

MEDIATORS' VIEWS OF WHAT CAN BE ACHIEVED  
BETTER IN INITIAL JOINT SESSIONS AND IN INITIAL  
SEPARATE CAUCUSES

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ABSTRACT

Over the past decade, the structure of the first formal mediation session has changed, with fewer traditional joint opening sessions and more separate caucuses to start the mediation. In light of these changes, the present Article explores whether mediators still see these two approaches as having the benefits conventionally ascribed to them, or whether they now see different advantages for each approach. The survey responses of over 700 experienced civil and family mediators from eight states show that mediators see several major differences in what can be better achieved in initial joint sessions and initial separate caucuses, respectively. Consistent with conventional wisdom, mediators said that initial joint sessions allow the parties to speak directly to and be heard by each other, and to develop a better understanding of the mediation process and the dispute, while initial separate caucuses permit the mediation to proceed when the parties are unable to mediate together civilly or meaningfully. Mediators noted multiple additional benefits associated with both parties hearing the same information at the same time in initial joint sessions, which previously have received little comment in the literature. Interestingly, mediators ascribed

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several other benefits to both initial joint sessions and initial separate caucuses, though generally for different reasons. Civil and family mediators differed in how often they mentioned some of the benefits for each approach. The present findings may encourage mediators and mediation trainers to revisit their views about the benefits they typically associate with initial joint sessions and initial separate caucuses and to weigh a broader set of considerations with the parties and lawyers when deciding how to begin the initial mediation session, allowing them to better tailor the mediation process to the needs of the particular case.

### INTRODUCTION

Historically, the initial mediation session in most cases began with all mediation participants together in a joint opening session.<sup>1</sup> Over the past decade, initial joint sessions are giving way to separate caucuses to begin the first formal mediation session, with the use of initial joint sessions ranging from 45% to 71% across several studies.<sup>2</sup> When initial joint sessions do still take place, mediators' purposes for starting jointly and what occurs during those sessions also are reported to have changed.<sup>3</sup>

During traditional joint opening sessions, the mediator typically explained the mediation process, and the parties made opening statements and then discussed the dispute together.<sup>4</sup> This was thought to provide numerous process, communication, and informational benefits deemed

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1. See, e.g., SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY, AND PRACTICE* 36-39 (2021–2022 ed.); Jay Folberg, *The Shrinking Joint Session: Survey Results*, *DISP. RESOL. MAG.*, Winter 2016, at 12, 20; DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION* 141 (3d ed. 2018).

2. See Folberg, *supra* note 1, at 13–15; Thomas J. Stipanowich, *Insights on Mediator Practices and Perceptions*, *DISP. RESOL. MAG.*, Winter 2016, at 6, 7; Roselle L. Wissler & Art Hinshaw, *The Initial Mediation Session: An Empirical Examination*, 27 *HARVARD NEGOT. L. REV.* 1, 14-15 (2021).

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, 165-66 (2010); Folberg, *supra* note 1, at 13-15; Wissler & Hinshaw, *supra* note 2, at 14-32.

4. See, e.g., HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING AS A PROBLEM-SOLVER IN ANY COUNTRY OR CULTURE* 98 (2d ed., 2010); Blankenship, *supra* note 3, at 181; COLE ET AL., *supra* note 1, at 37-39; FRENKEL & STARK, *supra* note 1, at 141-47; DWIGHT GOLANN & JAY FOLBERG, *MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL* 136-145 (2d ed. 2011); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 154-63, 168-71 (1986).

important for the quality of the mediation and its outcomes.<sup>5</sup> Some argue, however, that the central features of traditional joint opening sessions are less relevant today because parties are more familiar with mediation; fewer mediated disputes involve disputants with ongoing relationships or non-monetary issues; and mediators are more likely to talk with the parties and receive case information before the first formal session.<sup>6</sup> Others maintain that initial separate caucuses can avoid some of the potential problems associated with the parties being together in initial joint sessions as well as provide additional benefits.<sup>7</sup> Still others note that the relative advantages of initial joint sessions versus initial separate caucuses depend on the characteristics of each case.<sup>8</sup>

One survey found that civil and commercial mediators were divided about whether the impact of the diminishing use of initial joint sessions was positive (22%), negative (33%), or neither (45%).<sup>9</sup> Surveys have not, however, examined mediators' views of the *specific* benefits of initial joint sessions relative to initial separate caucuses, and vice versa. Considering the reported changes in the initial mediation session, do mediators still see these two approaches as having the benefits conventionally ascribed to them? Do mediators today see initial joint sessions as having fewer or different

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5. See, e.g., ABRAMSON, *supra* note 4, at 98, 175-77, 249-50 (2d ed., 2010); Blankenship, *supra* note 3, at 174-76, 178; FRENKEL & STARK, *supra* note 1, at 142-47, 164-65; GARY FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING 174, 187-93, 197 (2008); GOLANN & FOLBERG, *supra* note 4, at 138-39, 267-69; MOORE, *supra* note 4, at 155-56, 168-71.

6. See, e.g., Blankenship, *supra* note 3, at 167, 182; Folberg, *supra* note 1, at 19-20; SECT. OF DISP. RESOL., AM. BAR ASS'N, TASK FORCE ON IMPROVING MEDIATION QUALITY [hereinafter MEDIATION QUALITY] at 6-7, 32-33 (2008). For rebuttals that others have made to each of these points, see Roselle L. Wissler & Art Hinshaw, *Joint Session or Caucus? Factors Related to How the Initial Mediation Session Begins*, 37 OHIO STATE J. ON DISP. RESOL. 391, 398-403 (2022).

7. See, e.g., ABRAMSON, *supra* note 4, at 178-79; Folberg, *supra* note 1, at 17, 19; FRENKEL & STARK, *supra* note 1, at 142, 148; Michael Geigerman, *New Beginnings in Commercial Mediations: The Advantages of Caucusing Before the Joint Session*, DISP. RESOL. MAG., Fall 2012, at 27-30; MEDIATION QUALITY, *supra* note 6, at 12-13; Kelly Browe Olson, *One Crucial Skill: Knowing How, When, and Why to Go into Caucus*, DISP. RESOL. MAG., Winter 2016, [hereinafter *Caucus*] at 32-34; Kelly Browe Olson, *Screening for Intimate Partner Violence in Mediation*, DISP. RESOL. MAG., Fall 2013, at 25, 27-28; Jill S. Tanz & Martha K. McClintock, *The Physiologic Stress Response During Mediation*, 32 OHIO ST. J. ON DISP. RESOL. 29, 55, 60-62, 70-71 (2017). See generally, David A. Hoffman, *Mediation and the Art of Shuttle Diplomacy*, 27 NEGOT. J. 263 (2011).

