JOINT SESSION OR CAUCUS? FACTORS RELATED TO HOW THE INITIAL MEDIATION SESSION BEGINS

ROSELLE L. WISSLER AND ART HINSHAW*

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* Roselle L. Wissler is Research Director, Lodestar Dispute Resolution Center, Sandra Day O'Connor College of Law, Arizona State University. Art Hinshaw is the John J. Bouma Fellow in Alternative Dispute Resolution, Clinical Professor of Law, and Founding Director of the Lodestar Dispute Resolution Center, Sandra Day O'Connor College of Law, Arizona State University. The authors thank the 1,065 mediators who participated in the survey, the AAA/ICDR Foundation for its financial support for this project, and many others for their input in the early stages of the project and their assistance throughout.

Abstract

The use of traditional joint opening sessions to begin the first formal mediation session has declined in recent years, with a corresponding increase in initial separate caucuses. Mediators and lawyers have offered several possible explanations for this change and have suggested rationales for and circumstances under which either initial joint sessions or initial caucuses should be used. To date, however, empirical research exploring these issues has been quite limited. The present Article reports the findings of the first study to examine whether a wide range of factors, including dispute and mediator characteristics as well as pre-session communications and other aspects of the mediation, are related to the use of initial joint sessions versus initial separate caucuses. The study involved the survey responses of more than 1,000 mediators who conducted court-based and private mediations in general civil and family cases in eight states.

The findings show that a majority of mediators in both civil and family cases say that they themselves have the most influence on how the mediation begins, and many mediators say that they often or always begin the first mediation session in the same way throughout their mediation practice. Moreover, the mediators' customary approach to the initial mediation session is the factor most strongly related to whether the mediation in a particular case begins in joint session or in separate caucuses. Overall, the strong role played by factors that apply broadly across the mediators' practice, especially the mediators' usual approach to the opening session and the state where the mediation took place, might explain why case characteristics and other case-specific factors do not have stronger relationships with how the mediation begins. The findings suggest that recommendations to structure the initial mediation session on a case-by-case basis often are disregarded.

I. INTRODUCTION

Mediation has come to be widely used to resolve many types of disputes, from small claims and family matters to large civil and commercial cases, in federal and state courts as well as outside the courts.[1] Historically, the first formal mediation session would begin with the mediator and all disputing parties together to discuss the case at hand.[2] Known as the joint opening session, this discussion typically would start with the mediator's opening remarks, followed by an opening statement made by each disputant or their lawyers.[3] Next, the mediator often would ask questions and summarize what the parties said, and the parties would begin to discuss the issues and their interests directly with each other.[4] The mediation then would either continue in joint session or move into separate caucuses, depending on how the mediation was proceeding and the usual practice of the mediator.[5]

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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 74–80 (2015–2016 ed. 2015); John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. STATE U. L. REV. 839, 840–41, 845–46 (1997); Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 6, 9–13 (2014).

[2] *See, e.g.*, COLE ET AL., *supra* note 1, at 34–37; Jay Folberg, *The Shrinking Joint Session: Survey Results*, 22 DISP. RESOL. MAG. 12, 20 (2015–2016); DOUGLAS N. FRENKEL & JAMES H. STARK, THE PRACTICE OF MEDIATION 141 (3d ed. 2018).

[3] *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); COLE ET AL., *supra* note 1, at 35–36; FRENKEL & STARK, *supra* note 2, at 141–42; DWIGHT GOLANN & JAY FOLBERG, MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL 147–151 (1st ed. 2006); CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 154–64 (1986).

[4] *See, e.g.*, COLE ET AL., *supra* note 1, at 35–36; GOLANN & FOLBERG, *supra* note 3, at 148, 151; MOORE, *supra* note 3, at 168–71.

[5] *See, e.g.*, HAROLD I. ABRAMSON, MEDIATION REPRESENTATION: ADVOCATING AS A PROBLEM-SOLVER IN ANY COUNTRY OR CULTURE 112–13 (2d ed. 2010); COLE ET AL., *supra* note 1, at 37, 40, 43; Folberg, *supra* note 2, at 12; FRENKEL & STARK, *supra* note 2, at 148, 217–23; GARY FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING xxxi–xxxvii (2008); David A. Hoffman, *Mediation and the Art of Shuttle Diplomacy*, 27 NEGOT. J. 263, 265–67 (2011); MOORE, *supra* note 3, at 263–65; Kelly Browe Olson, *One Crucial Skill: Knowing How, When, and Why to Go into Caucus*, 22 DISP. RESOL. MAG. 32, 32–34 (2016) [hereinafter Olson, *One Crucial Skill*].

The use of joint opening sessions, as well as joint sessions later in the mediation, has been said to be declining in the past decade or two, with the first formal mediation session starting instead in separate caucuses.[6] While two studies conducted over a decade ago reported that almost every observed opening mediation session began jointly,[7] more recent studies found that joint opening sessions took place in between roughly half and three-fourths of the cases.[8]

There has been considerable discussion among mediators, lawyers, and frequent mediation users regarding the rationales for and the circumstances under which either joint sessions or caucuses *should* be used to begin the first formal mediation session.[9] Empirical research, however, generally has not examined which factors *actually are* related to the use of initial joint sessions versus initial caucuses in practice. Only a handful of empirical studies have examined the influence of a few factors on how the

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[6] *See, e.g.*, Lynne S. Bassis, *Face-to-Face Sessions Fade Away: Why Is Mediation's Joint Session Disappearing?*, 21 DISP. RESOL. MAG. 30 (2014); Debra Berman & James Alfini, *Lawyer Colonization of Family Mediation: Consequences and Implications*, 95 MARQ. L. REV. 887, 921–22 (2012); Eric Galton & Tracy Allen, *Don't Torch the Joint Session*, 21 DISP. RESOL. MAG. 25 (2014).

[7] Elizabeth Ellen Gordon, *Attorneys' Negotiation Strategies in Mediation: Business as Usual?*, 17 MEDIATION Q. 377, 378, 382, 389 (2000) (reporting observations of 31 court-connected mediations of "large-dollar-amount nondomestic civil suits" in North Carolina); 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, 103–04, 109 (2007) (reporting observations of 46 mostly court-ordered medical malpractice mediations in North Carolina).

[8] Folberg, *supra* note 2, at 12–15 (reporting that of the 205 private civil and commercial JAMS mediators surveyed across the United States, 45% said they regularly began the mediation in joint session at the time of the survey, compared to 80% saying they did so when they started their mediation practice, which was six or more years prior for a majority of the mediators); Thomas J. Stipanowich, *Insights on Mediator Practices and Perceptions*, 22 DISP. RESOL. MAG. 6, 6–7 (2016) [hereinafter Stipanowich, *Insights*] (reporting that of the 94 surveyed members of the International Academy of Mediators who mediate in the United States, specializing in the private mediation of civil and commercial disputes, 55% said they never or only sometimes begin the first session in caucus); Roselle L. Wissler & Art Hinshaw, *The Initial Mediation Session: An Empirical Examination*, 27 HARV. NEGOT. L. REV. 1, 10–11, 14–15 (2021) [hereinafter Wissler & Hinshaw, *Initial Mediation*] (reporting that a majority of the 1,065 mediators surveyed in eight states said that their most recent court-connected or private mediation began in joint session (71% of civil cases and 64% of family cases)).

[9] *See infra* Sections II.A.–B.

initial mediation session begins.[10] Moreover, because these studies were conducted solely in the context of the private mediation of large civil and commercial cases, their findings might not apply to other mediation settings and types of cases.[11]

This Article reports the findings of the first study to examine whether a wide range of factors, including dispute and mediator characteristics, pre-session mediation communications, and other aspects of the mediation, are related to the use of initial joint sessions versus initial separate caucuses. Based on the survey responses of more than 1,000 mediators across eight states, this study involves more diverse mediation settings and cases, including court-based and private mediations in a range of general civil and family cases. Section II discusses common explanations for the traditional use of and recent decline in joint opening sessions, including general and case-specific arguments for and against joint sessions as well as the role played by lawyers' increased involvement in mediation. Section III describes the survey procedure and respondents. Section IV reports the findings of analyses examining the relationships between many factors and whether the first mediation session began in joint session or in separate caucuses. Section V discusses the implications of the findings, and Section VI summarizes the main conclusions.

II. EXPLANATIONS FOR THE DECLINE IN JOINT OPENING SESSIONS

At the core of most explanations for the reduced use of joint opening sessions is that they generally are not needed because the traditional functions they were designed to serve are no longer relevant due to changes over time in the nature of the disputes being mediated and in mediation practices before the first session.[12] Another reason offered is that instead of the presumption of a joint opening session, mediators and mediation participants are taking into consideration the characteristics of the case when deciding how to begin the mediation.[13] Yet others attribute the decline in joint opening sessions to the

[10] *See infra* notes 63–67 and accompanying text.

[11] *See* Folberg, *supra* note 2, at 18 (noting that the surveyed mediators were "not necessarily representative of the general population of mediators"); A.B.A. SEC. OF DISP. RESOL., TASK FORCE ON IMPROVING MEDIATION QUALITY, 18–19 (2008) [hereinafter MEDIATION QUALITY] (stating that research needs to expand to other case types because there are many differences among different mediation contexts, as well as "severe limitations" in trying to extrapolate findings from one to another).

[12] *See infra* Section II.A.

[13] *See infra* Section II.B.

increased involvement of lawyers in mediated disputes, both as counsel and as mediators, and their preference for separate caucuses.[14] We discuss each of these three sets of explanations in turn.

A. *General Arguments for and Against Joint Opening Sessions*

In this section, we discuss the original rationales for and functions of the main elements of the traditional joint opening session, explanations offered for why those rationales and functions no longer apply, and arguments countering those explanations.

1. *UNDERSTANDING THE MEDIATION PROCESS*

The mediator's opening statement, which traditionally included an explanation of aspects of the mediation process, was thought to help participants better understand the mediation process and the mediator's role.[15] Some argue that explaining the process during the initial mediation session is no longer necessary because most lawyers are now familiar with mediation and can explain the process to their clients, or because the mediators have already explained their approach and discussed the process and the ground rules during pre-session conversations with the disputants and/or their lawyers.[16] Others note, however, that not all litigants in mediation are

[14] *See infra* Section II.C.

[15] S*ee, e.g.*, ABRAMSON, *supra* note 5, at 98; Folberg, *supra* note 2, at 20; Galton & Allen, *supra* note 6, at 26–27; GOLANN & FOLBERG, *supra* note 3, at 147–51; MOORE, *supra* note 3, at 154–62.

[16] *See, e.g.*, Folberg, *supra* note 2, at 19–20. For recommendations that these topics be discussed before the first mediation session, see, for example, ABRAMSON, *supra* note 5, at 97, 304; MEDIATION QUALITY, *supra* note 11, at 4, 8, 10–11 (discussing the views of over 300 mediators, lawyers, and insurance company and corporate representatives throughout the United States who had "significant experience" in the private mediation of "large commercial and other civil cases in which all parties are represented by counsel").

represented[17] and, when they do have counsel, their lawyer might not have a clear understanding of mediation or might not thoroughly explain the process and prepare them for the mediation.[18] Moreover, pre-session communications between the mediator and the disputants and/or their lawyers often are not

[17] *See, e.g.*, *The Landscape of Civil Litigation in State Courts*, NATIONAL CENTER FOR STATE COURTS 31–33 (Nov. 11, 2015), https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf (finding that 54% of the defendants and 4% of the plaintiffs did not have counsel in cases disposed in general jurisdiction civil courts); Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URB. L.J. 419, 428 (2010) (citing studies of family mediation that found that both disputants were unrepresented in 3% to 33% of cases, and one disputant was unrepresented in 17% to 26% of cases); Wissler & Hinshaw, *Initial Mediation*, *supra* note 8, at 13 (reporting that one or both disputants in mediation did not have legal counsel in 11% of civil cases and 37% of family cases).

[18] *See, e.g.*, FRIEDMAN & HIMMELSTEIN, *supra* note 5, at 247 (noting that many lawyers do not share with their client the mediator's letter explaining his approach); Michael Geigerman, *New Beginnings in Commercial Mediations: The Advantages of Caucusing Before the Joint Session*, 19 DISP. RESOL. MAG. 27, 29 (2012–2013) (stating that lawyers "may not take the time . . . to prepare their clients for mediation"); MEDIATION QUALITY, *supra* note 11, at 18 (noting that mediation users, including lawyers but especially disputants, "come to mediation with a great variety of understandings and misunderstandings about the mediation process"); Wissler, *supra* note 17, at 432 (reporting that studies have found that represented disputants often had misconceptions about the goals of mediation or did not know what to expect, and that findings are mixed regarding whether or how extensively lawyers prepare their clients for mediation).

held,[19] and represented litigants often are not present during those discussions.[20]

2. *UNDERSTANDING THE DISPUTE*

The parties' opening statements and discussions during the joint opening session were thought to provide the parties and the mediator with a clearer understanding of the parties' perspectives and priorities and the

[19] John Lande, *Analysis of Data from New Hampshire Mediation Trainings*, INDISPUTABLY: LINKING DISP. RES. SCHOLARSHIP, EDUC., AND PRAC. 1–3, 5–6 (Dec. 10, 2017), https://secureservercdn.net/45.40.149.159/gb8.254.myftpupload.com/wp-content/uploads/Analysis-NH-training-data.pdf [https://perma.cc/HRJ9-J7U4] (reporting that fewer than 20% of the 87 mediators and lawyers surveyed had a substantial pre-session discussion about the mediation in more than half of their recent cases, which were primarily civil or family cases); Roselle L. Wissler & Art Hinshaw, *What Happens Before the First Mediation Session? An Empirical Study of Pre-Session Communications*, 23 CARDOZO J. OF CONFLICT RESOL. 143, 149, 153 (2022) [hereinafter Wissler & Hinshaw, *What Happens*] (finding that of the 1,065 mediators surveyed in eight states, 66% in civil cases and 39% in family cases had pre-session discussions about non-administrative matters with the disputants and/or their lawyers in their most recent court-connected or private mediation). *But see* MEDIATION QUALITY, *supra* note 11, at 6 (reporting that "many" civil and commercial mediators said they have pre-session discussions as part of their regular practice, but also noting that the "actual practice" varied widely). In some mediation settings, pre-session communications are barred or are not feasible prior to the day of the first mediation session. *See, e.g.*, FRENKEL & STARK, *supra* note 2, at 125; Geigerman, *supra* note 18, at 29; MEDIATION QUALITY, *supra* note 11, at 6, 19; Wissler & Hinshaw, *What Happens*, *supra* note 19, at 154 (finding that mediators in 11% of civil cases and 31% of family cases said that pre-session communications were either prohibited or not feasible).

[20] *See, e.g.*, ABRAMSON, *supra* note 5, at 319; Geigerman, *supra* note 18, at 29; GOLANN & FOLBERG, *supra* note 3, at 96; MEDIATION QUALITY, *supra* note 11, at 6–7 (reporting that mediators' pre-session conversations only "sometimes" included the disputants themselves, and that lawyers had a "very strong preference for calls without parties"); Wissler & Hinshaw, *What Happens*, *supra* note 19, at 160–61 (finding that neither disputant was present in approximately three-fourths of civil cases and one-fourth of family cases during communications held prior to the day of the first mediation session, and in fewer than one-fifth of both civil and family cases during pre-session communications held on the same day as the first session).

impediments to resolution.[21] Some argue that party opening statements are not needed and delay getting to the negotiations because the issues in dispute and the parties' arguments or positions are already known from discovery, pre-session communications, and mediation memos or other documents submitted to the mediator before the first session.[22] Moreover, information about the disputants' interests and the obstacles to settlement can be obtained more completely and efficiently in separate pre-session communications or in caucuses during the first mediation session, where the disputants and lawyers could speak more freely.[23]

Others counter these arguments by noting that communications are not always held before the first mediation session and that the litigants themselves, who might not be as familiar with the other side's positions as their lawyers are, often are not present.[24] In addition, mediation memos or other case

[21] *See, e.g.*, ABRAMSON, *supra* note 5, at 175–76, 249–50; Bassis, *supra* note 6, at 32; Blankenship, *supra* note 3, at 174; William J. Caplan, *Mediation—Joint Session or No Joint Session? That is the Question*, ASS'N BUS. TRIAL LAWS. REP. ORANGE CNTY., Fall 2013, at 3, 9–10; FRENKEL & STARK, *supra* note 2, at 164–65; FRIEDMAN & HIMMELSTEIN, *supra* note 5, at 187–89; Galton & Allen, *supra* note 6, at 26–27; GOLANN & FOLBERG, *supra* note 3, at 147–48; MEDIATION QUALITY, *supra* note 11, at 12, 34. Other benefits cited for hearing each other's opening statements include providing the parties with 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. *See e.g.*, ABRAMSON, *supra* note 5, at 250; Caplan, *supra* note 21, at 3, 9; Galton & Allen, *supra* note 6, at 26–27; MEDIATION QUALITY, *supra* note 11, at 34.

