, or gain a better understanding of, the other side's positions, interests, or priorities in many cases. And there is less opportunity for the parties and the lawyers to communicate directly with the other side.

We also examined whether there were discussions among the parties during initial joint sessions. The parties and the lawyers in civil cases asked questions of or responded to questions or statements from the other side in fewer than half of the cases. They were more likely to ask questions of or respond to the other side through the mediator during initial caucuses, with over half of the parties and almost two-thirds of the lawyers doing so. The parties in civil cases were less likely than the lawyers in the same case to interact with the other side directly during both initial joint sessions and initial caucuses. In family cases, the parties asked questions of or responded to statements or questions from the other side in almost three-fourths of the cases during both initial joint sessions and initial caucuses. The lawyers asked questions of or responded to statements or questions from the other side in around half of the cases during initial joint sessions and in around two-thirds of the cases during initial caucuses. In family cases, there were no differences between the parties and the lawyers in the same case in responding to the other side during either initial joint sessions or initial caucuses.

Thus, during initial joint sessions, there is no interchange between the parties in a majority of civil cases but in a minority of family cases. This limited interaction in civil cases suggests there is less opportunity for the disputants themselves to speak directly to each other and for the mediator to observe their dynamics, help them improve their communication, or develop a norm of information sharing for the rest of the mediation. And there also is less chance for the parties to gain insights that could help humanize the other party or enhance their understanding of the other party's perspective or priorities.

With regard to discussions among the parties specifically about substantive settlement proposals, the parties and the lawyers in civil cases exchanged proposals with the other side in one-fifth of the cases during initial joint sessions, but they discussed settlement proposals with the mediator in a majority of the cases during initial caucuses. The parties were less likely than the lawyers in the same case to discuss settlement proposals during both initial joint sessions and initial caucuses. In family cases, the parties exchanged settlement proposals with the other side during initial joint sessions in around half of the cases, while the lawyers did so in around one-fourth of the cases. The parties and the lawyers were more likely to discuss settlement proposals with the mediator during initial caucuses, both groups doing so in a majority of family cases. There was no difference between parties and lawyers in the same case in whether they discussed settlement proposals during either initial joint sessions or initial caucuses. Thus, parties and/or lawyers in many cases do not discuss substantive settlement proposals during initial joint sessions, especially in civil cases; more do so in initial caucuses. Unless the parties are together

again later in the mediation, this could reduce their ability to jointly consider how different settlement options meet their respective interests and goals and to develop more creative “outcomes that surface during face-to-face dialogue.”¹⁴⁶

Regardless of how the initial session began, the parties (*i.e.*, the disputants themselves) were together for at least some time later in the mediation in fewer than one-third of the civil cases but in over half of the family cases. Considering the entire mediation, the parties were together for at least some time in around three-fourths of both civil and family cases. Among these cases where the parties were together for some of the mediation, that joint time was only during the initial session in a majority of civil cases but in relatively few family cases. Considering that there were limited direct interactions and substantive discussions among the parties in civil cases during initial joint sessions, as described above, there is likely to have been less dialogue between the parties in civil cases than might be suggested by the total proportion of cases in which there was at least some time spent jointly.

V. Conclusion

The present Article takes a systematic and comprehensive look at what currently happens during joint opening sessions and how that compares to the traditional joint opening session as well as to what currently happens when mediation begins in separate caucuses. Joint opening sessions are still held in a majority of civil and family cases, and mediators still explain the mediation process in most cases. The rest of what occurs during initial joint sessions, however, diverges from traditional practice. Party opening statements, the discussion of substantive matters with the mediator, and exchanges directly between the two sides occur less frequently than they would have historically, with larger differences in civil cases than in family cases. And many of these actions are more likely to occur during initial caucuses than during initial joint sessions. Parties in civil cases generally are less likely than the lawyers in the same case to engage in most actions; there are virtually no differences between parties’ and lawyers’ actions in family cases. In sum, current joint opening sessions often are a shadow of their traditional selves. And given the many differences in what takes place between initial joint sessions and initial caucuses, as well as between civil and family cases, blanket assertions about what “typically” occurs during the initial mediation session cannot be made.

In subsequent articles, we will explore how different factors are related to the use of initial joint sessions, as well as to the mediation participants’ interactions and what they discuss during the initial session. We also will examine the relationships between what takes place during the initial mediation session and other aspects of the mediation process and mediation outcomes.

¹⁴⁶ Bassis, *supra* note 8, at 32.