8. See, e.g., ABRAMSON, *supra* note 4, at 173, 208, 231-33, 251; Blankenship, *supra* note 3, at 175, 177, 185-87; Folberg, *supra* note 1, at 19-20; Geigerman, *supra* note 7, at 27-30; Hoffman, *supra* note 7, at 263, 275-86, 304-06; MEDIATION QUALITY, *supra* note 6, at 3, 7, 12-13; *Caucus*, *supra* note 7, at 32-34.

9. See Folberg, *supra* note 1, at 12, 14, 16.

benefits? Do mediators see new advantages for either approach, especially for initial separate caucuses?

This Article explores the views of experienced civil and family mediators from eight states regarding the respective advantages of initial joint sessions and initial separate caucuses. Part I describes the survey procedure and the mediator respondents. Part II presents the mediators' views of what can be better achieved by beginning the mediation in joint session, and Part III presents their views of what can be better achieved by beginning in separate caucuses. Part IV discusses the findings, comparing mediators' views of the benefits of the two approaches as well as comparing the views of civil and family mediators. The Article concludes with potential implications for mediation practice and training.

### I. SURVEY PROCEDURE AND RESPONDENTS

A total of 1,065 civil and family mediators who practice in private and court settings across eight states completed an online survey about the early stages of mediation.<sup>10</sup> “Two-thirds of the mediators who responded to the survey most frequently mediate civil cases, while one-third most frequently mediate family cases. Three-fourths of the mediators had been mediating for more than eight years and typically mediate more than two cases per month.”<sup>11</sup> Most civil mediators (96%) and a majority of family mediators (79%) had a legal background.<sup>12</sup> The two most frequent sources of the disputes the civil and family mediators typically mediate in their practice were directly from the lawyers (45% and 30%, respectively) and directly from court mediation programs or judges (39% and 41%, respectively).<sup>13</sup>

Two-thirds of both the civil and family mediators said they usually (more than two-thirds of the time) or always begin the mediation in joint session in the type of disputes they most frequently mediate.<sup>14</sup> By contrast,

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10. We selected mediators whose contact information was available online, primarily from the rosters of state and federal court mediation programs, the National Academy of Distinguished Neutrals, and the American Arbitration Association. The states were California, Utah, Michigan, Illinois, Florida, North Carolina, Maryland, and New York. For more details on the survey procedure and response rate, see Wissler & Hinshaw, *supra* note 2, at 10-12.

11. *Id.* at 12 (omitting numerical listing of percentages).

12. A minority of civil and family mediators had only a non-legal background (3% and 21%, respectively), while around 10% had both legal and non-legal backgrounds. *Id.* at 12-13.

13. See Wissler & Hinshaw, *supra* note 6, at 413.

14. *Id.* at 429 n.149.

fewer than one-fourth of both the civil and family mediators said they never or seldom (less than one-third of the time) begin the mediation in joint session in the type of disputes they most frequently mediate. Approximately ten percent of both civil and family mediators said they begin in joint session between one-third and two-thirds of the time.

Mediators' views reported in this article are based on their responses to two open-ended questions.<sup>15</sup> (1) "Focusing on the type of disputes you mediate most frequently, what, if anything, can generally be better achieved by starting the first mediation session in a joint opening session rather than in separate caucuses?" A total of 726 mediators (478 who usually mediate civil cases and 248 who usually mediate family cases) provided one or more substantive responses to this question.<sup>16</sup> (2) "Focusing on the type of disputes you mediate most frequently, what, if anything, can generally be better achieved by starting the first mediation session in separate caucuses with each side rather than in a joint opening session?" A total of 663 mediators (437 who usually mediate civil cases and 226 who usually mediate family cases) provided one or more substantive responses to this question.<sup>17</sup>

After reading the mediators' responses several times, the authors developed a set of categories to capture the main ideas expressed for each question. Some mediators gave multiple responses to each question; we coded up to five responses per question. This resulted in 1,381 coded responses about initial joint sessions and 1,085 coded responses about initial separate caucuses. The two authors discussed the coding of any response on which we initially disagreed until we reached agreement. We report the percentage of mediators who provided substantive responses in each

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15. The order of the two questions was varied randomly to reduce any possible effect resulting from which question mediators answered first. *See, e.g., Order Effects*, PSYCH. RSCH. & REFERENCE, <http://psychology.iresearchnet.com/social-psychology/social-psychology-research-methods/order-effects/> [https://perma.cc/LBW5-4ZN7].

16. An additional 125 mediators (85 civil and 40 family mediators) provided responses that did not list specific benefits. Many of these responses were that little or nothing could be better achieved using this approach, or that they rarely use initial joint sessions. We do not report the number of mediators who said "nothing" because other mediators who also felt this way might simply have left the question unanswered.

17. An additional 168 mediators (113 civil and 55 family mediators) provided responses that did not list specific benefits. *See supra* note 16.

category, separately for initial joint sessions and initial caucuses and separately for civil and family mediators.<sup>18</sup>

Throughout the Article, we conducted tests of statistical significance to determine if an observed difference between the views of civil and family mediators is a “true” difference and does not merely reflect chance variation.<sup>19</sup> Accordingly, any “differences” reported herein are statistically significant differences, while “no differences” indicate there were no statistically significant differences.

## II. MEDIATORS’ VIEWS OF WHAT CAN BE BETTER ACHIEVED IN INITIAL JOINT SESSIONS

To capture the things that mediators said can generally be better achieved in initial joint sessions than in initial separate caucuses, we created eighteen substantive categories plus a general “other” category (see Table 1). We discuss these benefits in approximate order from most to least frequently mentioned.<sup>20</sup>

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18. Because some mediators provided multiple responses, (1) the percentages in the tables presented herein add to more than 100% and (2) the same mediator can have a response in more than one of the categories. The alternative approach—reporting the responses as a percentage of all coded responses—would give more weight to those mediators who provided more responses. The rank order of the categories from the most to least frequently mentioned was the same whether using the percentage of mediators or the percentage of responses.