[22] *See, e.g.*, Bassis, *supra* note 6, at 31; Blankenship, *supra* note 3, at 165, 167, 172, 182 (reporting the views of 47 surveyed Tennessee "lawyers and ADR neutrals with significant experience" in construction and commercial mediation); Caplan, *supra* note 21, at 3, 10; Folberg, *supra* note 2, at 19; Galton & Allen, *supra* note 6, at 25; GOLANN & FOLBERG, *supra* note 3, at 277; MEDIATION QUALITY, *supra* note 11, at 34.

[23] *See, e.g.*, Blankenship, *supra* note 3, at 177; FRENKEL & STARK, *supra* note 2, at 142; Hoffman, *supra* note 5, at 263, 297, 302–03; Olson, *One Crucial Skill*, *supra* note 5, at 32, 34.

[24] *See supra* notes 19–20 and accompanying text.

documents are not always submitted to the mediator before the first session.[25] Even when they are submitted, not all issues and goals that disputants value are included in those memos or in court filings.[26] As a result, many consider it helpful for everyone to hear what the disputants consider most important to resolving the dispute.[27]

3. *COMMUNICATING FACE-TO-FACE*

The disputants' direct communication during initial joint sessions, and in subsequent joint sessions more generally, was also thought to accomplish other goals benefitting the mediation process and its outcomes. Face-to-face communication could help humanize the other disputant, re-open channels of communication, and improve the disputants' understanding and ability to work together, as well as facilitate the development of more creative resolutions.[28] The disputants' face-to-face communication could also help

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[25] The frequency of the pre-session submission of documents appears to vary across case types. *See* Brian Farkas & Donna Erez Navot, *First Impressions: Drafting Effective Mediation Statements*, 22 LEWIS & CLARK L. REV. 157, 166–68 (2018) (finding that 81% of the 180 surveyed mediators, who primarily handle commercial and labor/employment disputes in New York and across the United States, said they usually or always require the submission of mediation statements before the first session); Lande, *supra* note 19, at 5–7 (finding that 46% of the mediators and 62% of the lawyers surveyed said that all parties submitted a statement to the mediator in more than half of their recent mediations); Wissler & Hinshaw, *What Happens*, *supra* note 19, at 157–58 (finding that mediators in 84% of civil cases and 55% of family cases had access to some case information before the first mediation session; see *id.* for the specific types of information). *See also* MEDIATION QUALITY, *supra* note 11, at 12 (reporting that a majority of mediators and mediation users thought it was important to submit a memo to the mediator, but that there was "very little agreement" on the importance of submitting other documents).

[26] *See, e.g.*, Caplan, *supra* note 21, at 11; LANDE *supra* note 19, at 5–6.

[27] *See, e.g.*, Blankenship, *supra* note 3, at 165–66 (reporting that a majority of surveyed mediators and lawyers favored opening statements); Galton & Allen, *supra* note 6, at 26–27; MEDIATION QUALITY, *supra* note 11, at 12 (finding that about two-thirds of surveyed lawyers thought that opening statements were useful in most to all cases).

[28] *See, e.g.*, ABRAMSON, *supra* note 5, at 176, 249–50; Bassis, *supra* note 6, at 32; Eric Galton, Lela Love & Jerry Weiss, *The Decline of Dialogue: The Rise of Caucus-Only Mediation and the Disappearance of the Joint Session*, 39 ALTERNATIVES 95, 97, 99–100 (2021); Morton Deutsch, *Cooperation and Competition*, *in* THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 23, 27–28, (M. Deutsch, P. T. Coleman & E. C. Marcus, eds., 2d ed. 2006); FRIEDMAN & HIMMELSTEIN, *supra* note 5, at 197; Olson, *One Crucial Skill*, *supra* note 5, at 32; John W. Thibaut & John Coules, *The Role of Communication in the Reduction of Interpersonal Hostility*, 47 J. ABNORMAL AND SOC. PSYCHOL. 770, 772–73 (1952).

meet their needs to explain their views directly to, and know they have been heard by, the other side,[29] which in turn would contribute to their sense that the mediation was fair and that they had their "day in court."[30] Plus the disputants would have control over the content of their message and direct knowledge of what the other side and the mediator said, without filtering by their lawyer or the mediator.[31]

Some maintain that these rationales for direct disputant communication during joint opening sessions were based on the nature of the disputes being mediated originally and no longer apply to many of the types of disputes being mediated today. The disputes being mediated originally (small claims, community, and family matters) were characterized as involving emotions, broader issues than those in the claim, and disputants in on-going relationships where they would need to deal with each other after the instant dispute was resolved.[32] By contrast, many of the larger non-family civil and commercial cases being mediated today are said to involve a single incident with more narrow issues and primarily monetary goals, and disputants with no continuing relationships.[33] Others counter these arguments by noting that, even in large civil and commercial disputes, some disputants have goals that might be better achieved with face-to-face communications, such as reaching broader, interest-based resolutions or preserving business

[29] *See, e.g.*, ABRAMSON, *supra* note 5, at 175–76, 250; Blankenship, *supra* note 3, at 175, 178; Caplan, *supra* note 21, at 10; Galton & Allen, *supra* note 6, at 26; Helaine Golann & Dwight Golann, *Why Is It Hard for Lawyers to Deal with Emotional Issues?*, DISP. RESOL. MAG. 26, 26 (2003); Hoffman, *supra* note 5, at 304.

[30] *See, e.g.*, Caplan, *supra* note 21, at 10; E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 101–06 (1988); BENNETT G. PICKER, MEDIATION PRACTICE GUIDE: A HANDBOOK FOR RESOLVING BUSINESS DISPUTES 31 (2d ed. 2003); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH U. L.Q. 787, 817, 853–55 (2001); Wissler, *supra* note 17, at 449–51.

[31] *See, e.g.*, ABRAMSON, *supra* note 5, at 176–77; Bassis, *supra* note 6, at 32; Blankenship, *supra* note 3, at 175–76; FRIEDMAN & HIMMELSTEIN, *supra* note 5, at 174, 190–92. In addition, some maintain that caucuses are less efficient than joint sessions because, when the parties are not talking directly, the mediator has to go back and forth between them to learn and then communicate their interests, offers, and responses. *See, e.g.*, Caplan, *supra* note 21, at 10–11; FRENKEL & STARK, *supra* note 2, at 148.

[32] *See, e.g.*, COLE ET AL., *supra* note 1, at 74–79; Folberg, *supra* note 2, at 20.

[33] *See, e.g.*, GOLANN & FOLBERG, *supra* note 3, at 112; Gordon, *supra* note 7, at 384.

relationships.[34] In addition, some experienced commercial mediators and mediation users believe that addressing emotions and interests in direct dialogue with the other disputant is essential to successful mediation outcomes.[35]

Others point out that direct disputant communication creates the risk of inflamed emotions and escalation that can disrupt the atmosphere for settlement and take considerable time to subside.[36] The disputants might make hostile remarks that produce angry responses from the other side, or the lawyers might posture or grandstand during opening statements, thereby increasing the parties' polarization.[37] Even in less emotionally charged disputes, joint opening sessions involve potential stressors that could negatively impact the disputants' ability to mediate constructively, especially for disputants without mediation or litigation experience.[38] Some counter these arguments by noting that disputants and lawyers are less likely to be contentious or to make misleading or inaccurate statements when speaking to

[34] *See, e.g.*, GOLANN & FOLBERG, *supra* note 3, at 113–14; Brian Osler, *Mediating Disputes Between Banks and Small Businesses*, 53 DISP. RESOL. J. 30, 30, 33 (1998); Stipanowich & Lamare, *supra* note 1, at 12, 36–37.

[35] *See, e.g.*, Galton & Allen, *supra* note 6, at 26; Galton et al., *supra* note 28, at 98; Gordon, *supra* note 7, at 383 (finding that almost all of the 292 lawyers surveyed about court-connected mediation of "large-dollar-amount nondomestic civil suits" in North Carolina said it was important to address litigants' emotions and needs in mediation. *Id.* at 378). *See also* Golann & Golann, *supra* note 29, at 27–28 (discussing the importance of dealing with emotional issues in mediation).

[36] *See, e.g.*, Bassis, *supra* note 6, at 31; Blankenship, *supra* note 3, at 172, 174, 177; Caplan, *supra* note 21, at 11; Folberg, *supra* note 2, at 17, 19; Galton & Allen, *supra* note 6, at 25–26; MEDIATION QUALITY, *supra* note 11, at 34 (noting that a "substantial number" of survey participants said that party opening statements are counterproductive because they can lead to polarization and entrenchment of positions).

[37] *See, e.g.*, Bassis, *supra* note 6, at 31; MEDIATION QUALITY, *supra* note 11, at 13.

[38] *See e.g.*, Geigerman, *supra* note 18, at 29–30; Jill S. Tanz & Martha K. McClintock, *The Physiologic Stress Response During Mediation*, 32 OHIO ST. J. DISP. RESOL. 29, 31, 37–38, 44–54 (2017).

or in front of the other disputant than in separate sessions.[39] Others suggest that the disputants' stress and negative interactions during joint opening sessions could be reduced if mediators hold discussions before the first mediation session that include the litigants themselves and that focus on developing trust and rapport; preparing the disputants for mediation and helping them craft less antagonizing opening statements; and exploring ways to modify the structure of the joint opening session (e.g., limiting who is present, who will speak, or which topics will be discussed).[40]

4. *ASSESSING THE DISPUTANTS, DEVELOPING RAPPORT, AND SETTING THE TONE*

Among other original rationales for joint opening sessions were that they would give the mediator a chance to develop trust and rapport with the disputants and to observe the disputants' reactions and interactional dynamics, thereby informing the conduct of the rest of the mediation.[41] In addition, the mediator would have the opportunity to facilitate civil communication between the disputants and set the tone of non-confrontational information sharing and problem solving during the joint opening session, helping to make subsequent discussions more constructive and improving the disputants' ability to work together going forward.[42] Some argue, however, that the mediator can instead do most of these things—get a feel for the disputants and establish rapport with them, screen for violence or other coercion, encourage

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[39] *See, e.g.*, Bassis, *supra* note 6, at 32; Blankenship, *supra* note 3, at 178; Galton et al., *supra* note 28, at 100; Gordon, *supra* note 7, at 381; Gary L. Welton, Dean G. Pruitt & Neil B. McGillicuddy, *The Role of Caucusing in Community Mediation*, 32 J. CONFLICT RESOL. 181, 192–94 (1988) (finding that "direct hostility" (e.g., hostile questions and sarcasm) was more likely in joint sessions than in caucus, but that the reverse was true for "indirect hostility" (e.g., criticizing the other) and self-enhancing statements, with the result that the mediator is more likely to get false and potentially biasing information in caucuses); Gary L. Welton, Dean G. Pruitt, Neil B. McGillicuddy, Carol A. Ippolito & Jo M. Zubek, *Antecedents and Characteristics of Caucusing in Community Mediation*, 3 INT'L. J. OF CONFLICT MGMT. 303, 311–12 (1992) (finding the same patterns as in the prior study).

[40] *See, e.g.*, Blankenship, *supra* note 3, at 186–87; Galton & Allen, *supra* note 6, at 28; MEDIATION QUALITY, *supra* note 11, at 12–13; Tanz & McClintock, *supra* note 38, at 53–62, 70–71.

[41] *See, e.g.*, Caplan, *supra* note 21, at 10; FRENKEL & STARK, *supra* note 2, at 142; Galton & Allen, *supra* note 6, at 27.

[42] *See, e.g.*, ABRAMSON, *supra* note 5, at 249–50; Bassis, *supra* note 6, at 32; FRENKEL & STARK, *supra* note 2, at 144; GOLANN & FOLBERG, *supra* note 3, at 148; MOORE, *supra* note 3, at 168–71; Tanz & McClintock, *supra* note 38, at 56–57.

a productive tone or coach on less confrontational presentations, and discuss options for tailoring the structure of the mediation process to the case—during separate communications prior to or on the day of first mediation session.[43] Others counter that these tasks cannot be accomplished in the many cases where pre-session communications do not take place, or where the disputants themselves are not present for those discussions.[44]

B. *Case-Specific Reasons to Use or Avoid Joint Opening Sessions*

Rather than arguing generally for or against the use of joint opening sessions, many mediators and lawyers instead recommend tailoring the structure of the initial mediation session to the needs of each case and using joint sessions in cases where the disputants are thought to be most likely to benefit from being together and where the potential risks are low.[45] Some say that decisions about joint opening sessions should be made in consultation with the disputants, as they are best situated to know whether such communications might be useful.[46]

The types of disputes for which joint opening sessions (and subsequent joint sessions) are recommended include those where the disputants have: shared or underlying interests that need to be addressed; relationship issues at the heart of the dispute; a continuing relationship where they will need to work together in the future; or goals for the mediation that include achieving a broader interest-based solution, speaking directly to the other disputant, or ending their relationship amicably.[47] Some also suggest that

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[43] *See, e.g.*, Geigerman, *supra* note 18, at 27, 30; Marilou Giovannucci & Karen Largent, *A Guide to Effective Child Protection Mediation: Lessons From 25 Years of Practice*, 47 FAM. CT. REV. 38, 46 (2009); MEDIATION QUALITY, *supra* note 11, at 7–9, 12–13, 32–34; Kelly Browe Olson, *Screening for Intimate Partner Violence in Mediation*, DISP. RESOL. MAG. 25, 27 (2003); Stipanowich, *Insights*, *supra* note 8, at 10; Tanz & McClintock, *supra* note 38, at 54–55, 70.

[44] *See supra* notes 19 and 20 and accompanying text.

[45] *See, e.g.*, ABRAMSON, *supra* note 5, at 173–82, 231–33; Bassis, *supra* note 6, at 32–33; Blankenship, *supra* note 3, at 186–87; Caplan, *supra* note 21, at 11–12; Folberg, *supra* note 2, at 19–20; Galton & Allen, *supra* note 6, at 28; Hoffman, *supra* note 5, at 263, 304; MEDIATION QUALITY, *supra* note 11, at 3, 7, 12–13.

[46] *See, e.g.*, Blankenship, *supra* note 3, at 180; FRIEDMAN & HIMMELSTEIN, *supra* note 5, at 195; Hoffman, *supra* note 5, at 304. However, many have the view that it is part of the mediator's role to determine how the mediation process will operate. *See e.g.*, FRENKEL & STARK, *supra* note 2, at 77–78.

[47] *See, e.g.*, Bassis, *supra* note 6, at 32; Folberg, *supra* note 2, at 19; GOLANN & FOLBERG, *supra* note 3, at 29.

joint opening sessions are helpful when the litigants are not well informed about each other's positions or views.[48]

Conversely, most mediators and lawyers recommend that joint opening sessions (and subsequent joint sessions) be avoided if there has been actual or threatened violence or abuse, or if one disputant would feel intimidated or coerced being in the same room with the other disputant.[49] Many mediators and lawyers also recommend starting the first session in separate caucuses if the case is unusually contentious, with emotions so strong that the disputants or their lawyers are unable to talk to each other and exchange information meaningfully or without the risk of a blow-up that could derail the mediation.[50] Some also caution against starting in a joint session, especially with disputants who lack mediation experience, unless the mediator has a chance to meet with the disputants to establish rapport and explain the mediation process before a joint session.[51]

C. *Lawyers' Preference for Separate Caucuses*

Another change that is often cited as contributing to the decline in the use of joint opening sessions, as well as subsequent joint sessions, is the increased involvement of lawyers in mediation, both as disputant representatives and as mediators.[52] Mediators in several surveys reported that lawyers (and in some studies, also disputants) do not want to meet jointly and refuse joint opening sessions.[53] Some also have suggested that mediators with

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[48] *See, e.g.*, Bassis, *supra* note 6, at 32.

[49] *See, e.g.*, ABRAMSON, *supra* note 5, at 251; Caplan, *supra* note 21, at 12; Hoffman, *supra* note 5, at 275; Olson, *One Crucial Skill*, *supra* note 5, at 32.

[50] *See, e.g.*, ABRAMSON, *supra* note 5, at 251; Blankenship, *supra* note 3, at 175, 185; Hoffman, *supra* note 5, at 276; Olson, *One Crucial Skill*, *supra* note 5, at 33–34.

[51] *See, e.g.*, Geigerman, *supra* note 18, at 27, 29–30; Tanz & McClintock, *supra* note 38, at 37–38, 55–56, 62.

[52] *See, e.g.*, Bassis, *supra* note 6, at 30; Berman & Alfini, *supra* note 6, at 913–14; Blankenship, *supra* note 3, at 172–73; Galton & Allen, *supra* note 6, at 25.

[53] Folberg, *supra* note 2, at 16 (finding that 58% of surveyed private civil and commercial mediators reported increased resistance to joint opening sessions from lawyers or litigants); Galton et al., *supra* note 28, at 99 (reporting that surveyed mediators said that lawyers and disputants did not want joint sessions); Lande, *supra* note 19, at 8 (reporting comments from some surveyed mediators and lawyers that "mediators generally prefer joint sessions more than lawyers do" and that mediators have to persuade lawyers about joint sessions); Stipanowich, *Insights*, *supra* note 8, at 8 (quoting several surveyed California mediators who said that many lawyers do not want joint sessions).

a legal background, especially those who adopt an evaluative approach, are less likely to use joint sessions.[54]

Among the explanations offered for lawyers' preferences for caucuses are that they tend to view a quick settlement as the primary goal of mediation and often overlook or undervalue other client goals that might benefit from joint sessions.[55] Research suggests that lawyers may underestimate how important it is to disputants to present (or hear their lawyer present) their views and know they have been heard by the other disputant.[56] Lawyers also are said to put more emphasis on monetary issues and solutions than on non-monetary

[54] *See, e.g.*, Berman & Alfini, *supra* note 6, at 920–22; Blankenship, *supra* note 3, at 184; COLE ET AL., *supra* note 1, at 40.

[55] *See, e.g.*, Bassis, *supra* note 6, at 33; Blankenship, *supra* note 3, at 172–73, 175 (noting that viewing settlement as the primary goal is "dangerous" because clients may have other goals they value more); Galton et al., *supra* note 28, at 97 (stating that lawyers' adversarial paradigm leads to a more transactional than relational focus); Hoffman, *supra* note 5, at 302–03; MEDIATION QUALITY, *supra* note 11, at 7–8 (finding that 88% of mediation users (primarily disputant representatives) said that their goal for the mediation in about half or more of their cases was to settle the case, while far fewer listed goals such as promoting communication (52%), giving disputants a chance to tell their story and feel heard (43%), or preserving relationships (23%)); TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES 26, 130–31 (2009) [hereinafter RELIS, PERCEPTIONS] (finding that approximately three-fourths of the lawyers representing plaintiffs, physicians, and hospitals in the 64 medical malpractice cases in the study had settlement or resolution as their mediation goal, while far fewer had goals like communicating their perspective or hearing the other side's perspective); Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. DISP. RESOL. 303, 367 (1998).

[56] Blankenship, *supra* note 3, at 174–75; MEDIATION QUALITY, *supra* note 11, at 7–8; RELIS, PERCEPTIONS, *supra* note 55, at 130–31 (finding that while almost all of the plaintiffs and physicians in medical malpractice cases had as a mediation goal communicating their perspective, only 16% of the plaintiffs' lawyers and 50% of the doctors' lawyers had that as a goal for mediation; *id*. at 346, n. 13); Welsh, *supra* note 30, at 854; Wissler, *supra* note 17, at 448–50.

interests that the litigants might have.[57] In addition, lawyers are accustomed to negotiating with opposing counsel in the absence of their clients and to talking for their clients in court proceedings.[58] Lawyers also typically are not trained to deal with the emotions that can arise when the disputants speak directly to each other in joint session.[59] In sum, lawyers might be less likely to see the potential benefits of joint opening sessions and more likely to see the potential downsides.[60]

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[57] GOLANN & FOLBERG, *supra* note 3, at 112–15; Gordon, *supra* note 7, at 384 (finding that 56% of surveyed lawyers felt that litigants were "concerned about money" and were not necessarily seeking "to satisfy some sense of justice"); Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701, 718–32 (2007) (finding that lawyers in the 64 medical malpractice cases in the study seldom understood the plaintiffs' reasons for suing and thought the plaintiffs' primary interest was compensation when they often had additional non-financial interests); RELIS, PERCEPTIONS, *supra* note 55, at 130–36 (finding that while a majority of plaintiffs and physicians in medical malpractice cases had non-monetary mediation goals that included an apology, discussing quality improvements, getting or providing explanations and answers, and showing they cared, a minority of lawyers had those mediation goals); Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 884–88 (2008) (discussing the range of narrow to broad problem definitions, and that lawyers often adopt more narrow definitions). Lawyers might be particularly likely to transform non-monetary issues into monetary terms when they have a contingency fee arrangement. *See, e.g.*, Dwight Golann, *Is Legal Mediation a Process of Repair - or Separation? An Empirical Study, and Its Implication*s, 7 HARV. NEGOT. L. REV. 301, 330 (2002); HERBERT M. KRITZER, LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION, 21–24, 45–46 (1991).

[58] *See, e.g.*, Bassis, *supra* note 6, at 33; FRIEDMAN & HIMMELSTEIN, *supra* note 5, at 173–74; Gordon, *supra* note 7, at 381, 383–84 (finding that 76% of surveyed lawyers did "not favor litigants' acting as the main participants in mediation").

[59] *See, e.g.*, Bassis, *supra* note 6, at 31; Caplan, *supra* note 21, at 11; Golann & Golann, *supra* note 29, at 28.

[60] *See, e.g.*, Bassis, *supra* note 6, at 31–32; Blankenship, *supra* note 3, at 172.

Some research findings suggest that lawyer-mediators might be less likely to hold these views than lawyers representing clients in mediation.[61] Mediators, however, are subject to pressures that could affect how they begin the first formal mediation session. Time constraints on court-based mediations (e.g., having a time limit of two or three hours for the entire mediation) create "pressure to quickly settle cases," which can lead mediators to be more directive and evaluative and to be less likely to use joint opening sessions.[62]

In addition, mediators are likely to feel pressure to acquiesce to the lawyers' preferences to not have a joint opening session. In one survey, one-third of private civil and commercial mediators said that their primary consideration in deciding whether to have an initial joint session was the lawyers' preferences, tied with the mediators' own general policy regarding initial joint sessions.[63] In another survey of private civil and commercial mediators, the mediators said their use of caucuses throughout the mediation was "heavily influenced" by the lawyers' preferences, which often were to reject joint sessions.[64] In a third survey of private civil and commercial mediators, the mediators reported that the main reasons they did not use joint sessions during the mediation was that the lawyers and, secondly, the disputants, did not want to meet jointly.[65] Because the lawyers often select the mediator, there are market pressures on the mediators to structure the

[61] Gordon, *supra* note 7, at 387 (reporting survey findings that attorney-mediators were less likely than litigants' lawyers to think that the litigants were focused on the money and were "more likely to emphasize aspects that reflect the ideals of traditional mediation"); MEDIATION QUALITY, *supra* note 11, at 7–8 (finding that mediators were more likely than disputant representatives to list the following as mediation goals: promoting communication between the parties, giving the parties a chance to tell their stories and feel heard, preserving relationships, and satisfying the parties' underlying interests).

[62] Berman & Alfini, *supra* note 6, at 919–20; *see also supra* note 54 and accompanying text.

[63] Folberg, *supra* note 2, at 16. By contrast, only 8% of the mediators said the parties' preferences was their primary consideration. *Id. See also* Berman & Alfini, *supra* note 6, at 920–22 (noting that "private sector family mediation is now primarily attorney driven in many regions"); Blankenship, *supra* note 3, at 175, 179–80 (noting that who decides whether to use joint session or caucus is often the mediator or the lawyers).

[64] Stipanowich, *Insights*, *supra* note 8, at 8.

[65] Galton et al., *supra* note 28, at 97, 99 (reporting the views of 129 surveyed members of the International Academy of Mediators, who specialize in private civil and commercial mediation, regarding joint sessions generally rather than joint opening sessions specifically).

mediation as the lawyers and their clients prefer.[66] Based on several surveys of private civil and commercial mediators that found regional differences in resistance to and use of joint opening sessions and subsequent joint sessions, the local mediation culture also appears to play a role in lawyers' and mediators' use of joint sessions.[67]

D. *The Present Study*

Clearly, there has been considerable debate about whether and under what circumstances initial joint sessions or initial separate caucuses should be used. At the same time, however, empirical research examining which factors actually are related to the use of initial joint sessions versus initial caucuses has been quite limited. This Article reports the findings of a study that takes a comprehensive look at the relationships between several sets of factors—communications between the mediator and the disputants and/or their lawyers prior to the initial mediation session, dispute and disputant characteristics, mediator practice and background characteristics, and other aspects of the mediation, such as the case referral source—and whether the first mediation session began in joint session or in separate caucuses.

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[66] Berman & Alfini, *supra* note 6, at 895, 914–15, 920–22; Folberg, *supra* note 2, at 20 ("[t]he mediation market may moot the debate" about joint opening sessions); Galton et al., *supra* note 28, at 99 (the private civil and commercial mediators surveyed "reported that overwhelmingly their source of cases was lawyer referral" and that they feared "they will be de-selected by lawyers and lose substantial income if they insist on hosting joint sessions"). *See generally*, Lande, *supra* note 1, at 841, 847, 880, 882 (noting that lawyers as repeat players are the buyers of mediation services and will hire mediators who shape the process in the way they prefer).

[67] *See* Folberg, *supra* note 2, at 15–16 (finding that mediators in the Southwest and Northwest regions were more likely to report increased resistance to joint opening sessions (81% and 67%, respectively) than were mediators in the East/Central region (40%) and were less likely to regularly use an initial joint session (24% and 34% vs. 68%, respectively)); Galton et al., *supra* note 28, at 99 (finding that mediators who practiced in California were more likely to keep the parties in caucus throughout the entire mediation, and were less likely to keep them in joint session, than were mediators in the Northeast); Stipanowich, *Insights*, *supra* note 8, at 7 (finding that mediators who practiced in California were less likely to regularly begin mediation in joint session than were those who practiced elsewhere in the United States).

III. SURVEY PROCEDURE AND RESPONDENTS

We obtained the names and email addresses of civil and family mediators whose contact information was publicly available online[68] in eight states across four regions of the United States.[69] We sent a personalized email invitation to each of these mediators, 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.[70] 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%.[71]

When responding to most of the questions in the survey, the mediators were asked to focus on their most recently concluded mediation[72] that involved

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[68] We selected mediators primarily from the rosters of state and federal court mediation programs, the National Academy of Distinguished Neutrals, and the American Arbitration Association. For more details on the selection of mediators, see Wissler & Hinshaw, *Initial Mediation*, *supra* note 8, at 10–11.

[69] 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.

[70] 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); LOUISE H. KIDDER, RESEARCH METHODS IN SOCIAL RELATIONS 156, 159 (4th ed. 1981).

[71] For an explanation of why this response rate is conservative and within the bounds of what can be expected given the format, length, and complexity of the present survey, see Wissler & Hinshaw, *Initial Mediation*, *supra* note 8, at 11, n.45. Moreover, the response rate is not necessarily an indicator of the quality of the survey findings. *See Response Rates – An Overview*, AM. ASS'N FOR PUB. OP. RSCH., https://www.aapor.org/Education-Resources/For-Researchers/Poll-Survey-FAQ/Response-Rates-An-Overview.aspx [https://perma.cc/J656-H9XD] (last accessed Nov. 4, 2021); Colleen Cook, Fred Heath & Russel L. Thompson, *A Meta-Analysis of Response Rates in Web- or Internet-Based Surveys*, 60 EDUC. AND PSYCHOL. MEASUREMENT 821 (2000).

[72] Focusing on a single recent case provides more precise and accurate information. *See, e.g.*, KIDDER, *supra* note 70, at 158–59; DONNA STIENSTRA, RULES OF THUMB FOR DESIGNING AND ADMINISTERING MAILED QUESTIONNAIRES 4 (2000). In addition, answering with regard to a specific case enables us to examine the relationships between the characteristics of the case and how the first mediation session began in that case.

a civil or family dispute with only two named parties. All findings presented in this Article are based on the subset of mediators whose most recent mediation began either in a joint opening session or in separate caucuses.[73]

Throughout the Article, we conducted tests of statistical significance to determine if an observed relationship between each characteristic and whether the initial mediation session started in joint session or in separate caucuses is a "true" relationship and does not merely reflect a chance association (or if an observed difference between two or more groups is a "true" difference rather than chance variation).[74] Accordingly, any "relationships" or "differences" reported herein are statistically significant relationships or differences, while "no relationships" and "no differences" indicate there were no statistically significant relationships or differences.

Of the cases that form the basis of this article,[75] 67% were civil cases and 33% were family cases.[76] The four substantive areas accounting for most of the civil cases were tort (34%), contract (31%), employment (23%), and property/real estate (12%).[77] Over half of the family cases involved two or more types of divorce-related issues (58%); roughly equal proportions of the

[73] *See infra* note 83. Because the responses of the small number of mediators who began the mediation in some other way are not included in the findings presented in this Article, the distributions of some pre-session factors differ slightly from those presented in Wissler & Hinshaw, *What Happens*, *supra* note 19, which reports the findings for the full set of mediators.

[74] The test of statistical significance primarily used in this Article is the chi-square (χ^2) test. *See* RICHARD P. RUNYON & AUDREY HABER, FUNDAMENTALS OF BEHAVIORAL STATISTICS 363–67 (5th ed. 1984). The conventional level of probability for determining the statistical significance of findings is the .05 level (i.e., $p < .05$). *Id.* at 229–31, 364. Cramer's *V* provides a measure of the strength of the effect for chi-square (χ^2) analyses. As a guide to interpreting the size of effects, *.10* is considered a small effect; *.30*, a medium effect; and *.50*, a large effect. *See, e.g.*, Charles Zaiontz, *Effect Size for Chi-square Test*, REAL STATISTICS USING EXCEL, https://www.real-statistics.com/chi-square-and-f-distributions/effect-size-chi-square/ (last visited Nov. 4, 2021).

[75] *See supra* note 73 and accompanying text.

[76] For 95% of the mediators, the type of case (civil or family) they usually mediate is the same as the type they most recently mediated. For more information on the mediators' practice and professional background characteristics, see *infra* Section IV.C.

[77] For a majority of the civil mediators, the subtype of case they usually mediate is the same as the subtype of their most recent case (ranging from 57% to 76%, depending on the subtype). We did not have information on the subtype of family case the mediators usually mediate to make a similar comparison.

remaining cases involved only custody/visitation issues (22%) or only financial issues (20%).[78]

The single most frequent source of the disputes the civil mediators typically mediate in their practice was as follows: directly from the lawyers (45%), directly from court mediation programs or judges (39%),[79] directly from professional mediation/ADR organizations or private mediation providers/firms (11%), directly from the disputants (1%), or from other sources (3%). The single most frequent source of the disputes the family mediators usually mediate in their practice was: directly from court mediation programs or judges (41%), directly from the lawyers (30%), directly from professional mediation organizations or private mediation providers/firms (6%), directly from the disputants (19%), or from other sources (4%).[80] We cannot assume that civil and family cases reported to be "directly referred" from the disputants or the lawyers were in private mediation because, in many court-connected mediation programs, the disputants or their lawyers may choose the mediator and, in some programs, they directly contact the mediator.[81]

The proportion of civil cases mediated in each state was as follows: California (26%), New York (20%), Florida (16%), North Carolina (12%), Maryland (9%), Michigan (8%), Illinois (4%), Utah (3%), and other, mostly adjoining states (3%). The proportion of family cases mediated in each state was: Florida (18%), Maryland (17%), Illinois (16%), Utah (13%), North Carolina (12%), Michigan (10%), California (6%), New York (6%), and other nearby states (1%).[82]

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[78] For information on additional characteristics of the disputes and the mediations, see *infra* Sections IV.A.–B., D.

[79] In civil cases, slightly over half of the court referrals were from state courts, and slightly fewer than half were from federal courts.

[80] *See infra* note 168 for the distribution of referral sources in the mediators' most recent case.

[81] *See, e.g.*, C.D. CAL., GEN. ORDER 11-10 §7.1(a); UTAH CODE JUD. ADMIN. 4-510.05(4)(E); MICH. CT. R. 2.411(B)(1) (civil), 3.216(E)(2) (family); N.C. R. FOR MEDIATED SETTLEMENT CONFS. & OTHER SETTLEMENT PROCS. IN SUPER. CT. CIVIL ACTIONS 2.A; N.C. R. FOR SETTLEMENT PROCS. IN FAM. FIN. CASES 2(A).

[82] The relative proportion of civil versus family cases mediated within a state largely reflected the proportion of civil and family mediators whose contact information was available in that state.

IV. FACTORS RELATED TO THE USE OF INITIAL JOINT SESSIONS VERSUS INITIAL CAUCUSES

In this section, we examine the relationships between many factors and whether the first formal mediation session in the mediators' most recent case began in joint session or in separate caucuses.[83] We conceptually grouped the factors into the following four categories, which we discuss in turn: the mediators' communications with the disputants and/or their lawyers and access to case information before the first mediation session; dispute characteristics and the disputants' main goals for the mediation; aspects of the mediators' professional background and mediation practice; and other aspects of the mediation, such as the case referral source.