19. The test of statistical significance used in this Article is the chi-square ( $\chi^2$ ) 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.

20. Because the relative frequency with which civil mediators listed the benefits differed from that of family mediators, no single rank ordering can reflect the responses of both sets of mediators.

	Civil		Family	
	Number	%	Number	%
Mediator explains & parties understand process	121	25%	55	22%
Parties hear same information	77	16%	58	23%
Mediator sets tone, facilitates communication	70	15%	49	20%
Parties hear each other's positions, case	131	27%	24	10%
Parties speak directly to each other & feel heard	76	16%	37	15%
Parties hear each other's interests, goals	28	6%	36	15%
Saves time, more efficient	39	8%	58	23%
Mediator develops trust and rapport	44	9%	25	10%
Mediator helps define issues, set agenda	40	8%	28	11%
Parties see mediator treating both equally	29	6%	24	10%
Mediator can assess parties/lawyers	30	6%	26	10%
Parties hear each other's perspectives	39	8%	7	3%
Mediator learns more about the dispute	19	4%	18	7%
Humanizes the parties	32	7%	6	2%
Parties/lawyers can assess other side	27	6%	4	2%
Develop some good will between parties	17	4%	11	4%
Parties can vent, work through emotions	19	4%	6	2%
Introduce mediation participants	18	4%	1	0.40%
Other	34	7%	18	7%

**Mediator explains and parties understand the mediation process:** Twenty-five percent (25%) of civil mediators and 22% of family mediators<sup>21</sup> said that the mediator can explain the mediation process better in initial joint sessions than in initial separate caucuses, with many adding that the parties also can better understand the process in initial joint sessions. More specifically, mediators said that they can explain the mediation process, its benefits, confidentiality, and their role and approach; develop,

21. There was no difference in the proportion of civil and family mediators who listed this benefit ( $p = .35$ ).

explain, or get agreement on the ground rules; set expectations for the mediation; or make an opening statement.<sup>22</sup>

**Parties hear the same information:** Sixteen percent (16%) of civil mediators and 23% of family mediators<sup>23</sup> said that an advantage of initial joint sessions is that both sides hear the same information about the mediation process and/or the substance of the dispute. Mediators added that this leads all participants to have a shared and potentially improved understanding of the process and the dispute. Moreover, this transparency lets the parties know that the mediator did not get secret or false information from the other side, thereby enhancing their trust in the process and the mediator. And because mediators do not have to relay information between the parties as they would in initial separate caucuses, initial joint sessions eliminate the mediators' and parties' concerns about whether the mediator is accurately communicating what the parties said.<sup>24</sup>

**Mediator sets the tone and facilitates communication:** Fifteen percent (15%) of civil mediators and 20% of family mediators<sup>25</sup> said that setting the tone of cooperation, joint problem-solving, and working toward resolution can be better achieved in initial joint sessions than in initial separate caucuses. Mediators also noted that initial joint sessions allow the

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22. Illustrative responses in this category: "Getting both parties to understand my role as mediator, rules of the mediation, and the confidentiality aspect of mediation is much easier in a joint session." "I explain about the way I conduct mediations and what the parties and counsel can expect." "Joint session develops clear understanding by both parties of neutrality of mediation and process and expectations of mediation."

23. Civil mediators were less likely than family mediators to list this benefit ( $\chi^2(1) = 5.71, p < .05$ ).

24. Illustrative responses: "Both parties hear the same thing at the same time. Each party's questions are heard and answered so that there is less dispute about what is or has been happening." "I find it is important to start [with the parties] together . . . so they have the opportunity to hear everything the other party shares and are able to hear me reframe and summarize the other party's statement." "I believe it is very important from the start to allow the parties access to all communications. It leads to a better understanding of the parties' positions and possibly their interests." "A joint session gives the parties a sense of trust as everyone is speaking together and one party isn't talking about the other from a different room. Joint allows for everything to be heard by the person themselves and not through the mediator's interpretation." "Less opportunity for mistakes in relaying of information." "Transparency enhances the process, while lack of transparency that occurs in caucus can lead the parties to make untrue assumptions about the mediator role being played."

25. There was no difference in the proportion of civil and family mediators who listed this benefit ( $p = .08$ ).



mediator to model, establish, or facilitate civil, respectful, and constructive communication and create a comfortable, non-stressful environment in which the parties can talk.<sup>26</sup>

**Parties hear each other's positions and cases:** Twenty-seven percent (27%) of civil mediators and 10% of family mediators<sup>27</sup> said that initial joint sessions permit the parties to present, hear, understand, clarify, or assess each side's opening statement, arguments, positions, claims and defenses, case merits, or trial strategy.<sup>28</sup> Some mediators added that initial joint sessions allow the parties to hear this information directly from the other side without filtering by their own lawyer; allow their lawyer to present their case directly to the opposing party without filtering by the opposing lawyer; and allow the parties to hear the mediator's questions about or assessment of the other side's case. We included in this category responses noting that the parties can better exchange information as well as discuss and agree on facts in initial joint sessions.<sup>29</sup>

**Parties speak directly to each other and feel heard:** Sixteen percent (16%) of civil mediators and 15% of family mediators<sup>30</sup> said that the disputants are better able to speak directly and listen to each other, interact, talk face-to-face, have a voice, and feel heard in initial joint sessions than in

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26. Illustrative responses: "A joint session can set the tone for the day and help to get the parties in the right frame of mind for a day of trying to resolve the dispute rather than advocate for their respective positions." "By opening in joint session, it reinforces to the participants that they can effectively collaborate." "Set the stage for communication between the parties with the hope of working together toward resolution of issues and opening channels of future communication." "Serves to model positive behavior and ground rules." "The role of the mediator is to facilitate communication, and this is best achieved by allowing the parties the space and opportunity to talk together."

27. Civil mediators were more likely than family mediators to list this as a benefit ( $\chi^2(1) = 30.56, p < .001$ ).

28. Responses that the *mediator* can gain a better understanding of the dispute comprise a different category. See *infra* note 51 and accompanying text.