A cautionary note: Finding a relationship between a particular factor and whether the mediation began in joint session versus in caucus means that factor was *associated with* more (or less) frequent use of joint opening sessions; it does not mean that factor necessarily *influenced* how mediators began the mediation (i.e., correlation does not equal causation). An additional note on the terminology we use to discuss the findings: Where possible, we use more precise language to discuss the different stages of the mediation process, such as using the term "pre-session" rather than "pre-mediation" to refer to communications and submissions before the first formal mediation session.[84] However, for the sake of brevity and simplicity, we say that "the

[83] In the mediators' most recent case, the mediation began in joint opening session in a majority of both civil and family cases (71% and 64%, respectively) and in separate caucuses with each side apart in a minority of cases (26% and 33%, respectively). An additional 3% of both civil and family cases began with opposing disputants apart but opposing counsel together. This latter set of cases was not included in any analyses in this Article because these cases do not fit clearly into either of the two main categories (i.e., they are an initial joint session from the lawyers' perspective but initial caucuses from the disputants' perspective), and there were too few cases to analyze this group separately.

[84] "Mediation" is often considered to begin with the first contact between the mediator and the disputants or their lawyers and includes communications from before the first formal mediation session through post-session follow-up conversations. *See, e.g.*, GOLANN & FOLBERG, *supra* note 3, at 146 (stating that "every contact between a mediator and a lawyer or client is part of the process"); MOORE, *supra* note 3, at 32–33 (describing twelve stages of mediation, five of which occur before the first mediation session); 42 PA. CONS. STAT. § 5949(c) (2014); IOWA STAT. CODE § 20.31 (2016) (stating that mediation begins at the mediator's receipt of the assignment); JoAnne Donner, *When Does Mediation Really Start?*, MEDIATE (Nov. 8, 2010), https://www.mediate.com/articles/donnerJ1.cfm.

mediation" began in joint session or caucus rather than saying that "the first (or initial) mediation session" began in joint session or caucus.

A. *Pre-Session Communications and Case Information*

In this section, we explore the relationships between a number of pre-session factors—the mediators' access to case information, whether they held pre-session communications, whether the disputants were present for those communications, and what was discussed during them—and how the mediation began. In addition, we examine the relationships between what was explored during pre-session communications and whether those same items were discussed during the initial mediation session.

1. *Access to Case Information or Documents*[85]

In civil cases, there was a small relationship between having case information or some documents and how the mediation began. Taking into consideration all types of case information or documents, the mediation was *less likely* to begin in joint session when the mediators had access to some case information or documents than when they had no information (70% vs. 90%).[86] With regard to specific types of case information, the mediation was *less likely* to begin in joint session when mediators had the parties' mediation memos or statements (68% vs. 90%) or when they had depositions or expert reports (61% vs. 75%) than when they did not have either of those types of information.[87] In family cases, however, whether mediators had any information versus none at all, or had specific types of case information or

[85] Eighty-three percent of mediators in civil cases and 55% in family cases had access to some case information before the first session. Mediators had access to these specific types of information or documents in civil and family cases, respectively: mediation memos (76% and 18%), pleadings/motions (50% and 33%), depositions/expert reports (11% and 2%), other documents (e.g., financial statements, medical records, contracts, etc.) (22% and 14%), and IPV screening (0.3% and 11%).

[86] $\chi^2(1) = 17.31, p < .001, V = .16$.

[87] Memos: $\chi^2(1) = 26.94, p < .001, V = .20$; depositions/expert reports: $\chi^2(1) = 5.90, p < .05, V = .10$. There was no relationship between having the pleadings/motions or having other documents (e.g., financial statements, medical records, or contracts) and how the mediation began (*p*'s of *.21* and *.12*, respectively). Too few mediators in civil cases had the results of Intimate Partner Violence screening to permit analysis.

documents (including the results of Intimate Partner Violence screening), was not related to whether the mediation began in joint session or in caucus.[88]

2. *PRE-SESSION COMMUNICATIONS*[89]

Whether mediators did or did not have communications about non-administrative matters with the disputants and/or their lawyers before the first mediation session was not related to how the mediation began in either civil or family cases.[90] In cases in which pre-session communications took place, the timing of those communications (i.e., only prior to the day of the first session, only on the same day as (but before) the first session, or at both times) was not related to how the mediation began in either civil or family cases.[91]

3. *DISPUTANTS' PRESENCE DURING PRE-SESSION COMMUNICATIONS*[92]

In civil cases, there was no relationship between whether both, one, or neither of the disputants were present for communications held either prior to or on the same day as the first mediation session[93] and whether the mediation

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[88] *p*'s ranged from *.44* to *.98*. Too few mediators in family cases had depositions or expert reports to permit analysis.

[89] Sixty-five percent of mediators in civil cases and 38% in family cases had pre-session communications. As to when the mediators held pre-session communications in civil and family cases, respectively: only prior to the day of the first session (each 37%); only on the same day as (but before) the first session (8% and 18%); and both prior to and on the same day as the first session (55% and 44%).

[90] Civil cases: $p = .92$. Family cases: $p = .19$.

[91] Civil cases: $p = .56$. Family cases: $p = .19$.

[92] Neither disputant was present in 77% of civil cases and 23% of family cases during pre-session communications held prior to the day of the first mediation session, and in 13% and 15% of civil and family cases, respectively, during same-day communications. Both disputants were present in 6% of civil cases and 29% of family cases during communications held prior to the day of the first session, and in 47% and 57% of civil and family cases, respectively, during same-day communications. Even when the disputants were present, at both times they spoke little or not at all in approximately two-thirds of civil cases and in slightly over one-third of family cases.

[93] Findings regarding communications held *prior to* the day of the first session include cases that had communications only at that time as well as the "prior to" communications in cases that had communications at both times. Similarly, findings regarding pre-session communications held on the *same day as* the first mediation session include cases that had communications only at that time as well as the "same day" communications in cases that had communications at both times. This also applies to analyses, *infra,* in Sections IV.A.4–5.

began in joint session or in caucus.[94] By contrast, in family cases there was a moderate relationship between the disputants' presence and how the mediation began. The mediation was *more likely* to begin in joint session when both disputants were present than when neither was present for pre-session communications held prior to or on the same day as the first session; the pattern of joint opening sessions when one disputant was present was different at the two times.[95]

The relationship seen in family cases, however, might reflect that disputants did not have counsel in a sizeable minority of cases[96] and, thus, would *have* to be present for pre-session communications to take place.[97] On repeating this analysis for the subset of family cases in which both disputants had counsel (and, thus, pre-session communications could take place without them), there still was a relationship between disputants' presence during communications held prior to the day of the first session and how the mediation began, although the pattern was somewhat different than that above.[98] For same-day communications, however, there was no relationship between disputants' presence and how the mediation began when both disputants had counsel.[99] Because these findings differ from the analyses that included disputants who did not have counsel,[100] whether the disputants do or do not have counsel might partly explain the relationship between the disputants' presence during pre-session communications and how the mediation began in family cases, especially for same-day communications.

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[94] Prior to: $p = .14$; same day: $p = .87$.

[95] Prior to: both present, 85%; one present, 82%; neither present, 52%; $\chi^2(2) = 8.26$, $p < .05$, $V = .30$. Same day: both present, 81%; one present, 44%; neither present, 40%; $\chi^2(2) = 10.24$, $p < .01$, $V = .40$.

[96] *See infra* note 166. Disputants in few civil cases did not have counsel.

[97] *See also* Wissler & Hinshaw, *What Happens*, *supra* note 19, at 161–62 (finding that one or both disputants in family cases were less likely to be present for pre-session communications held prior to or on the same day as the first session when both disputants had counsel than when neither disputant had counsel).

[98] Prior to: one present, 90%; both present, 71%; neither present, 55%; $\chi^2(2) = 6.52$, $p < .05$, $V = .34$. *Cf. supra* note 95 and accompanying text.

[99] Same day: $p = .13$.

[100] *See supra* note 95 and accompanying text.

4. *PROCESS ACTIONS THE MEDIATORS ENGAGED IN BEFORE THE FIRST SESSION*[101]

In both civil and family cases, most of the process actions the mediators engaged in during pre-session communications were not related to how the mediation began.[102] The few process actions that *were* related to how the mediation began had small relationships in civil cases but moderate relationships in family cases and, for the most part, were associated with *more* rather than less frequent use of joint opening sessions.

In civil cases, only two process actions that took place during pre-session communications held prior to the day of the first mediation session were related to how the mediation began. The mediation was *more likely* to begin in joint session when the mediators had explained the mediation process than when they had not (79% vs. 68%).[103] But the mediation was *less likely* to

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[101] The process actions we examined were: the mediators explained the mediation process, their approach, confidentiality, and the ground rules for the mediation; explored who should or should not attend the mediation; assessed the disputants' capacity to mediate (including issues of cognitive ability, violence, coercive control, or other intimidation); assessed the disputants' and/or their lawyer's ability to communicate civilly; explored if the disputants would be okay being together in the same room; explored options for how the opening mediation session as well as the rest of the mediation after the opening session might be structured; and coached the disputants and/or their lawyers on non-adversarial communications. For how frequently the mediators engaged in each of these actions during pre-session communications, see Wissler & Hinshaw, *What Happens*, *supra* note 19, at 164–69.

[102] Civil cases: prior to, *p*'s ranged from *.19* to *.99*; same day, *p*'s ranged from *.09* to *.95*. Family cases: prior to, *p*'s ranged from *.08* to *.84*; same day, *p*'s ranged from *.06* to *.95*. It is possible that some of the process actions the mediators engaged in were not related to how the mediation began because different mediators learned information that led to different decisions. For example, when mediators explored how the opening session might be structured, in some cases they and the participants might have opted for a joint session, while in other cases, they might have chosen separate caucuses. These opposite decisions resulting from the same action could result in no apparent relationship between that action and how the mediation began. We do not have the information that the mediators learned from each action to directly test this potential explanation. One action for which opposite decisions could have been reached—exploring whether the disputants would be okay being together in the same room—*was* related to how the mediation began, though the relationship was in opposite directions depending on when that assessment took place in family cases. In Section IV.B, *infra*, we examine the relationships between how the mediation began and dispute characteristics and disputant goals, some of which the mediators presumably learned as a result of their pre-session assessments.

[103] $\chi^2(1) = 5.20$, $p < .05$, $V = .12$.

begin in joint session when the mediators had explored whether the disputants would be okay being together in the same room than when they had not explored that question (68% vs. 77%).[104] In family cases, the mediation was *more likely* to begin in joint session when the mediators, during pre-session communications held prior to the day of the first session, had explained the mediation process (81% vs. 48%), their approach (84% vs. 57%), and mediation confidentiality (81% vs. 62%), and when they had explored whether the disputants would be okay being together in the same room (84% vs. 46%), than when they had not addressed these matters.[105] Only one action the mediators engaged in during pre-session communications held on the same day as the first mediation session was related to how the mediation began: The mediation was *less likely* to begin in joint session when the mediators had explored whether the disputants would be okay being together in the same room than when they had not (56% vs. 88%).[106]

5. *Substantive Items the Mediators Discussed Before the First Session*[107]

In civil cases, none of the substantive items discussed during pre-session communications at either time were related to how the mediation began.[108] In family cases, only one substantive item had a moderate relationship with how the mediation began: the mediation was *less likely* to begin in joint session if the mediator had explored the disputants' legal theories

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[104] $\chi^2(1) = 4.24$, $p < .05$, $V = .11$.

[105] Process, $\chi^2(1) = 9.21$, $p < .01$, $V = .31$; approach, $\chi^2(1) = 8.66$, $p < .01$, $V = .30$; confidentiality, $\chi^2(1) = 3.95$, $p < .05$, $V = .20$; okay together: $\chi^2(1) = 13.67$, $p < .001$, $V = .38$.

[106] $\chi^2(1) = 7.01$, $p < .01$, $V = .32$.

[107] We examined the following substantive items: the issues to be addressed, the agenda, the disputants' interests, the disputants' goals for the mediation, the procedural or litigation status of the dispute, the disputants' legal theories and surrounding facts, the status of settlement negotiations, the obstacles to settlement, new substantive settlement proposals, and the costs and risks of litigation. For how frequently the mediators had explored each of these items during pre-session communications, see Wissler & Hinshaw, *What Happens*, *supra* note 19, at 172–76.

[108] Prior to, *p*'s ranged from *.19* to *.90*; same day, *p*'s ranged from *.06* to *.86*. For a possible explanation of the lack of relationship between some of these items (e.g., exploring the disputants' interests, goals, and obstacles to settlement) and how the mediation began, see *supra* note 102. For the relationships between disputants' goals and how the mediation began, see *infra* Section IV.B.

and surrounding facts during pre-session communications held prior to (50% vs. 81%) or on the same day as the first session (44% vs. 77%).[109]

6. *Relationships Between What Was Discussed During Pre-Session Communications and What Was Discussed During the Initial Session*

We examined the relationships between (a) the process actions the mediators had engaged in and the substantive issues they had discussed at some time during pre-session communications[110] and (b) whether they engaged in that same process action or discussed that same substantive issue during the first mediation session.[111] Overwhelmingly, in both civil and family cases, mediators who had engaged in a specific process action at some time during pre-session communications were *more likely* to engage in that same action during the initial mediation session than were mediators who had not engaged in that action before the first session.[112] Only a few of the process actions engaged in during pre-session communications were not related to whether the same action occurred during the initial mediation session;[113] none

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[109] Legal theories: prior to: $\chi^2(1) = 6.88$, $p < .01$, $V = .28$; same day: $\chi^2(1) = 6.15$, $p < .05$, $V = .31$. All other items: prior to, *p*'s ranged from *.14* to *.96*; same day, *p*'s ranged from *.052* to *.88*.

[110] If a process or substantive matter was discussed either prior to or on the same day as the first session, or at both times, that matter was counted as having been explored *at some time* during pre-session communications.

[111] Initial joint sessions and initial caucuses were combined for these analyses.

[112] Civil cases: process: 97% vs. 89%, $\chi^2(1) = 11.25$, $p < .01$, $V = .17$; approach: 88% vs. 71%, $\chi^2(1) = 16.45$, $p < .001$, $V = .20$; ground rules: 92% vs. 72%, $\chi^2(1) = 27.48$, $p < .001$, $V = .27$; civility: 78% vs. 44%, $\chi^2(1) = 47.37$, $p < .001$, $V = .35$; capacity: 70% vs. 26%, $\chi^2(1) = 72.20$, $p < .001$, $V = .44$; structure rest: 66% vs. 41%, $\chi^2(1) = 23.47$, $p < .001$, $V = .25$; coaching: 55% vs. 12%, $\chi^2(1) = 21.33$, $p < .001$, $V = .46$; okay together: 62% vs. 28%, $\chi^2(1) = 10.37$, $p < .01$, $V = .31$. Family cases: approach: 81% vs. 57%, $\chi^2(1) = 6.43$, $p < .05$, $V = .24$; ground rules: 88% vs. 67%, $\chi^2(1) = 6.73$, $p < .01$, $V = .25$; civility: 80% vs. 45%, $\chi^2(1) = 13.86$, $p < .001$, $V = .36$; capacity: 75% vs. 52%, $\chi^2(1) = 4.81$, $p < .05$, $V = .21$; coaching: 67% vs. 20%, $\chi^2(1) = 5.98$, $p < .05$, $V = .45$; okay together: 67% vs. 17%, $\chi^2(1) = 4.89$, $p < .05$, $V = .40$. Mediators were asked if they explored whether the disputants would be okay being together in the same room or coached the participants on non-adversarial communications during the initial mediation session only in cases that began in separate caucuses.

[113] Civil cases: confidentiality, $p = .61$; structure opening session, $p = .12$. Family cases: process, $p = .27$; confidentiality, $p = .35$; structure opening session: $p = .12$; structure rest of mediation: $p = .12$.

of the process actions were less likely to occur during the initial mediation session if they had taken place during pre-session communications.

The same pattern was seen for the substantive items: mediators who had discussed a particular item during pre-session communications generally were *more likely* to discuss that same item during the initial mediation session than were mediators who had not discussed that item before the first session.[114] A few of the substantive items discussed during pre-session communications were not related to whether the same item was discussed during the initial mediation session;[115] none of the items were less likely to be discussed during the initial mediation session if they had been discussed before the first session.

B. *Dispute Characteristics and Disputant Mediation Goals*[116]

In this section, we explore whether a number of dispute characteristics and disputants' goals for the mediation are related to whether the mediation begins in joint session or separate caucuses.

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[114] Civil cases: issues: 73% vs. 54%, $\chi^2(1) = 10.27$, $p < .01$, $V = .16$; agenda: 52% vs. 24%, $\chi^2(1) = 31.42$, $p < .001$, $V = .29$; interests: 60% vs. 40%, $\chi^2(1) = 13.78$, $p < .001$, $V = .19$; goals: 65% vs. 39%, $\chi^2(1) = 23.19$, $p < .001$, $V = .25$; theories/facts: 67% vs. 47%, $\chi^2(1) = 11.93$, $p < .01$, $V = .18$; obstacles: 54% vs. 24%, $\chi^2(1) = 25.80$, $p < .001$, $V = .26$; proposals: 44% vs. 14%, $\chi^2(1) = 41.30$, $p < .001$, $V = .34$; risks: 60% vs. 32%, $\chi^2(1) = 28.77$, $p < .001$, $V = .28$. Family cases: agenda: 90% vs. 42%, $\chi^2(1) = 23.53$, $p < .001$, $V = .48$; goals: 84% vs. 56%, $\chi^2(1) = 9.62$, $p < .01$, $V = .31$; theories/facts: 70% vs. 22%, $\chi^2(1) = 19.92$, $p < .001$, $V = .45$; negotiation status: 80% vs. 43%, $\chi^2(1) = 14.27$, $p < .001$, $V = .38$; obstacles: 74% vs. 42%, $\chi^2(1) = 10.42$, $p < .01$, $V = .33$; proposals: 75% vs. 39%, $\chi^2(1) = 10.62$, $p < .01$, $V = .33$; risks: 61% vs. 29%, $\chi^2(1) = 8.99$, $p < .01$, $V = .30$.

[115] Civil cases: litigation status, $p = .06$; negotiation status, $p = .25$. Family cases: issues, $p = .56$; interests, $p = .39$; litigation status, $p = .75$.

[116] The mediators were asked which of twelve listed goals the disputants themselves had as their main goals for the mediation at its start. These questions were asked at the level of the case; that is, a particular goal would have been noted for a case if either one or both of the disputants had that goal. Five percent of the mediators said they did not know the disputants' goals at the start of mediation and did not answer these questions.

1. *VIOLENCE, COERCION, EMOTION, OR ANGER*[117]

In civil cases, none of the following dispute characteristics were related to how the mediation began: whether the dispute involved (a) physical abuse or violence; (b) harassment, coercion or other intimidation; or (c) unusually angry or emotional disputants or lawyers.[118] In family cases, only one of these characteristic had a small relationship with how the mediation began: mediation was *less likely* to begin in joint session when the lawyers were unusually angry or emotional than when they were not (39% vs. 68%).[119]

2. *DISPUTANTS' RELATIONSHIPS OR RELATIONSHIP-RELATED GOALS*[120]

In both civil and family cases, whether the disputants had a prior personal or business relationship before the dispute arose,[121] or expected to have future dealings with the other disputant after the dispute concluded,[122] was not related to how the mediation began. In civil cases, there was no relationship between the disputants' goals of preserving or restoring their relationship or ending their relationship on amicable terms and how the mediation began.[123] In family cases, however, the mediation was *more likely* to begin in joint session when the disputants had the goal of preserving or

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[117] Few civil and family cases involved physical abuse or violence (1% civil and 7% family); harassment, coercion, or other intimidation (5% civil and 13% family); or unusually emotional or angry lawyers (6% in each group). However, 26% of civil cases and 47% of family cases involved unusually emotional or angry disputants. It is worth noting that few mediators had access to the results of intimate partner violence screening before the first mediation session. *See supra* note 85.

[118] *p*'s ranged from *.06* to *.59*. There were too few cases involving physical violence to examine.

[119] $\chi^2(1) = 6.45$, $p < .05$, $V = .14$. Other characteristics: *p*'s ranged from *.09* to *.85*.

[120] In civil cases, the disputants had a personal or a business relationship before the dispute arose in 14% and 57% of the cases, respectively, and expected to have future dealings (business or personal) after the dispute concluded in 19% of the cases. In family cases, the disputants had a prior business relationship in 4% of the cases and expected future dealings in 66% of the cases. In 5% of civil cases and 14% of family cases, the disputants had as a main goal for the mediation to preserve or restore their relationship; in 8% and 33% of cases, respectively, a main goal was to end their relationship on amicable terms.

[121] Civil cases: *p*'s of *.22* and *.37*, respectively. Family cases: business, $p = .40$.

[122] Civil cases: $p = .15$. Family cases: $p = .16$.

[123] *p*'s of *.26* and *.77*.

restoring their relationship (86% vs. 63%) or ending their relationship on amicable terms (79% vs. 60%) than when they did not have those goals.[124]

3. *Goals of Talking Directly to Each Other and Feeling Heard*[125]

In civil cases, there was a small relationship between the disputants' goal of having a chance to talk about the matter directly with the other disputant and how the mediation began, but the goal of feeling heard was not related to how the mediation began.[126] Specifically, the mediation was *more likely* to begin in joint session when the disputants had the goal of talking directly with the other disputant than when they did not have that goal (90% vs. 70%). In family cases, there was a moderate relationship between the disputants' goal of having a chance to talk about the matter directly with the other disputant and how the mediation began, and a small relationship between the goal of feeling heard and how the mediation began.[127] The mediation was *more likely* to begin in joint session when the disputants had the goal of talking directly with the other disputant (92% vs. 54%) or the goal of feeling heard (73% vs. 60%) than when they did not have either of those goals.

4. *Non-monetary or Broader Issues and Goals*[128]

In both civil and family cases, there was no relationship between whether cases involved either non-monetary issues or broader issues than those in the claim and how the mediation began.[129] There was a small relationship between the disputants' goal of resolving broader issues than those in the claim and how the mediation began: The mediation was *more likely* to begin in joint session when disputants wanted to resolve broader

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[124] Restore: $\chi^2(1) = 8.20$, $p < .01$, $V = .16$; end amicably: $\chi^2(1) = 11.24$, $p < .01$, $V = .19$.

[125] In 15% of civil cases and 32% of family cases, a main mediation goal of the disputants was having the chance to talk about the matter directly with the other disputant. Disputants had "feeling heard" as a main goal in 34% of civil cases and 48% of family cases. The latter question did not specify by whom the disputants wanted to feel heard.

[126] Talk: $\chi^2(1) = 16.38$, $p < .001$, $V = .16$; feel heard: $p = .33$.

[127] Talk: $\chi^2(1) = 42.18$, $p < .001$, $V = .37$; feel heard: $\chi^2(1) = 5.32$, $p < .05$, $V = .13$.

[128] Approximately one-fifth of civil cases involved non-monetary issues (20%) or broader issues than those in the claim (17%). Almost half of family cases involved non-monetary issues (49%), and 28% involved broader issues than those in the claim. Disputants in 12% of civil cases and 18% of family cases had as a main goal for the mediation to resolve broader issues than those in the claim.

[129] Civil cases: *p*'s of *.27* and *.16*. Family cases: *p*'s of *.10* and *.49*.

issues than when they did not (83% vs. 71%).[130] In family cases, there was no relationship between the goal of resolving broader issues and how the mediation began.[131]

5. *DISPUTANTS' PRIOR MEDIATION EXPERIENCE AND BEING INFORMED ABOUT THE OTHER'S VIEWS*[132]

Whether the disputants did or did not have prior mediation experience was not related to how the mediation began in either civil or family cases.[133] There also was no relationship between whether the disputants were or were not well informed about the other side's positions and how the mediation began in either civil or family cases.[134]

6. *OTHER DISPUTANT GOALS FOR THE MEDIATION*[135]

In civil cases, there were small relationships between the disputants' goals of having a neutral person offer opinions or suggestions, reducing costs, or having more control over the outcome and how the mediation began, with the mediation being *less likely* to begin in joint session when the disputants had each of these goals than when they did not have that goal.[136] The goals of settling the matter and being done with it, saving time, getting a better outcome than at trial, and keeping the matter confidential were not related to how the mediation began in civil cases.[137] In family cases, there were small relationships between the disputants' goals of keeping the matter confidential and settling the matter/being done with it and how the mediation began. The

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[130] $\chi^2(1) = 4.40$, $p < .05$, $V = .08$.

[131] $p = .22$.

[132] A majority of disputants in both civil and family cases did not have prior mediation experience (62% to 76%); the exception was the responding parties in civil cases (34%). In 20% of civil cases and 30% of family cases, one or both disputants were not well informed about the other disputant's views or positions.

[133] Civil cases: $p = .62$. Family cases: $p = .15$.

[134] Civil cases: $p = .80$. Family cases: $p = .26$.

[135] These goals included: to settle the matter and be done with it (86% of civil cases and 82% of family cases); reduce costs (51% and 68%, respectively); save time (44% and 56%, respectively); have more control over the outcome (40% and 62%, respectively); have a neutral person offer opinions and suggestions (33% and 29%, respectively); get a better outcome than at trial (20% and 29%, respectively); and keep the matter confidential (19% and 20%, respectively).

[136] Neutral: 65% vs. 77%, $\chi^2(1) = 9.63$, $p < .01$, $V = .13$; costs: 67% vs. 79%, $\chi^2(1) = 10.36$, $p < .01$, $V = .13$; control: 68% vs. 76%, $\chi^2(1) = 5.45$, $p < .05$, $V = .09$.

[137] p's ranged from .15 to .75.

mediation was *more likely* to begin in joint session when the disputants wanted to keep the matter confidential than when they did not, but was *less likely* to begin in joint session when the disputants wanted to settle the matter and be done with it than when they did not have that goal.[138] The goals of reducing costs, saving time, having a neutral person offer opinions, having more control over the outcome, and getting a better outcome than at trial were not related to how the mediation began in family cases.[139]

7. *CASE SUBTYPES*[140]

Mediators who were not aware of some or any of the case characteristics or disputant goals might nonetheless have known what the subtype of civil or family case was and made some assumptions about the dispute, which could have influenced how the mediation began. There were no differences among the four major civil case subtypes (torts, contracts, employment, and property/real estate) in how the mediation began.[141] In family cases, the mediation was *more likely* to begin in joint session in cases that involved only custody and/or visitation issues (86%) than in cases that involved only financial issues (62%) or two or more types of divorce-related issues (60%).[142]

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[138] Confidential: 78% vs. 63%, $\chi^2(1) = 4.82$, $p < .05$, $V = .13$; settle and be done: 63% vs. 82%, $\chi^2(1) = 7.69$, $p < .01$, $V = .16$.

[139] *p*'s ranged from *.13* to *.99*.

[140] For the distribution of the case subtypes, see *supra* notes 77 and 78 and accompanying text.

[141] $p = .19$.

[142] $\chi^2(2) = 15.27$, $p < .001$, $V = .22$. There were small to moderate differences in several characteristics and goals between cases that involved only custody/visitation issues and those that involved only financial issues. Disputants in cases with only custody/visitation issues were *more likely* than those in cases with only financial issues to have expected future relationships ($\chi^2(1) = 11.30$, $p < .01$, $V = .30$), non-monetary issues ($\chi^2(1) = 7.67$, $p < .01$, $V = .24$), and the goal of talking directly with the other disputant ($\chi^2(1) = 9.61$, $p < .01$, $V = .28$). But disputants in cases with only custody/visitation issues were *less likely* than those in cases with only financial issues to have as goals ending their relationship amicably ($\chi^2(1) = 12.66$, $p < .001$, $V = .32$), having a neutral person offer suggestions or opinions ($\chi^2(1) = 6.30$, $p < .05$, $V = .23$), reducing costs ($\chi^2(1) = 8.37$, $p < .01$, $V = .26$), or settling the matter/being done with it ($\chi^2(1) = 4.62$, $p < .05$, $V = .20$).

8. *ADDITIONAL ANALYSES ON THE SUBSET OF "INFORMED" MEDIATORS*

We conducted additional analyses to explore a possible explanation for why many of the individual case characteristics and goals had no or small relationships with how the mediation began. If the person who made the decision whether to begin the mediation in joint session or caucus was not aware of potentially relevant characteristics at the time of the decision, that could limit the relationships between dispute characteristics and how the mediation began. It appears that the mediators had the most influence on how the mediation began in a majority of both civil and family cases.[143] However, we do not know whether the mediators learned about the case characteristics and disputant goals *before* deciding how to begin the mediation, or if they found out about these characteristics later during the mediation.[144]

To try to rule out the possibility that the limited relationships between the individual dispute characteristics and how the mediation began reflect the mediators' lack of case information, we repeated the above analyses looking only at the subset of mediators who were most likely to be aware of dispute characteristics and disputant goals before deciding how the mediation would begin. This group consisted of the mediators who had access to case information and/or who had communications with the disputants or their lawyers before the first mediation session. Of those characteristics that were not related to how the mediation began for the full set of mediators, only one characteristic had a small relationship with how the mediation began for this subset of "informed" mediators in civil cases, and none were related in family cases.[145] These findings suggest that the limited relationships between individual case characteristics and how the mediation began cannot be attributed to the mediators' lack of information about the case.

9. *ALL CASE CHARACTERISTICS AND GOALS COMBINED*

We conducted a discriminant analysis to examine whether the combined set of case characteristics and disputant goals could distinguish

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[143] *See infra* note 172 and accompanying text.

[144] The survey asked the mediators if the disputants had certain goals "at the start of the mediation" or if the case involved certain characteristics, but it did not ask *when* the mediators learned this information.

[145] For those mediators who had pre-session communications and/or case information in civil cases, the mediation was *more likely* to begin in joint session if there was a prior business relationship than if there was not (74% vs. 67%, $\chi^2(1) = 3.96$, $p < .05$, $V = .08$).

between cases that began in joint session and cases that began in separate caucuses.[146] Together, the case characteristics and goals could significantly distinguish between joint opening sessions and caucuses to a moderate degree in civil cases and strongly in family cases.[147] In both civil and family cases, the five characteristics or goals in this analysis that most strongly distinguished between cases that began in joint session versus those that began in caucus were the same five characteristics and goals with the largest individual relationships with how the mediation began.[148] Based on these top five characteristics, civil cases were *more likely* to start in joint session when the disputants had the goals of talking directly with the other side or resolving broader issues than those in the claim, and when they did *not* have the goals of having a neutral person offer their opinions, reducing costs, or controlling

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[146] "Discriminant analysis is a statistical technique which allows the researcher to study the differences between two or more groups" (here, cases that began in joint session versus cases that began in caucus) ". . . with respect to several variables simultaneously" (here, case characteristics and goals). WILLIAM R. KLECKA, DISCRIMINANT ANALYSIS 7 (1980). Discriminant analysis is used to study "the ways in which groups differ . . . on the basis of some set of characteristics, how well do they discriminate, and which characteristics are the most powerful discriminators?" *Id.* at 9. When there are two groups, this technique derives a single function that is "a linear combination of the discriminating variables . . . so that the group means on the function are as different as possible." *Id.* at 15–16.

[147] Civil cases: $\chi^2(23) = 48.90$, $p < .01$, Wilk's lambda = *.91*, canonical correlation = *.29*. Family cases: $\chi^2(22) = 69.83$, $p < .001$, Wilk's lambda = *.77*, canonical correlation = *.48* (excluding personal relationship since that was present in all cases). The case subtype (e.g., tort, custody/visitation only) was not included so that the characteristics being analyzed would be the same in both civil and family cases. Wilks' Lambda ranges from 0 (strong differences between the groups) to 1 (no differences). The canonical correlation indicates the relationship between the combined set of characteristics and the groups (here, initial joint session versus caucus). The canonical correlation squared indicates the proportion of variation between the groups that is explained by the combined set of characteristics: they accounted for 8% of the variation in how the mediation began in civil cases and 23% of the variation in family cases. *See* KLECKA, *supra* note 146, at 36–39.

[148] Civil cases: talk directly = *.54*; neutral's views = *–.43*; reduce costs = *–.40*; control outcome = *–.29*; resolve broader issues = *.26*. Family cases: talk directly = *.79*; end amicably = *.35*; preserve relationship = *.33*; settle and be done = *–.30*; unusually angry/emotional lawyers = *–.30*. Coefficients with a minus sign indicate that characteristic is associated with fewer joint opening sessions; no sign indicates an association with more joint opening sessions. These structure coefficients are correlations that indicate the relationship between each characteristic and the discriminant function and, thus, are a guide to the meaning of the function that distinguishes the cases that began in joint opening session from those that began in caucus. *See* KLECKA, *supra* note 146, at 31–34.

the outcome. Family cases were *more likely* to start in joint session when the disputants had the goals of talking directly with the other disputant, ending their relationship amicably, or preserving or restoring their relationship, and when they did *not* want to settle the matter and be done with it or did not have unusually emotional or angry lawyers.