29. Illustrative responses: "A consistent and immediately mutual understanding of each parties' case, facts, legal theories." "The lawyers' or parties' opening statement will better inform each side as to the strengths of the other side's claim or defenses." "It allows the parties to hear directly from the other side what the weaknesses in their case might be and what the evidence and arguments from the other side will likely be at trial." "Having the parties hear about the other side's case directly, rather than filtered through their attorneys." "Often we are going over the assets, debts and incomes of the parties/family, and it is much easier to do that information gathering in a joint session, to have everyone agree on the facts."

30. There was no difference in the proportion of civil and family mediators who listed this benefit ( $p = .73$ ).

initial separate caucuses. Responses in this category mostly did not include mention of the content of what the parties say or hear,<sup>31</sup> unless the mediators said that the parties are able to apologize, acknowledge, or express empathy to the other disputant or tell them what impact their actions had on them. We also included in this category when mediators said that the parties can feel heard by the mediator (instead of or in addition to feeling heard by the other party) and when they merely said “feeling heard” without explicitly stating by whom.<sup>32</sup>

**Parties hear and understand each other’s interests and goals:** Six percent (6%) of civil mediators and 15% of family mediators<sup>33</sup> said that initial joint sessions give the parties a better chance to explain, hear, clarify, and understand their own and the other party’s interests, goals, needs, concerns, or underlying circumstances. Some mediators added that this involves the disputants hearing each other’s interests and goals directly, unfiltered by the mediator or the lawyers.<sup>34</sup>

**Saves time and is more efficient:** Eight percent (8%) of civil mediators and 23% of family mediators<sup>35</sup> said that initial joint sessions save time and are faster than initial separate caucuses. Mediators noted as reasons that the mediators can explain the mediation process once rather than twice; learn

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31. Responses specifying that the parties could state and hear each other’s case, interests, or perspectives comprise those respective categories. *See supra* note 29; *infra* notes 34, 47 and accompanying text.

32. Illustrative responses: “Joint sessions . . . allow the parties to truly hear each other, truly understand each other.” “The parties have an opportunity to hear each other’s voices, look each other in the eye, and hear something they may not have heard before.” “Direct communication leads to empathy and understanding between the parties that helps the negotiation process.” “Giving a voice to clients.” “I use this time for the principals to talk to each other and often times they discover that they have been talking past each other.” “I think it’s always valuable for the parties to interact, especially the clients to hear from each other. Sometimes it can produce amazing results quickly. A simple apology can be a big deal.”

33. Civil mediators were less likely than family mediators to list this benefit ( $\chi^2(1) = 15.23$ ,  $p < .001$ ).

34. Illustrative responses: “Each party can hear the unadulterated interests, needs, and concerns of the other.” “Letting the parties hear and see that they have some common goals and interests, even in the beginning.” “Joint sessions generally promote better understanding, helping the parties focus on interests rather than positions.” “Active listening allows people to develop a better understanding of what is operating in the background of the conflict.”

35. Civil mediators were less likely than family mediators to list this benefit ( $\chi^2(1) = 32.71$ ,  $p < .001$ ).

about the status and substance of the case a single time; quickly clarify any disagreements over basic facts; and do not have to repeat what each side said to the other.<sup>36</sup>

**Mediator develops trust and rapport:** Nine percent (9%) of civil mediators and 10% of family mediators<sup>37</sup> said that initial joint sessions are better than initial separate caucuses at permitting the mediator to develop trust or rapport with the parties; develop the parties' confidence in and comfort with the mediator or the mediation process; and get process buy-in by the parties.<sup>38</sup>

**Mediator helps define issues and set agenda:** Eight percent (8%) of civil mediators and 11% of family mediators<sup>39</sup> said that initial joint sessions are better than initial separate caucuses at allowing the mediator to be able to get to the real issues; define, frame, narrow, or prioritize which disputed issues will be the focus of the mediation; and set the agenda and develop goals for the mediation.<sup>40</sup>

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36. Illustrative responses: "Just about everything can be accomplished more fully and efficiently in joint session – from hearing the mediator opening to agreement on ground rules to hearing each other's goals and concerns." "The rules, the status of the case, and prior offers are discussed once." "Quicker identification of agreement/disputes." "Joint session saves time, and time is often a limited commodity." "Sometimes dialogue moves the process along more efficiently and productively than prolonged shuttle diplomacy."

37. There was no difference in the proportion of civil and family mediators who listed this benefit ( $p = .70$ ).

38. Illustrative responses: "I believe that the parties develop a much better relationship with me as their mediator if the sessions are joint. . . . They develop a level of trust. . . ." "The ability to create rapport and trust." "Get the parties to buy into the process in front of each other." "Establishing trust and confidence in the mediation process."

39. There was no difference in the proportion of civil and family mediators who listed this benefit ( $p = .20$ ).

40. Illustrative responses: "The issues can be more quickly defined and agreed on in a joint opening session." "You can engage the parties to create common goals for the mediation and help direct the agenda towards resolution if you start together." "Clearing out some of the claims and contentions that sound ridiculous if said out loud in front of the other party." "Joint opening sessions permit me to gather information quickly from both parties about . . . the most pressing issues each side would like to resolve."

**Parties see the mediator treating both equally:**<sup>41</sup> Six percent (6%) of civil mediators and 10% of family mediators<sup>42</sup> said that initial joint sessions give parties the chance to see or experience the mediator being neutral, not being swayed by one side, and treating them the same.<sup>43</sup>

**Mediator can assess the parties and lawyers:** Six percent (6%) of civil mediators and 10% of family mediators<sup>44</sup> said that initial joint sessions give the mediator a chance to assess and develop an understanding of the parties' relationship, interactions, and communication dynamics, as well as the lawyers' interactions with their clients and each other. Mediators also noted that initial joint sessions give them the opportunity to assess the parties' anxiety, anger, and readiness to mediate. Mediators' improved understanding on the above dimensions helps them determine how to approach the rest of the mediation.<sup>45</sup>

**Parties hear each other's perspectives:** Eight percent (8%) of civil mediators and three percent (3%) of family mediators<sup>46</sup> said that the disputants were better able to present their own—as well as to hear, clarify,

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41. This goes beyond the mediator merely explaining the neutrality of the mediator's role or saying that she or he will not take sides.

42. There was no difference in the proportion of civil and family mediators who listed this benefit ( $p = .08$ ).

43. Illustrative responses: "Both sides get to establish a relationship with the mediator at the same time and see that the mediator interacts the same with both." "They see that I treat each side equally. The same rules apply to all, and they see me deliver those to them both." "The parties will understand that the mediator is neutral because the interactions with each party are in the presence of the other." "It reduces suspicions of favoritism and bias against mediator. If one party sees mediator in caucus alone with the other party, the trust factor is affected."

44. Civil mediators were less likely than family mediators to list this benefit ( $\chi^2(1) = 4.06, p < .05$ ).

45. Illustrative responses: "May pick up invaluable information both in the verbal communication and body language about the parties' relationship to each other and the intensity of their dispute." "It gives me the opportunity to observe the parties' interaction and communication with one another so I can get a sense of the approach I will take with them. It helps me understand their communications styles and where the breakdown is so I can adjust how I work to accommodate their styles and coach them on what the other needs in communication." "It allows me to assess how the sessions should go on during mediation – whether I should do the session together or separate from that point forward." "The joint session gives me an opportunity to assess the parties and if there's any overreaching or intimidation going on." "Assessing the interactions between the parties and their lawyers." "The mediator achieves a sense of the parties' willingness to settle the case or try the case."

46. Civil mediators were more likely than family mediators to list this benefit ( $\chi^2(1) = 7.84, p < .01$ ).

or understand the other side's—perspective, point of view, side of the story, or issues.<sup>47</sup> Some mediators added that this involved the parties hearing each other's perspectives or viewpoints directly, unfiltered by the mediator or the lawyers.<sup>48</sup>

**Mediator learns more about the dispute:**<sup>49</sup> Four percent (4%) of civil mediators and seven percent (7%) of family mediators<sup>50</sup> said that initial joint sessions let the mediator get a better or more accurate understanding of the dispute, the issues, and the parties' positions, interests, or goals.<sup>51</sup>

**Humanize the parties:** Seven percent (7%) of civil mediators and two percent (2%) of family mediators<sup>52</sup> said that initial joint sessions humanize the parties, allow them to be seen as a person, and de-demonize them.<sup>53</sup>

**Parties or lawyers can assess the other side:** Six percent (6%) of civil mediators and two percent (2%) of family mediators<sup>54</sup> said that initial joint

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47. Responses in this category used more general terms and did not mention the parties' legal positions or their interests and goals, which were addressed in other categories. *See supra* notes 29, 34 and accompanying text.

48. Illustrative responses: "Generally, I think it's important for both parties to hear the other side's viewpoint to get a dose of the reality of disparate viewpoints." "It's an opportunity for each side to share their perspective with the other side . . . and for the other side to LISTEN to that perspective." "They need to hear the other's viewpoint because they've never heard it before."

49. This category is different than other categories where it was the *parties* who were better able to understand these aspects of the dispute; *see supra* notes 29, 34, 47 and accompanying text.

50. There was no difference in the proportion of civil and family mediators who listed this benefit ( $p = .06$ ).

51. Illustrative responses: "In my opinion, it is better for me to hear the background information with both parties in the room so they can correct the information or relay it from their perspective." "A better understanding of what each party expects." "I can get a feel of the parties' issues." "I almost always summarize my understanding of the facts and issues, and invite addition or correction." "Clarification of questions that . . . I as mediator . . . have about the positions of a side."

52. Civil mediators were more likely than family mediators to list this benefit ( $\chi^2(1) = 6.02, p < .05$ ).

53. Illustrative responses: "The insurance carrier often has not met the Plaintiff before, and seeing them makes them more human to the adjuster than just a number on paper. It also has the effect of humanizing the insurance carrier for the Plaintiff and their attorney as well." "Sometimes people just need . . . to see and be seen as a person, not just through their lawyers." "Allowing the parties to see each other and realize the importance of why they are there, humanizing the procedure so that both sides see there is a real person on the other side of this case, not just a position." "De-demonization of the other side. . . . If during the joint session each side sees that the other side is human and not demonic, it tends to encourage civility and working together to solve the problem."

54. Civil mediators were more likely than family mediators to list this benefit ( $\chi^2(1) = 6.51, p < .05$ ).

sessions enable the parties and/or the lawyers to assess the other side (party and/or lawyer) to gain a better understanding for mediation or for trial.<sup>55</sup> Regarding the mediation itself, mediators said that each party is able to get a feel for the other party or assess their sincerity, willingness, or readiness to negotiate or settle. With an eye toward trial, mediators said that each side can observe and assess the other side's credibility, demeanor, and how they will appear to a judge or jury.<sup>56</sup>

**Develop some trust or good will between the parties:** Four percent (4%) each of civil and family mediators<sup>57</sup> said that initial joint sessions help to develop trust or rapport between the parties and establish some good will. Some mediators also said that initial joint sessions can lessen tensions between the parties, reduce some bad feelings, and reset their relationship.<sup>58</sup>

**Parties can vent or work through emotions:** Four percent (4%) of civil mediators and two percent (2%) of family mediators<sup>59</sup> said that initial joint sessions give the parties a chance to vent, clear the air, express or work through their feelings, deal with their emotions, and achieve a catharsis.<sup>60</sup>

**Introduce mediation participants:** Four percent (4%) of civil mediators and less than one percent (<1%) of family mediators<sup>61</sup> noted that

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55. This category did not include assessing or understanding the substantive content of the parties' or lawyers' presentation or the strength of their arguments. These responses were addressed in a different category; *see supra* note 29 and accompanying text.

56. Illustrative responses: "Having a joint session allows the attorneys to meet the clients and gain a sense of their demeanor and willingness to resolve the dispute." "Greater opportunity . . . for each to judge the other's sincerity." "Having everyone meet each other to assess personalities." "Counsel can evaluate the credibility of each of the individual parties and their likely effectiveness as witnesses at depositions and at trial."

57. There was no difference in the proportion of civil and family mediators who listed this benefit ( $p = .56$ ).

58. Illustrative responses: "Begin the process of re-establishing trust." "It breaks down walls between the parties." "The maintenance or creation of some good will." "Establishing and ideally ameliorating the relationship between parties." "Lessening tension between the parties."

59. There was no difference in the proportion of civil and family mediators who listed this benefit ( $p = .28$ ).

60. Illustrative responses: "Letting the parties and me hear each other out. Sometimes one or both parties need to vent." "Allows for venting, which is cathartic. Once the venting occurs, the money issue is a lot easier." "You can cut through the bickering and hard feelings early by letting everybody just say what they need to say." "We can get some of the emotions on the table and resolved before addressing the parties' interests and concerns."