There are two possible explanations for why many of the individual case characteristics and goals had no or small relationships with how the mediation began, while together as a group they had a stronger relationship with how the mediation began. First, the larger relationship seen for the total group might be attributed to the cumulative, small contributions of multiple characteristics and goals that led to the same decision about how to begin the mediation. For instance, if disputants who expect to deal with each other in the future also want to restore their relationship, talk directly with the other side, feel heard, and resolve broader issues than those in the claim—each of which suggests having a joint opening session—their individual small relationships would add up to a stronger combined relationship with how the mediation began. Second, some cases have characteristics and goals that are thought to benefit from a joint opening session, while simultaneously having other characteristics for which initial caucuses are recommended instead. For instance, a case might involve disputants who expect to have future dealings but who also are unusually angry or emotional. The mediator might feel that the disputants could mediate constructively despite their anger in some cases, but reach the opposite conclusion in others. Or the case's other characteristics and goals might suggest that, overall, one approach would be more beneficial than the other. These circumstances could result both in no apparent relationship between each of the individual characteristics and how the mediation began and in a statistically significant discriminant analysis, because the latter takes into consideration the direction of the relationships that the different items have with how the mediation began.

C. *The Mediators' Practice and Professional Background*

In this section, we examine the relationships between aspects of the mediators' mediation and non-mediation practice and their professional background and whether their most recent case began in joint session or in separate caucuses.

FACTORS RELATED TO HOW THE INITIAL MEDIATION SESSION BEGINS

1. *How Frequently the Mediators Usually Begin in Joint Session*[149]

In both civil and family cases, how frequently the mediators typically use joint opening sessions in the type of disputes they usually mediate in their practice was strongly related to whether the mediation in their most recent case began in joint session.[150] Specifically, mediators in civil cases who often (i.e., more than two-thirds of the time) or always begin in joint session were *more likely* to begin in joint session in their most recent case (94%) than mediators who begin in joint session one-third to two-thirds of the time (64%), who in turn were *more likely* to begin in joint session than mediators who seldom (i.e., fewer than one-third of the time) or never begin in joint session (19%). A similar pattern was seen in family cases: Mediators who often or always begin in joint session were *more likely* to begin in joint session in their most recent case (88%) than mediators who begin in joint session one-third to two-thirds of the time (44%), who in turn were *more likely* to begin in joint session than mediators who seldom or never begin in joint session (18%).

2. *The Mediator's Professional Background*[151]

In civil cases, the mediation was *more likely* to begin in joint session when the mediator had only a non-legal background (95%) than when the mediator had a mixed background (both legal and non-legal training) (85%), and was *least likely* to begin in joint session when the mediator had only a

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[149] Almost one-third of both civil and family mediators (30% and 32%, respectively) said they always begin the mediation in joint session in the type of disputes they most frequently mediate, and around another third (36% and 34%, respectively) said they begin in joint session more than two-thirds of the time but less than always. A smaller proportion of civil and family mediators said they never begin the mediation in joint session in the type of disputes they most frequently mediate (13% and 11%, respectively) or begin in joint session more than never but less than one-third of the time (11% each). Only 10% of civil mediators and 12% of family mediators showed considerable variation in their approach to the initial session, beginning in joint session between one-third and two-thirds of the time.

[150] Civil cases: $\chi^2(2) = 314.75$, $p < .001$, $V = .71$. Family cases: $\chi^2(2) = 122.04$, $p < .001$, $V = .64$.

[151] A majority of both civil and family mediators (88% and 68%, respectively) had only a legal background, while a minority had only a non-legal background (3% and 21%, respectively). Approximately ten percent of both civil and family mediators had both legal and non-legal backgrounds. The most common non-legal backgrounds included mental health fields, business, construction or engineering, accounting, and conflict resolution.

legal background (71%).[152] In family cases, the mediation was *more likely* to begin in joint session when the mediator had only a non-legal background (84%) than when the mediator had only a legal background (62%) or had both backgrounds (54%).[153]

3. *THE MEDIATORS' NON-MEDIATION EVALUATIVE OR DECISIONMAKING ROLES*[154]

In both civil and family cases, how the mediation began was not related to whether the mediators had regularly served in one or more non-mediation evaluative or decisionmaking roles versus in none of those roles.[155] With regard to specific roles, in civil cases, there was a small relationship between the mediators having served regularly as an early neutral evaluator or other case evaluator and how the mediation began, but there was no relationship between having served as a judge or arbitrator and how the mediation began.[156] When the mediators had regularly served as a neutral case evaluator, the mediation was *less likely* to begin in joint session than when they had not served in that role (59% vs. 77%). In family cases, there was no relationship between having served in any specific role and how the mediation began.[157]

4. *THE MEDIATORS' PRACTICE VOLUME AND YEARS MEDIATING*[158]

In both civil and family cases, there was no relationship between the number of cases the mediator mediated per month and how the mediation began.[159] In civil cases, there was no relationship between how long the

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[152] $\chi^2(2) = 9.55$, $p < .01$, $V = .12$.

[153] $\chi^2(2) = 12.38$, $p < .01$, $V = .20$.

[154] Over two-thirds of the mediators who usually mediate civil cases (68%) and almost half of those who usually mediate family cases (47%) had regularly served as a neutral in one or more non-mediator roles where they made a formal decision, recommendation, or evaluation to resolve disputes. These roles included judge, arbitrator, early neutral evaluator or other case evaluator, and a role that involved making recommendations to the court about the children in family cases. We did not ask the mediators whether they had an evaluative mediation style.

[155] Civil cases: $p = .10$. Family cases: $p = .36$.

[156] Case evaluator: $\chi^2(1) = 16.72$, $p < .001$, $V = .17$; arbitrator, $p = .09$; judge, $p = .34$.

[157] p's ranged from .22 to .91.

[158] The civil and family mediators, respectively, had been mediating an average of sixteen and thirteen years, and mediated an average of five and six cases per month.

[159] Civil cases: $p = .051$. Family cases: $p = .69$.

mediators had been mediating and how the mediation began.[160] In family cases, the mediation was *more likely* to begin in joint session if the mediators had been mediating twenty years or longer (81%) than if the mediators had been mediating fewer than ten years (60%) or ten to twenty years (59%).[161]

D. *Other Aspects of the Mediation*

We also examined the relationships between several other aspects of the mediation and how the mediation began: time limits or time pressures on the mediation; whether the disputants had counsel; the person or entity the mediators said had the most influence on how the mediation began; the case referral source; and the state where the mediation took place.[162]

1. *MEDIATION TIME LIMITS OR PRESSURES*[163]

In civil cases, there was no relationship between whether the mediation had time limits or pressures and how the mediation began.[164] In family cases, there was a small relationship between time limits or pressures and how the mediation began, with the mediation being *more likely* to begin in joint session when the mediation had a time limit or some form of time pressure than when there were no time constraints (73% vs. 59%).[165]

2. *DISPUTANTS HAD LEGAL COUNSEL*[166]

Whether the disputants had legal counsel had a small relationship with how the mediation began in civil cases and a moderate relationship in family

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[160] $p = .18$.

[161] $\chi^2(2) = 12.69, p < .01, V = .21$.

[162] Some of these factors arguably could have been included in the section on dispute characteristics. We discuss them here instead because they are broader than the dispute itself and include the context in which the mediation occurs.

[163] This measure 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 of hours. There were time limits or pressures in 28% of civil cases and 54% of family cases.

[164] $p = .44$.

[165] $\chi^2(1) = 7.28, p < .01, V = .16$.

[166] In civil cases, both disputants had counsel in 89% of cases, one disputant had counsel in 5% of cases, and neither disputant had counsel in 6% of cases. In family cases, both disputants had counsel in 62% of cases, one disputant had counsel in 14% of cases, and neither disputant had counsel in 24% of cases.

cases.[167] In both civil and family cases, the mediation was *more likely* to begin in joint session when neither disputant had counsel (95% and 88%, respectively) than when one disputant had counsel (82% and 67%, respectively), and was *least likely* to begin in joint session when both disputants had counsel (72% and 57%, respectively).

3. *CASE REFERRAL SOURCE*[168]

The case referral source had a small to moderate relationship with how the mediation began in civil cases and a strong relationship in family cases. In civil cases, the mediation was *least likely* to begin in joint session in cases referred directly from mediation organizations or private providers (47%). The mediation was *more likely* to begin in joint session when the case was referred directly from the lawyers (71%), state court programs or judges (77%), the disputants (82%), or federal court programs or judges (85%).[169] In family cases, the mediation was *less likely* to begin in joint session when the case was referred directly from the lawyers (33%) than when it was referred directly from state court programs or judges (72%), and was *most likely* to begin in joint session when the case was referred directly from the disputants (88%) or from professional mediation organizations or private providers (88%).[170]

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[167] Civil cases: $\chi^2(2) = 11.04$, $p < .01$, $V = .13$. Family cases: $\chi^2(2) = 22.74$, $p < .001$, $V = .27$.

[168] The largest number of both civil and family cases were referred directly from court mediation programs/judges (42% and 39%, respectively) or directly from the lawyers (44% and 29%, respectively). Three percent of civil cases but 25% of family cases were referred directly from the disputants; 9% of civil cases and 5% of family cases were referred directly from professional mediation/ADR organizations or private mediation providers/firms; and a few were referred from other sources. Cases "directly referred" from the lawyers or the disputants could involve either private or court-connected mediation. *See supra* note 81 and accompanying text. There was a strong relationship between the mediators' usual referral source and the referral source in their most recent case (civil cases: $\chi^2(16) = 836.01$, $p < .001$, $V = .61$; family cases: $\chi^2(9) = 328.16$, $p < .001$, $V = .63$). A majority of the mediators in both civil and family cases got their most recent case from the same source as they typically get the cases they mediate (62% to 85% across sources), with the exception that only 16% of mediators whose most recent civil case was referred directly from the disputants usually get their cases from the disputants. *See supra* notes 79 and 80 and accompanying text for the distribution of the mediators' usual referral sources.

[169] $\chi^2(4) = 27.82$, $p < .001$, $V = .21$.

[170] $\chi^2(3) = 63.94$, $p < .001$, $V = .46$.

4. *THE PERSON OR ENTITY THE MEDIATOR SAID HAD THE MOST INFLUENCE ON HOW THE MEDIATION BEGAN*[171]

A majority of the mediators in civil and family cases (70% and 60%, respectively) said that they themselves had the most influence on how the mediation began.[172] Fewer than one-fifth said that the lawyers (17% and 14%, respectively) had the most influence on how the mediation began, and 5% and 16%, respectively, said that the disputants had the most influence. Few mediators in civil or family cases said that the law or the rules of the mediation program, court, or provider organization had the most influence (5% and 6%, respectively) or indicated some other primary influence on how the mediation began (4% each).[173]

What person or entity the mediators said had the most influence on whether to begin in joint session or in caucus had a moderate relationship with how the mediation began in civil cases and a strong relationship in family

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[171] The person or entity who the mediators *said* had the most influence on how the mediation began, or what they *said* their primary consideration usually is, might not be the *actual* primary influence or consideration. *See infra* note 173; *see, e.g.*, Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231, 247–49 (1977) (reporting research findings that people often make inaccurate assertions about what influences their assessments and behavior, based on shared or individual implicit causal theories).

[172] Although the question asked for the *single* person or entity with the *most* influence on how the mediation began in this case, there likely were multiple sources of influence. For instance, several mediators who said that they themselves had the most influence added a comment that their decision was made after consultation with the lawyers or the disputants. And a few mediators who chose "other" commented that "everyone agreed" or "both the lawyers and the disputants."

[173] A similar question with slightly different response options asked instead about the mediators' primary consideration in determining how to begin the mediation in the type of disputes they mediate most frequently. A similar majority of the mediators in both civil and family cases typically have a primary role in how their mediations begin, split between those who said that their usual primary consideration in determining how to begin the mediation is their sense of what would work best for the particular dispute (39% and 29%, respectively) and those who said that their general practice is their usual primary consideration (28% and 30%, respectively). Twenty percent of civil mediators but 9% of family mediators said that the lawyers' preferences was their usual primary consideration in determining how to begin the mediation; 7% and 24%, respectively, said that the disputants' preferences was their usual primary consideration. Few mediators (6% and 7%, respectively) said that the law or the rules of the mediation program, court, or provider organization was their usual primary consideration.

cases.[174] In civil cases, the mediation was *least likely* to begin in joint session when the mediators said that the disputants had the most influence on how the mediation began (34%), followed by when they said that the lawyers had the most influence (50%). The mediation was *more likely* to begin in joint session in civil cases when the mediators said that they themselves had the most influence on how the mediation began (81%), and was *most likely* to begin in joint session when the mediators said that the law or the rules of the program or organization (94%) had the most influence on how the mediation began. In family cases, the mediation was *least likely* to begin in joint session when the mediators said that the lawyers had the most influence on how the mediation began (17%), followed by when they said that the disputants had the most influence (50%). The mediation was *more likely* to begin in joint session when the mediators said that either they themselves (82%) or the law or the rules of the program or organization (85%) had the most influence on how the mediation began.

We also explored how the case referral source was related to which person or entity the mediators said had the most influence on how the mediation began. There was a small relationship between the referral source and who the mediators said had the most influence on how the mediation began in civil cases, and a moderate relationship in family cases.[175] In civil cases referred from the lawyers, the mediators were *more likely* to say that the lawyers had the most influence on how the mediation began (58%) than to say that the mediator (44%) had the most influence, and were *least likely* to say that the disputants had the most influence on how the mediation began (32%). In civil cases referred from state courts, the mediators were *more likely* to say that either the disputants (29%) or the mediator (28%) had the most influence on how the mediation began than to say that the lawyers had the most influence (15%).[176]

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[174] Civil cases: $\chi^2(3) = 75.06, p < .001, V = .35$. Family cases: $\chi^2(3) = 76.33, p < .001, V = .51$.

[175] Civil cases: $\chi^2(8) = 31.69, p < .001, V = .17$. Family cases: $\chi^2(6) = 45.90, p < .001, V = .29$. Cases in which the law or the rules of the program, court, or provider had the primary influence were excluded from these analyses because those laws or rules would have controlled how the mediation began, regardless of the referral source.

[176] There were only small differences in whom the mediator said had the most influence in civil cases referred from federal courts (10% to 17%), the disputants (0% to 16%), or mediation organizations/private providers (8% to 13%).

In family cases referred from the lawyers, the mediators were *more likely* to say that the lawyers had the most influence on how the session began (67%) than to say that either the disputants (31%) or the mediator (21%) had the most influence. In family cases referred from the disputants, the mediators were *more likely* to say that either the disputants (37%) or the mediator (30%) had the most influence on how the mediation began than to say that the lawyers had the most influence (2%). In family cases referred from state courts, the mediators were *more likely* to say that the mediator had the most influence on how the mediation began (45%) than to say that either the lawyers (29%) or the disputants (22%) had the most influence.[177]

5. *STATE WHERE THE MEDIATION TOOK PLACE*[178]

In both civil and family cases, there was a strong relationship between the state where the mediation took place and how the mediation began. In civil cases, the use of joint opening sessions was lowest in California and Utah (39% and 47%, respectively); intermediate in Michigan (67%); and highest in Illinois, New York, Florida, Maryland, and North Carolina (85% to 93%).[179] In family cases, there was a different pattern of joint opening sessions across the states. The use of joint opening sessions was lowest in North Carolina, Utah, and Florida (36% to 42%); intermediate in Michigan (60%); and highest in Maryland, California, New York, and Illinois (90% to 98%).[180] In three states, there were moderate to large differences in how frequently the civil and family cases began in joint session.[181]

We conducted additional analyses to see whether the above interstate differences in the use of joint opening sessions might be explained by the

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[177] There were only small differences in whom the mediator said had the most influence in family cases referred from mediation organizations or private providers (2% to 10%).

[178] *See supra* note 82 and accompanying text for the distribution of cases by state. This is the state where the mediators' most recent mediation took place. Although this is likely to be the same state in which most of the mediators primarily practice, some might mediate more cases in another state.

[179] $\chi^2(7) = 165.35$, $p < .001$, $V = .52$.

[180] $\chi^2(7) = 94.58$, $p < .001$, $V = .55$.

[181] In Florida and North Carolina, the mediation was *more likely* to begin in joint session in civil cases than in family cases (Florida, $\chi^2(1) = 37.87$, $p < .001$, $V = .49$; North Carolina, $\chi^2(1) = 42.48$, $p < .001$, $V = .60$). In California, the mediation was *less likely* to begin in joint session in civil cases than in family cases ($\chi^2(1) = 18.67$, $p < .001$, $V = .32$). There was no difference in the five other states; *p*'s ranged from .*19* to .*93*.

moderate differences across the states in the proportion of cases referred from different sources,[182] given that the referral source also was related to how the mediation began.[183] To control for the case referral source, we repeated the above analyses of interstate differences in joint opening sessions looking separately at cases referred directly from state courts and cases referred directly from the lawyers.[184]

In civil cases, the pattern of interstate differences in joint opening sessions was largely similar in cases referred from state courts and in cases referred from the lawyers. Specifically, the use of joint opening sessions was lowest in Utah (36% for lawyer referrals) and California (38% for state court and 44% for lawyer referrals); intermediate in Michigan (67% for state court and 54% for lawyer referrals); and highest in the rest of the states (87% to 97% for state court and 85% to 94% for lawyer referrals).[185] Given that there was a similar pattern of differences among the states when looking separately at

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[182] Civil cases: $\chi^2(28) = 302.01$, $p < .001$, $V = .36$. Family cases: $\chi^2(21) = 73.78$, $p < .001$, $V = .28$. For instance, the proportion of civil cases referred from state courts was much higher in Maryland (67%) than in the other states (17% to 31%), and the proportion of civil cases referred from federal courts was much higher in New York (57%) than in the other states (0% to 12%). Broadly speaking, the proportion of civil cases referred from the lawyers was highest in Florida, North Carolina, and Utah (65% to 70%), intermediate in Illinois, Michigan, and California (44% to 52%), and lowest in New York and Maryland (16% and 23%, respectively). Among family cases, the proportion of cases referred from state courts was lower in Utah and California (each 20%) than in the other states (35% to 51%). The proportion of family cases referred from the lawyers was lowest in Maryland, New York, and California (8% to 12%), intermediate in Florida, Illinois, Utah, and Michigan (24% to 43%), and highest in North Carolina (59%). The proportion of cases referred by the disputants was lowest in North Carolina (5%), followed by Florida and Illinois (14% and 20%); higher in Utah, Michigan, and Maryland (28% to 36%); and successively higher in New York (47%) and California (60%). The relative proportion of cases from different referral sources within each state, and the differences in referral sources across the states, in part reflects the available online sources from which we drew the sample of mediators in each state.

[183] *See supra* notes 169–70 and accompanying text.

[184] There were not enough cases referred from federal courts, mediation organizations/private providers, or the disputants to be able to analyze interstate differences separately in those sets of cases. Even for cases referred from the lawyers or from state courts, there were not sufficient cases in some of the states to include them in all of the analyses, as noted *infra* for each analysis.

[185] State court referrals, $\chi^2(5) = 49.35$, $p < .001$, $V = .56$ (excluding Utah and Illinois due to insufficient cases); lawyer referrals, $\chi^2(7) = 62.69$, $p < .001$, $V = .48$ (including all states).

cases referred from state courts and at cases referred from the lawyers, and that each was similar to the pattern seen for all cases, the interstate differences in the frequency of joint opening sessions in civil cases do not appear to be due to underlying differences in referral sources among the states.

In family cases, however, the pattern of joint opening sessions in a number of states was different in cases referred from state courts than in cases referred from the lawyers. In cases referred from state courts, the use of joint opening sessions was lowest in Utah and North Carolina (25% and 29%, respectively); intermediate in Florida (54%); and successively higher in Michigan (73%), Illinois (88%), and Maryland (100%).[186] By contrast, in family cases referred from the lawyers, the use of joint opening sessions was lowest in Michigan (0%), Florida (8%), and Utah (13%); higher in North Carolina (35%); and highest in Illinois (100%).[187] The different pattern of joint opening sessions in cases referred from state courts versus in cases referred from the lawyers suggests that the interstate differences in the frequency of joint opening sessions in family cases could in part be due to differences among the states in the proportion of cases referred from different sources.

Several other factors that had small to moderate relationships with how the mediation began also differed across the states, with small differences in civil cases and moderate differences in family cases. These included whether the mediator had a legal background,[188] whether the disputants had counsel,[189] and in family cases, the case subtype.[190] However, there were too few cases in some subgroups of these factors to be able to analyze them separately.[191] In addition, in civil cases, the subgroups of cases with sufficient

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[186] State court referrals, $\chi^2(5) = 37.85$, $p < .001$, $V = .59$ (excluding California and New York due to insufficient cases).

[187] Lawyer referrals: $\chi^2(4) = 39.57$, $p < .001$, $V = .70$ (excluding California, New York, and Maryland due to insufficient cases).

[188] Civil cases: $\chi^2(7) = 17.80$, $p < .05$, $V = .17$. Family cases: $\chi^2(7) = 38.60$, $p < .001$, $V = .36$. *See supra* notes 152–53 and accompanying text.

[189] Civil cases: $\chi^2(14) = 52.58$, $p < .001$, $V = .21$. Family cases: $\chi^2(14) = 40.54$, $p < .001$, $V = .26$. *See supra* note 167 and accompanying text.

[190] $\chi^2(14) = 76.49$, $p < .001$, $V = .35$. *See supra* note 142 and accompanying text.

[191] These included cases in which the mediators had a non-legal background instead of or in addition to a legal background; in which neither or one disputant had counsel; and in which the dispute involved only custody/visitation issues or only financial issues. *See supra* notes 78, 151, 166 and accompanying text.

numbers to permit analysis accounted for most of the cases,[192] which would inevitably produce patterns similar to those using the full set of cases and not contribute meaningful information. Consequently, we explored whether underlying differences among the states in these case characteristics might play a role in the interstate differences in joint opening sessions only in family cases[193] by comparing the pattern of findings for the subsets of cases that had sufficient numbers to the pattern of findings for the full set of family cases.

In family cases where the mediator had only a legal background, the pattern of interstate differences in the use of joint opening sessions was similar to that seen above for all family cases.[194] In family cases where both disputants had counsel, the overall pattern of interstate differences in the use of joint opening sessions was similar to that seen for all family cases, but the relative position of a few states within the lower-use and higher-use groups was different.[195] Finally, in cases involving two or more divorce-related issues, the overall pattern of interstate differences in the use of joint opening sessions was similar to that seen for all family cases, but the relative position of a few states,

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[192] These included cases in which the mediators had only a legal background and in which both disputants had counsel. *See supra* notes 151, 166 and accompanying text.

[193] In family cases, the proportion of mediators with only a legal background was lowest in New York, Maryland, and Utah (44% to 51%); intermediate in Florida and Illinois (65% and 74%, respectively); and highest in California, Michigan, and North Carolina (83% to 95%). The proportion of cases in which both disputants had counsel was lower in California and New York (37% and 45%, respectively) than in Michigan, Utah, and Maryland (53% to 55%), and successively higher in Florida (65%), Illinois (74%), and North Carolina (87%). The proportion of cases involving multiple divorce-related issues was lowest in Illinois and New York (39% and 45%, respectively) and higher in each of the remaining states (California, 53%; Maryland, 58%; North Carolina, 60%; Michigan, 62%; Florida, 68%; and Utah, 72%).

[194] $\chi^2(7) = 61.26, p < .001, V = .56$. When the mediators had only a legal background, the use of joint opening sessions was lowest in Utah, Florida, and North Carolina (26% to 38%); intermediate in Michigan (65%); and highest in New York, Illinois, California, and Maryland (88% to 96%). *Cf. supra* note 180 and accompanying text.

[195] $\chi^2(7) = 82.87, p < .001, V = .66$. When both disputants had counsel, the use of joint opening sessions was lowest in Florida (19%), followed by Utah and North Carolina (27% and 35%, respectively); intermediate in Michigan (50%); and highest in California, New York, Illinois, and Maryland (86% to 96%). *Cf. supra* note 180 and accompanying text.

particularly California, was different.[196] These findings suggest that, for the most part, the interstate differences in joint opening sessions in family cases do not appear to be due to underlying differences in these factors among the states, but that they might play a small role.

E. *Summary: Factors That Were Related to How the Mediation Began*[197]

In both civil and family cases, the factor that was by far the most strongly related to how the mediation began was how frequently the mediators typically begin their mediations in joint sessions as part of their usual mediation practice (see Table 1). The state where the mediation took place also was strongly related to how the mediation began in both civil and family cases. The person or entity that the mediators said had the most influence on the decision how to begin the mediation, the combined set of dispute characteristics and disputant goals, and the case referral source each had a moderate relationship with how the mediation began in civil cases and a strong relationship in family cases. These five factors had the strongest relationships with whether the mediation began in joint session or caucus in both civil and family cases. Looking at these and all other factors, somewhat fewer factors were related to how the mediation began in civil cases than in family cases, and the size of the relationships tended to be smaller in civil cases than in family cases.

Several factors involving pre-session communications had small or no relationships with how the mediation began in civil cases but were moderately related in family cases. These included whether the disputants were present during pre-session communications; whether the mediators explored if the disputants would be okay being together in the same room; whether the mediators explained the mediation process, their approach, and confidentiality; and whether the mediators discussed the disputants' legal theories and surrounding facts (see Table 1). The only other pre-session factor

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[196] $\chi^2(7) = 58.28, p < .001, V = .57$. When cases involved two or more divorce-related issues, the use of joint opening sessions was lowest in Utah, North Carolina, and Florida (31% to 40%); intermediate in Michigan (50%); and successively higher in California (80%) and in Illinois, Maryland, and New York (95% to 100%). *Cf. supra* note 180 and accompanying text.

[197] The focus of this section is on the *strength* of the relationships of those factors that were related to how the mediation began in either civil or family cases or both. For the nature and the direction of these relationships, as well as the factors that were not related to how the mediation began in either civil or family cases, see *supra* Sections IV.A.–D.

that had a small relationship with how the mediation began in civil cases, but had no relationship in family cases, was whether the mediator had case information or documents before the first session.

The individual dispute characteristics and disputant goals for the mediation generally had small or no relationships with how the mediation began, notwithstanding their larger combined relationship noted above. The main exception was that the disputants' goal of talking directly about the matter with the other disputant had a moderate relationship with how the mediation began in family cases, but only a small relationship in civil cases (see Table 1). Several other case characteristics and goals had no relationship with how the mediation began in civil cases, but had mostly small relationships in family cases. These included the case subtype; the goals of ending their relationship amicably, restoring or preserving their relationship, settling the matter and being done with it, feeling heard, or keeping the matter confidential; and whether the lawyers were unusually angry or emotional. Several other disputant goals had small relationships with how the mediation began in civil cases but had no relationships in family cases, including wanting to hear a neutral person's views, reduce costs, control the outcome, and resolve broader issues.

The only mediator practice and background characteristic that was strongly related to how the mediation began in both civil and family cases, as noted above, was how frequently the mediators typically use joint opening sessions in their mediation practice. Whether the mediators had a non-legal background instead of or in addition to a legal background had a small relationship with how the mediation began in both civil and family cases (see Table 1). Whether the mediators had mediated twenty or more years was not related to how the mediation began in civil cases, but had a small relationship in family cases. And whether the mediators had served regularly as an early neutral evaluator or other case evaluator had a small relationship with how the mediation began in civil cases, but had no relationship in family cases.

As to other aspects of the mediation, as noted above, the state in which the mediation took place, the person or entity who had the most influence on how the mediation began, and the case referral source had moderate to strong relationships with how the mediation began in both civil and family cases (see Table 1). Whether the disputants had counsel had a small relationship with how the mediation began in civil cases and a moderate relationship in family cases. Whether the mediation had time constraints had no relationship with

how the mediation began in civil cases, but had a small relationship in family cases.

Table 1. Summary: Factors That Were Related to the Mediation Beginning in Joint Session*

	Civil Cases	***Family Cases***
Mediator more frequently begins in joint session	.71	.64
State where the mediation took place	.52	.55
Who mediators said had the most influence on how the mediation began	.35	.51
All case characteristics and goals combined	.29	.48
Case referral source	.21	.46
Pre-session, disputants were present (prior to / same day)	*ns / ns*	.30 / .40
Pre-session, mediator explored if disputants OK together (prior to / same day)	(.11) / *ns*	.38 / (.32)
Disputants had goal of talking directly with the other	.16	.37
Pre-session, prior to: mediators explained process, approach, confidentiality	*.12, ns, ns*	.31, .30, .20
Pre-session, mediators discussed disputants' legal theories & facts (prior to / same day)	*ns / ns*	(.28) / (.31)
Disputants had counsel	(.13)	(.27)
Case subtypes	*ns*	.22
Mediator mediated twenty or more years	*ns*	.21
Mediator has only a non-legal background	.12	.20
Disputants had goals of ending relationship amicably, restoring or preserving relationship	*ns, ns*	.19, .16
Mediator served as neutral case evaluator	(.17)	*ns*
Pre-session, mediator had some case information	(.16)	*ns*
Mediation had time limits or pressures	*ns*	.16
Disputants had goal of settling & being done with it	*ns*	(.16)
Unusually angry or emotional lawyers	*ns*	(.14)
Disputants had goals of feeling heard, keeping matter confidential	*ns, ns*	.13, .13
Disputants had goals of hearing neutral's views, reducing costs	(.13), (.13)	*ns, ns*
Disputants had goals of controlling outcome, resolving broader issues	(.09), .08	*ns, ns*

** The numbers indicate the strength of the relationship, ranging between 0 and 1. Numbers <u>not</u> in parentheses indicate that factor is associated with <u>more</u> joint opening sessions, while numbers inside parentheses indicate that factor is associated with <u>fewer</u> joint opening sessions. ns = not a statistically significant relationship.*

F. *Additional Analyses: Factors Related to the Mediators' Customary Practice*

Because the factor that was most strongly related to how the mediation began in the mediators' most recent case was how frequently the mediators said they use joint opening sessions in their mediation practice (see Table 1), we conducted additional analyses to explore which other general (i.e., not case specific) factors and aspects of the mediators' background were related to how frequently the mediators use joint opening sessions in their mediation practice.[198]

The state where they mediate[199] was the factor that had the strongest relationship with how frequently the mediators use joint opening sessions in their mediation practice, with moderate relationships for both civil and family mediators.[200] For civil mediators, there was no relationship between the mediators' single most frequent source of the disputes they typically mediate and how frequently they use joint opening sessions in their mediation practice; for family mediators, their usual referral source was moderately related to how frequently the mediators use joint opening sessions in their mediation practice.[201] For civil mediators, there was a small relationship between what the mediators said is typically their primary consideration in determining whether to use joint opening sessions and how frequently they use joint opening sessions in their mediation practice; there was a moderate relationship

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[198] In order to have sufficient cases for analysis, we combined mediators who said they never begin mediation in joint session with those who said they begin in joint session less than one-third of the time but more than never. We did the same for mediators who said they often or always start in joint session in order to have comparable groups.

[199] *See supra* note 178.

[200] Civil mediators: $\chi^2(14) = 157.07$, $p < .001$, $V = .36$. Family mediators: $\chi^2(14) = 89.71$, $p < .001$, $V = .39$. The pattern of relative differences across the states in whether the mediators often or always use joint opening sessions in their mediation practice was generally similar to the pattern of differences across the states in their use of joint opening sessions in their most recent case. *See supra* notes 179–80 and accompanying text.

[201] Civil mediators: $p = .17$. Family mediators: $\chi^2(6) = 62.05$, $p < .001$, $V = .33$. The pattern of relative differences across the mediators' usual referral sources in whether the mediators often or always use joint opening sessions in their mediation practice was generally similar to the pattern of differences across referral sources in their use of joint opening sessions in their most recent case. *See supra* note 170 and accompanying text.

for family mediators.[202] It is worth noting that 73% of civil mediators and 76% of family mediators who said their typical primary consideration is "their general practice" often or always use joint opening sessions in their mediation practice, and 62% of civil mediators and 66% of family mediators who said their typical primary consideration is their "sense of what would work best for the particular case" often or always use joint opening sessions.

The mediators' professional background and aspects of their mediation practice had small or no relationships with how frequently they use joint opening sessions in their mediation practice. For both civil and family mediators, there was a small relationship between the mediators' legal background and how frequently they use joint opening sessions in their mediation practice, with mediators who had only a non-legal background being *more likely* than those who had a legal background to often or always use joint opening sessions.[203] Family mediators who had regularly served in one or more non-mediation roles where they evaluate or decide cases were *less likely* to often or always use joint opening sessions in their mediation practice than were those who had not served regularly in any of those roles, but there was no relationship for civil mediators.[204] There was a small relationship between mediating more cases per month and being *less likely* to often or always use joint opening sessions in their mediation practice for civil

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[202] Civil mediators: $\chi^2(8) = 32.67$, $p < .001$, $V = .16$. Family mediators: $\chi^2(8) = 36.67$, $p < .001$, $V = .25$. We cannot directly compare this question with the question that asked what person or entity had the most influence on how the mediation began in the mediators' most recent case because some of the response options were different in the two questions. However, consistent with the findings for the most recent case, when mediators said their usual primary consideration was the lawyers' or the disputants' preferences, they generally were *less likely* to often or always use joint opening sessions in their mediation practice, and they were *most likely* to often or always use joint opening sessions in their mediation practice when the law or rules of the program or organization was their primary consideration. *See supra* note 174 and accompanying text.