61. Civil mediators were more likely than family mediators to list this benefit ( $\chi^2(1) = 7.24, p$

initial joint sessions provide the opportunity for them to introduce everyone<sup>62</sup> who is participating in the mediation.<sup>63</sup>

**Other:** Seven percent (7%) each of civil and family mediators<sup>64</sup> wrote responses that did not fit into any of the above categories. Many of these responses were unique to a single mediator; none of them were numerous enough to constitute their own separate category. Several mediators said “almost everything” or “works better together.”<sup>65</sup>

### III. MEDIATORS' VIEWS OF WHAT CAN BE BETTER ACHIEVED IN INITIAL SEPARATE CAUCUSES

To capture the things that mediators said can generally be better achieved in initial separate caucuses than in initial joint sessions, we created fourteen substantive categories plus a general “other” category (see Table 2). We discuss these benefits in approximate order from most to least frequently mentioned.<sup>66</sup>

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< .01).

62. These responses simply mentioned the parties meeting each other; there was no mention of humanizing or assessing the parties, which were addressed in other categories. *See supra* notes 53, 55, and accompanying text.

63. Illustrative responses: “A joint session will introduce the faces/names of the participants.” “It allows all the participants to meet and greet each other.”

64. There was no difference in the proportion of civil and family mediators who listed “other” benefits ( $p = .94$ ).

65. A sample of “other” responses: “Hearing your advocate speak on your behalf.” “Some momentum by signing the confidentiality statement together.” “This is always the best way to get both parties engaged.” “Ability to establish credentials and control.” “Sometimes a party needs to feel that he or she is getting their day in court which requires that opposing parties be gathered together.” “Craft resolutions that can actually work for the parties.”

66. *See supra* note 20.

	<b>Civil</b>		<b>Family</b>	
	<b>Number</b>	<b>%</b>	<b>Number</b>	<b>%</b>
Avoids problems in cases with extreme hostility	145	33%	55	24%
Avoids inflammatory remarks, grandstanding	129	30%	45	20%
Provides a calm, comfortable setting	66	15%	53	23%
Permits mediation in cases with violence, coercion	40	9%	62	27%
Parties/lawyers can speak more freely, frankly	58	13%	44	19%
Mediator develops trust, rapport	51	12%	19	8%
Mediator can assess parties/lawyers	37	8%	25	11%
Mediator learns the parties' legal positions	38	9%	9	4%
Mediator learns the parties' interests, goals	20	5%	14	6%
Mediator learns more about the dispute	20	5%	21	9%
Saves time, more efficient	21	5%	10	4%
Mediator explains mediation process	15	3%	6	3%
Parties can vent, work through emotions	10	2%	9	4%
Mediator & parties can prepare for joint session	13	3%	1	0.44%
Other	27	6%	22	10%

**Avoids problems in cases involving extreme emotions or hostility:** Thirty-three percent (33%) of civil mediators and 24% of family mediators<sup>67</sup> said that cases involving extreme emotions, anger, or hostility are better able to be mediated in initial separate caucuses than in initial joint sessions. These types of cases include those that involve parties who cannot stand to

67. Civil mediators were more likely than family mediators to list this benefit ( $\chi^2(1) = 5.53, p < .05$ ).



be with each other or refuse to be in the same room; issues that are highly contentious or emotional; parties who cannot communicate at all; or lawyers who are very contentious or adversarial.<sup>68</sup> Many mediators simply said that initial separate caucuses are the only way to mediate these cases productively or at all, without specifying in what way separate caucuses are beneficial. Some mediators added one or more of the following benefits<sup>69</sup> of using initial separate caucuses in these cases: reducing the parties' anxiety or emotion; allowing the parties to think more clearly and focus on problem-solving; and preventing inflamed emotions, escalation of the dispute, or polarization or entrenchment of the parties' positions.<sup>70</sup>

**Avoids inflammatory remarks and their negative impact:** Thirty percent (30%) of civil mediators and 20% of family mediators<sup>71</sup> said that initial separate caucuses avoid hostile or antagonizing statements, angry outbursts, and posturing or grandstanding by the parties or the lawyers. Mediators elaborated on the negative impact that these kinds of remarks can have: inflaming emotions or escalating hostility; creating defensiveness; or polarizing, entrenching, or hardening the parties' positions. Sometimes mediators did not list the statements or actions that initial separate caucuses can avoid but only noted one or more of the negative impacts that can be prevented.<sup>72</sup>

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68. This category focuses on high-emotion cases and preventing their escalation. Other categories address cases involving violence or calming emotions in the typical dispute; *see infra* notes 75, 78 and accompanying text.

69. When benefits were mentioned, those responses were included in categories representing each benefit. *See infra* notes 72, 75, 80 and accompanying text.

70. Illustrative responses: "If I feel that the parties are hostile to each other and that being in the same room together initially would disrupt the proceeding and lessen chances of settlement." "If there are emotional issues in the case, such as a wrongful death action." "If there is genuine hostility between the parties, meeting separately would give me a better chance at understanding the real problems, defusing the situation." "In very contentious cases, it can keep parties focused on solving problems rather than inflaming them." "Anger runs high and hot; some parties cannot be in the same room together; they cannot listen."

71. Civil mediators were more likely than family mediators to list this benefit ( $\chi^2(1) = 7.10, p < .01$ ).

72. Illustrative responses: "[Prevents] situations when the parties will say things in joint session that will inflame the other party and set the mediation off on a negative course." "[Prevents] people from becoming angrier hearing what the other party has to say, and then the mediator and attorneys have to work to reduce that anger before being able to address the interests at issue." "It [prevents] entrench[ing] the parties further in their respective positions." "Many lawyers are prone to inflame or entrench their opponents." "When . . . the attorneys tend to grandstand, a joint opening session can inflame emotions and inhibit constructive dialogue that is key to reaching a negotiated settlement."