[203] Civil mediators: $\chi^2(2) = 6.39$, $p < .05$, $V = .10$. Family mediators: $\chi^2(2) = 6.04$, $p < .05$, $V = .14$. This is a similar pattern to that seen in the mediators' most recent case. *See supra* notes 152–153 and accompanying text.

[204] Civil mediators: $p = .90$. Family mediators: $\chi^2(2) = 9.53$, $p < .01$, $V = .18$. When looking at specific roles, civil mediators who had regularly served as an early neutral evaluator or other case evaluator were *less likely* to often or always use joint opening sessions in their mediation practice than were mediators who had not served in that role ($\chi^2(2) = 11.72$, $p < .01$, $V = .14$; other roles, p's ranged from $.70$ to $.92$). Family mediators who had served as a judge were *less likely* to often or always use joint opening sessions in their mediation practice than were mediators who had not served as a judge ($\chi^2(2) = 7.52$, $p < .05$, $V = .16$; other roles, p's ranged from $.08$ to $.86$).

mediators, but there was no relationship for family mediators.[205] There was no relationship between how long either civil or family mediators had been mediating and how frequently they use joint opening sessions in their mediation practice.[206]

In sum, the mediators' customary approach to the initial mediation session appears to be influenced more by the mediation practice culture and norms in the state and, in family cases, by their usual case referral source, than by other aspects of their background or mediation practice.

V. DISCUSSION AND IMPLICATIONS OF THE FINDINGS[207]

The present study examined whether a number of factors were related to how the mediation began, focusing on those thought to explain the decreased use of joint opening sessions in general, as well as those recommended to be considered when deciding how to begin the mediation in a particular case. In this section, we discuss what the findings tell us about the role that pre-session communications, case characteristics, the state in which the mediation was held, the lawyers, and the mediators appear to play in the use of joint opening sessions.

First, some assert that joint opening sessions are not needed because several of their original functions—to help the participants understand the mediation process, to gain an understanding of the dispute, and to assess the disputants—can instead be accomplished through document submissions and pre-session communications with the disputants or their lawyers.[208] For the most part, the findings do not show a pattern that would be expected if pre-session discussions and submissions have replaced joint opening sessions.

In both civil and family cases, there was no relationship between whether the mediators did or did not have pre-session communications and how the mediation began. Whether the disputants themselves were present during pre-session communications was not related to how the mediation began in civil cases but was moderately related to having more joint opening sessions in family cases. This might suggest that mediators in family cases feel

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[205] Civil mediators: $r(594) = -.10$, $p < .05$. Family mediators: $p = .06$.

[206] Civil mediators: $p = .52$. Family mediators: $p = .07$.

[207] The summary of the factors related to mediators' use of joint opening sessions in this section is a simplified overview of the main findings. For more details and additional findings, see *supra* Section IV.

[208] *See supra* Sections II.A.1–2, 4.

more comfortable proceeding with a joint opening session after having a chance to directly speak with and assess the disputants. Having access to some versus no case information or documents before the first mediation session had a small relationship with fewer joint opening sessions in civil cases but had no relationship in family cases.

In addition, few of the specific process actions the mediators engaged in or the particular substantive issues they discussed during pre-session communications were related to how the mediation began in either civil or family cases. Explaining the mediation process had a small relationship with more joint opening sessions in civil cases, and explaining the process, the mediators' approach, and confidentiality were moderately related to more joint opening sessions in family cases. Only one of the mediators' actions that might inform their decision whether to begin in joint session or caucus—exploring whether the disputants would be okay being together in the same room—had a small relationship with how the mediation began in civil cases but a moderate relationship in family cases; the direction of these relationships depended on whether this concern was explored during communications held prior to versus on the same day as the first session. Only one substantive item, exploring the disputants' legal theories and surrounding facts, was moderately related to having fewer joint opening sessions in family cases, but had no relationship in civil cases. It is possible, however, that the lack of relationships for some of the process and substantive matters might reflect that different mediators learned information that led to different decisions about how to begin the mediation.

Moreover, in both civil and family cases, mediators who engaged in specific process actions or discussed particular substantive matters during pre-session communications generally were more likely to engage in that same action or discuss that same issue during the initial mediation session. There were no process or substantive matters that mediators were less likely to explore during the opening session after having explored them during pre-session communications. In sum, the findings suggest that, for the most part, aspects of the mediators' pre-session practice are not associated with fewer joint opening sessions or with less frequent discussion of basic process and substantive matters during the initial mediation session.

Second, many mediators and lawyers recommend that joint opening sessions be used in cases that involve certain characteristics and disputant

goals, but be avoided in cases with other characteristics and goals.[209] None of the individual case characteristics in civil cases were related to how the mediation began, and only two characteristics in family cases had small to moderate relationships. Among the characteristics that showed no relationship were some for which joint opening sessions are recommended, such as when the dispute involves expected future dealings or non-monetary issues, as well as others for which initial caucuses are suggested, such as when the dispute involves coercion or unusually angry or emotional disputants.

More of the disputants' goals for the mediation, approximately half, were related to how the mediation began, although most of these relationships were small in both civil and family cases. Wanting to talk directly about the matter with the other disputant was related to more joint opening sessions in both civil and family cases and was the goal that had the strongest relationship. The fact that all of the communication and relationship goals were related to more joint opening sessions in family cases is consistent with recommendations that joint opening sessions be used when disputants have those goals and suggests that face-to-face discussions are viewed as better able to accomplish them than separate caucuses.[210]

When taking into consideration all of the case characteristics and goals as a group, together they had a moderate relationship with how the mediation began in civil cases and a strong relationship in family cases. The larger relationship seen for the total group might be explained by the cumulative, small contributions of multiple characteristics and goals that led to the same decision about how to begin the mediation. Or it might reflect that the combined analysis takes into consideration when some of the characteristics and goals in a particular case have opposite relationships with how the mediation began, which the separate analyses of each characteristic do not.

In sum, disputant goals, particularly those involving communication and relationship concerns in family cases, play a larger role in how the mediation begins than do case characteristics. Case characteristics and goals have a stronger relationship with how the mediation begins when they are combined as a group than they do individually. But even then, they have a smaller relationship than several other factors, discussed below, that apply more broadly across the mediators' caseload. Thus, contrary to some

[209] *See supra* Section II.B.
[210] *See supra* notes 28–29, 47 and accompanying text.

recommendations,[211] tailoring the initial mediation session to the needs of the individual case is not the primary factor in whether the mediation begins in joint session or separate caucuses.

Third, other studies involving the private mediation of large civil and commercial cases have reported regional differences in the use of joint opening sessions, and joint sessions more generally, with lower use in California and the western United States than in other regions of the country.[212] The present study found that the state where the mediation took place was strongly related to how the mediation began in both civil and family cases. In civil cases, the pattern was similar to that above: joint opening sessions were least likely in California and Utah, intermediate in Michigan, and most likely in Illinois, Florida, North Carolina, Maryland, and New York. But a somewhat different pattern was seen in family cases: joint opening sessions were least likely in North Carolina, Utah, and Florida, intermediate in Michigan, and most likely in Illinois, California, New York, and Maryland.

Thus, there were differences in the use of joint opening sessions between states within a single region, as well as similarities in their use among states in different regions. Importantly, in three states, the use of joint opening sessions differed between civil and family cases. It is not clear, however, whether the latter finding suggests that the mediation culture differs between civil and family cases in some states, or whether some other difference between civil and family cases might explain the differences in the frequency of joint opening sessions within a state. Additional analyses suggested that, in family cases but not in civil cases, the differences in joint opening sessions across the states might in part be explained by underlying interstate differences in referral sources and, to a lesser extent, by differences in several case characteristics.

Fourth, several studies have reported that lawyers generally do not want to use joint opening sessions, and some have noted that mediators defer to the lawyers' preferences out of concerns about future case referrals, resulting in fewer joint opening sessions.[213] Some also have suggested that mediators with a legal background and those who use an evaluative approach

[211] *See supra* note 45 and accompanying text.
[212] *See supra* note 67 and accompanying text.
[213] *See supra* notes 53, 63–66 and accompanying text.

are less likely than other mediators to use joint opening sessions.[214] Several sets of interrelated findings bear on these issues.

Looking first at the mediators, in both civil and family cases, the mediation was less likely to begin in joint session when the mediators had a legal background than when they had only a non-legal background, though the relationships were small. Whether the mediators had regularly served in one or more non-mediation evaluative or decisionmaking roles versus having served in none of those roles was not related to how the mediation began in either civil or family cases. However, having served specifically as an early neutral evaluator or other case evaluator had a small relationship with fewer joint opening sessions in civil cases; none of the other specific evaluative or decisionmaking roles were related to how the mediation began in civil or family cases.

Looking next at the disputants' lawyers, their influence on whether the mediation begins in joint session operates through multiple avenues. The mediation was less likely to begin in joint opening session when both disputants had counsel than when one or neither disputant had counsel in both civil and family cases. In addition, the mediation was less likely to begin in joint opening session in both civil and family cases when the case was referred directly from the lawyers than when the case was referred directly from the courts or the disputants.[215] When the case was referred from the lawyers, the mediators in both civil and family cases were more likely to say that the lawyers had the most influence on how the mediation began than to say that the mediators themselves or the disputants had the most influence. Moreover, when the mediators said that the lawyers had the most influence on how the mediation began, the mediation was less likely to start in joint session in both

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[214] *See supra* note 54 and accompanying text.

[215] In addition, both of these factors were related to whether the mediator had a legal background, such that cases where one or both disputants had counsel or that were referred from the lawyers also were more likely to have mediators who had a legal background. Mediators were more likely to have a legal background than to have only a non-legal background when one or both disputants had counsel (civil: 96% vs. 60%, $\chi^2(1) = 48.06$, $p < .001$, $V = .28$; family: 79% vs. 62%, $\chi^2(1) = 6.86$, $p < .01$, $V = .15$). In family cases, mediators were more likely to have a legal background than to have only a non-legal background when the case was referred from the lawyers (93%) than from state courts (78%) or from the disputants or from organizations/private providers (69% and 60%, respectively) ($\chi^2(3) = 17.37$, $p < .001$, $V = .25$); there were too few civil mediators with only a non-legal background to examine differences among referral sources.

civil and family cases than when the mediators said they themselves had the most influence.

Taken together, this series of analyses suggests that lawyers are less likely to want a joint opening session than mediators, and that part of their influence on how the mediation begins is through their role as a source of cases. In civil cases, however, the mediation was even less likely to begin in joint session when the case was referred directly from mediation organizations or private ADR providers than directly from the lawyers.[216] Additionally, in both civil and family cases referred from the state courts, the mediators generally were more likely to say that they themselves or the disputants had the most influence on how the mediation began than to say that the lawyers had the most influence. This was even though the lawyers had the opportunity to choose the mediator in many state court mediation programs.[217] Thus, the mechanism underlying the influence that different referral sources have on how the mediation begins seems to be not only through their ability to provide the mediators with future mediation business but also as a source of a mediation practice norms and culture regarding the initial mediation session.

The above discussion of the role that various factors appear to play in whether the mediation begins in joint session versus in separate caucuses needs to be placed in the context of the large role that the mediators themselves play. A majority of the mediators in both civil and family cases said that they themselves had the most influence on how the mediation began. The mediators in both civil and family cases had a generally consistent approach to the initial mediation session: almost half said they use a single approach in all of their cases, and almost half said they use a single approach in the majority of their cases.[218] In addition, the factor that had by far the strongest relationship with whether the mediators' most recent case began in joint session was how frequently the mediators use joint opening sessions in the disputes they typically mediate. Thus, many mediators' largely consistent approach to the

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[216] The opposite pattern was seen in family cases: the mediation was more likely to begin in joint session when the case was referred from organizations or private providers than from the lawyers.

[217] *See supra* note 81 and accompanying text.

[218] *See also* MEDIATION QUALITY, *supra* note 11, at 12–13 (noting that some mediators, lawyers, and disputants "rely upon essentially identical approaches to every case"). In both civil and family cases, mediators who said that they often or always use a single approach or that their typical primary consideration in determining how to begin the mediation is their general practice were three times as likely to use joint opening sessions as separate caucuses.

initial mediation session across their mediation practice helps to explain why the combined set of case characteristics and goals, as well as other factors, did not have a stronger relationship with how the mediation began.

A number of factors were associated with the mediators' customary use of either joint opening sessions or separate caucuses. The state was moderately related to the mediators' usual approach in both civil and family cases. The mediators' most frequent referral source and their typical primary consideration in determining how to begin the mediation, respectively, had no or small relationships with the mediators' customary approach to the initial session in civil cases, but had moderate relationships in family cases. Other factors, including the mediators' legal background, having served in non-mediation evaluative and decisionmaking roles, number of cases mediated per month, and years mediating had no or only small relationships with the mediators' usual approach to the initial session in both civil and family cases. These findings suggest that the mediators' customary approach to the initial mediation session is influenced more by the mediation practice culture and norms in the state and, in family cases, by their usual case referral source, than by other aspects of their background or mediation practice.

Finally, by expanding beyond the types of cases (large civil and commercial cases), mediation settings (private mediation), and referral sources (lawyers or private mediation providers) that formed the basis of most of the recent prior studies,[219] the present study advances our knowledge of the use of initial joint sessions and initial separate caucuses. Although many of the same factors were related to how the mediation session began in both civil and family cases, fewer factors were related to the use of joint opening sessions, and they tended to have smaller relationships in civil cases than in family cases. And some factors that were related to how the mediation began in both civil and family cases nonetheless showed different patterns in the two types of cases, such as the patterns among different states, referral sources, and the person or entity who the mediator said had the most influence on how the mediation began. In addition, by including cases referred from state and federal courts and from the disputants, we were able to see that different referral sources are associated with different rates of joint opening sessions

[219] *See supra* note 8 and accompanying text.

and to gain a broader understanding of the possible ways that referral sources influence how the mediation begins.[220]

VI. CONCLUSION

The present Article reports the findings of the first comprehensive empirical study to examine whether a number of dispute, mediator, and mediation process factors are related to the use of initial joint sessions versus initial separate caucuses. The findings show that a majority of mediators in both civil and family cases say that they themselves have the most influence on how the mediation begins, and many mediators say that they often or always begin the first mediation session in the same way in the disputes they typically mediate. Moreover, the mediators' customary approach to the initial mediation session is the factor most strongly related to whether the mediation in a particular case begins in joint session or in separate caucuses. Other factors that are moderately or strongly related to how the mediation begins are the state where the mediation took place, what person or entity the mediators say had the most influence on how the mediation began, the combined set of case characteristics and goals, and the case referral source.

For the most part, aspects of the mediators' pre-session practice are not associated with fewer joint opening sessions or with less frequent discussion of basic process and substantive matters during the initial mediation session. Lawyers appear to be less likely than mediators to want joint opening sessions and have influence on how the mediation begins through multiple avenues. Overall, the strong role played by factors that apply broadly across the mediators' practice, especially the mediators' usual approach to the opening session and the state, might explain why case characteristics and other more case-specific factors do not have stronger relationships with how the mediation begins. Taken together, the findings suggest that recommendations to determine the structure of the opening mediation session on a case-by-case basis and tailor it to the needs of the disputants and the dispute are largely disregarded.[221]

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[220] The present study's inclusion of referral sources associated with a higher rate of joint opening sessions might explain why there were more joint opening sessions in civil cases in the present study than in prior studies. *See supra* note 8 and accompanying text.

[221] *See, e.g.*, Bassis, *supra* note 6, at 32–33 (habit should not drive process decisions); MEDIATION QUALITY, *supra* note 11, at 12–13 (noting that many mediation users complained about a "cookie cutter" approach and preferred a flexible approach and a process customized to the case).

The present study helps lay the groundwork for future empirical research using different methodologies and data sources[222] that could provide more detailed and contemporaneous information about the decisionmaking process regarding how to begin the mediation as well as the interplay of the mediators, lawyers, and disputants in that decision. This could include examining what the mediators know about the dispute and the disputants' goals at the time they are considering which approach to use, as well as what the lawyers and disputants know about how joint opening sessions or separate caucuses, or other approaches, might be beneficial or detrimental to achieving those goals and resolving the particular dispute. Additional research could also explore what leads mediators to adopt a standard approach to the initial mediation session in many of their cases and under what circumstances they depart from that approach.

[222] *See* A.B.A. SEC. DISP. RESOL., REPORT OF THE TASK FORCE ON RESEARCH ON MEDIATOR TECHNIQUES 59–60 (2017).