**Provides a calm and comfortable setting:** Fifteen percent (15%) of civil mediators and 23% of family mediators<sup>73</sup> said that, by separating the parties so they do not have to see or hear each other, initial separate caucuses can calm the parties, help them relax, make them feel more comfortable, and reduce their stress levels.<sup>74</sup> Mediators also said that initial separate caucuses can defuse tension, de-escalate emotions, and decrease hostility. The parties' reduced stress and emotions can help them listen better, think more clearly, engage in problem-solving, and make decisions.<sup>75</sup>

**Permits mediation in cases involving violence, coercion, or intimidation:** Nine percent (9%) of civil mediators and 27% of family mediators<sup>76</sup> said that initial separate caucuses provide the only way mediation can occur safely in cases where there is or has been violence, abuse, or safety concerns; coercion, intimidation, sexual harassment, or fear of retaliation; or a power imbalance between the parties themselves or whether they have counsel. Many mediators said simply that initial separate caucuses were the only way to mediate these cases, without specifying in what way separate caucuses were beneficial. Some mediators added one or more of the following benefits<sup>77</sup> of using initial separate caucuses in these cases: preventing potential violence, trauma, or coercion; creating a sense of comfort, safety, or reduced anxiety; allowing parties to focus on the substantive issues and problem solving; permitting the parties to speak freely without feeling intimidated or harassed; and evening the balance of power.<sup>78</sup>

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73. Civil mediators were less likely than family mediators to list this benefit ( $\chi^2(1) = 7.05$ ,  $p < .01$ ).

74. Responses that refer to calming anxiety or fear about the mediation process itself comprise a different category; *see infra* note 82 and accompanying text. Similarly, preventing escalation in cases involving extreme hostility and preventing violence or intimidation are addressed in other categories; *see supra* note 70 and *infra* note 78 and accompanying text.

75. Illustrative responses: "Parties are typically very nervous. Meeting in caucus for a brief time . . . tends to calm parties and meeting me in advance seems to reduce some anxiety." "Separate helps parties to calm down and think clearly without responding to the other person's presence." "My goal is to reduce the stress and acrimony to the extent possible." "Making the parties feel comfortable is the most important thing. . . . [C]omfort is most likely to result in cooperation in the process in my view." "De-escalates and allows the parties to focus."

76. Civil mediators were less likely than family mediators to list this benefit ( $\chi^2(1) = 38.24$ ,  $p < .001$ ).

77. When benefits were mentioned, those responses were included in categories representing each benefit. *See supra* notes 70, 75 and *infra* note 80 and accompanying text.

78. Illustrative responses: "When there has been domestic violence or coercive control in past."

**Parties and lawyers can speak more freely and frankly:** Thirteen percent (13%) of civil mediators and 19% of family mediators<sup>79</sup> said that the parties and lawyers can speak more openly and freely in initial separate caucuses than in initial joint sessions. Because the parties and lawyers are less guarded and more forthright, they can tell the mediator what they are really thinking, disclose the real issues or their real needs, give a more frank assessment of the case, or discuss sensitive or confidential matters. This provides mediators with information that they would not get in joint session or that would take longer for them to get, and gives mediators a real feel for the parties and the issues.<sup>80</sup>

**Mediator develops trust and rapport:** Twelve percent (12%) of civil mediators and eight percent (8%) of family mediators<sup>81</sup> said that the mediator can develop rapport and trust with the parties and lawyers better in initial separate caucuses than in initial joint sessions. This includes developing a relationship or personal connection; having the parties get comfortable with or develop confidence in the mediator and the mediator's style or approach; easing the parties' fears about the mediation process; developing the parties' trust and confidence in the mediation process; and obtaining process buy-in.<sup>82</sup>

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"Lessening an existing imbalance of power, such as one side having an attorney when the other side does not." "If one party feels particularly threatened or intimidated, it eliminates dynamics resulting from that, and protects the weaker party." "In employment disputes, there is an inherent power imbalance, so giving a plaintiff and her lawyer their own space and time shows a deference and effort to redistribute the power from the outset." "If there is a potential fear of retaliation, I would conduct separate sessions first."

79. Civil mediators were less likely than family mediators to list this benefit ( $\chi^2(1) = 4.39, p < .05$ ).

80. Illustrative responses: "It gives . . . the parties an opportunity to ask questions and have a discussion about the mediation without being worried about saying something in front of opposing party & counsel." "I can get to the root of the dispute more quickly because the parties are less guarded." "Obtaining true interests of each party." "Allows frank discussions of strengths and weaknesses of the case." "Getting a true picture of what each will settle for."

81. There was no difference in the proportion of civil and family mediators who listed this benefit ( $p = .20$ ).

82. Illustrative responses: "To establish a relationship of trust with the party/lawyer on each side." "The mediator can develop rapport with the parties when meeting with them separately and letting them speak to an independent person in a private setting." "Instilling confidence in me as the mediator if I feel there is a sense of distrust." "Easing participants fears regarding the process." "Once I have earned the trust of the parties, separately, they feel much more confident in the process, goals, and 'ground rules' when walking into a joint session."

**Mediator can assess the parties and lawyers:** Eight percent (8%) of civil mediators and 11% of family mediators<sup>83</sup> said that initial separate caucuses allow the mediator to assess the parties' and lawyers' temperament, civility, emotional state, or willingness to settle. In addition, initial separate caucuses give the mediator an opportunity to privately assess the parties' capacity to mediate; screen for domestic violence or abuse; and explore whether there is animosity, intimidation, coercion, or a power imbalance. These assessments can help the mediator better understand the potential dynamics and relationship issues and determine whether it would be safe or productive to have a joint session. Some mediators also said that initial separate caucuses give them a chance to talk privately with the parties about a possible subsequent joint session to see whether they would be comfortable being together in the same room and whether they would be willing to meet jointly or would find that desirable or helpful.<sup>84</sup>

**Mediator learns the parties' legal positions:** Nine percent (9%) of civil mediators and four percent (4%) of family mediators<sup>85</sup> said that, in initial separate caucuses, mediators can get more information about and better understand the facts; the legal and substantive issues; the parties' legal positions; the strengths and weaknesses of each party's case; the parties' settlement parameters; and what additional information the parties need.<sup>86</sup>

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83. There was no difference in the proportion of civil and family mediators who listed this benefit ( $p = .28$ ).

84. Illustrative responses: "I can screen for safety, determine if there have been or are orders of protection or domestic violence issues, evaluate the level of anxiety of each party, determine if one is easily intimidated by the other." "Mediator can gauge the abilities of each party to proceed." "Assessing the personalities and temperament of the parties and lawyers." "Understanding the emotional landscape, the willingness to sit in one room and exchange information and views." "Hearing if the parties are interested in speaking directly to each other."

85. Civil mediators were more likely than family mediators to list this benefit ( $\chi^2(1) = 5.02$ ,  $p < .05$ ).

86. Illustrative responses: "Better opportunities to acquire additional factual and legal information about the parties' position." "When I do not understand the positions of the parties, I like to hear from them separately." "Finding out what additional information or documents each side would want but haven't yet received and which might affect their current view of the dispute." "Getting a better sense of settlement positions." "Focus on points, strengths and weaknesses."

**Mediator learns the parties' interests and goals:** Five percent (5%) of civil mediators and six percent (6%) of family mediators<sup>87</sup> said that initial separate caucuses allow them to get information about, or get a better understanding of, the parties' goals, needs, interests, priorities, underlying issues, concerns, or what led to the dispute.<sup>88</sup>

**Mediator gets more information about the dispute:** Five percent (5%) of civil mediators and nine percent (9%) of family mediators<sup>89</sup> said that initial separate caucuses enable the mediator to gather more information and develop a better understanding of the dispute, the issues at the heart of the dispute, or the parties' points of view or perspectives.<sup>90</sup> We included in this category that the mediator is able to develop the goals and the agenda for the mediation.<sup>91</sup>

**Saves time and is more efficient:** Five percent (5%) of civil mediators and four percent (4%) of family mediators<sup>92</sup> said that initial separate caucuses save time and are more efficient than initial joint sessions. Some mediators said only that initial separate caucuses are faster, while others added reasons, including that caucuses can prevent getting slowed down by emotions or can help identify the issues, get to the negotiations, or focus on resolution more quickly.<sup>93</sup>

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87. There was no difference in the proportion of civil and family mediators who listed this benefit ( $p = .37$ ).

88. Illustrative responses: "Finding the underlying interests and needs of the parties." "I am better able to determine the emotional non-legal issues that are barring reaching a reasonable settlement." "Determining what are the real issues that need to be addressed rather than the issues argued in the mediation briefs." "You can begin to assess what the 'goals' are rather than merely the positions of the parties."

89. Civil mediators were less likely than family mediators to list this benefit ( $\chi^2(1) = 5.71, p < .05$ ).

90. Responses in this category used more general terms that did not mention the parties' legal positions or their interests and goals, which were addressed in other categories. *See supra* notes 86, 88 and accompanying text.

91. Illustrative responses: "It is a better mechanism for getting to the heart of the matter." "It allows the parties and their attorneys (if they have one) . . . to be thorough going over all of the issues." "The mediator would be able to ask questions and try to see one person's viewpoint before going over to the other person." "Separate allows the mediator to form an agenda and plan to move the mediation forward."

92. There was no difference in the proportion of civil and family mediators who listed this benefit ( $p = .83$ ).

93. Illustrative responses: "Gets to the issues more quickly." "Getting on with the resolution rather than having the contention of having both sides in the same room." "Avoids wasting time with

**Mediator explains the mediation process:** Three percent (3%) each of civil and family mediators<sup>94</sup> said that the mediator can explain the mediation process better in initial separate caucuses than in initial joint sessions. A few mediators added that they can help the parties understand how the mediation will work, set expectations, and discuss ground rules for a subsequent joint session during initial separate caucuses.<sup>95</sup>

**Parties can vent or work through emotions:** Two percent (2%) of civil mediators and four percent (4%) of family mediators<sup>96</sup> said that initial separate caucuses allow the parties to vent, air grievances, or express frustrations; deal with and work through feelings or emotions and take the edge off their anger; discuss emotional issues; or achieve a catharsis—and to do so privately with the mediator so that the mediation does not escalate as it might if they vent directly to the other party in an initial joint session.<sup>97</sup>

**Mediator and parties can prepare for a later joint session:** Three percent (3%) of civil mediators and less than one percent (<1%) of family mediators<sup>98</sup> said that a benefit of initial separate caucuses is that the mediator and the parties can do things that will facilitate or enhance the productiveness of a later joint session or increase the parties' comfort with or willingness to use a later joint session.<sup>99</sup> Although mediators most

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parties making arguments to the mediator that the opposing party is already familiar with." "Sooner to negotiating." "Parties are able to get focused quicker and easier."

94. There was no difference in the proportion of civil and family mediators who listed this benefit ( $p = .59$ ).

95. Illustrative responses: "Explain the process to participants unfamiliar with mediation." "Set ground rules for the procedure." "I believe speaking with them separately . . . gives them a better understanding of what to expect when they come face to face with the opposing party [in a later joint session]."

96. There was no difference in the proportion of civil and family mediators who listed this benefit ( $p = .22$ ).

97. Illustrative responses: "I would rather the parties vent to me, or posture to me, than to the other side." "Work out frustrations prior to a joint session." "Separate caucuses allow the parties to have their cathartic moment without alienating the other side." "When there is significant anger or hurt on the part of one or both parties, they seem better able to work through these feelings when they don't have to face the other party."

98. Civil mediators were more likely than family mediators to list this benefit ( $\chi^2(1) = 4.62, p < .05$ ).

99. This category did not include the mediator building the parties' trust or confidence in the mediator or the mediation process. Those responses were addressed in a different category; *see supra* note 82 and accompanying text.

commonly did not specify what they did to prepare, those who did said they discussed issues; what to say or not say in the joint session and how to say it; or how to structure the joint session and what to expect.<sup>100</sup>

**Other:** Six percent (6%) of civil mediators and ten percent (10%) of family mediators<sup>101</sup> wrote responses that did not fit into any of the above categories. Many of these responses were unique to a single mediator; none of them were numerous enough to constitute their own separate category.<sup>102</sup>

#### IV. DISCUSSION

There are several major differences between what mediators said can be better achieved in initial joint sessions and in initial separate caucuses. First, mediators saw initial joint sessions as providing the opportunity for direct, civil dialogue and constructive problem-solving between the parties themselves. A sizeable number of mediators said that the mediator can better facilitate communication between the parties and set a problem-solving tone for the mediation in initial joint sessions, and the parties can directly speak to and feel heard by the other party.

By contrast, mediators saw initial separate caucuses as permitting mediation to proceed when the parties would be unable to communicate civilly or participate meaningfully in the mediation if they were in the same room. The types of cases for which mediators said separate caucuses are needed are those where the parties are highly emotional or extremely hostile

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100. Illustrative responses: "Finding what specific issues can be best addressed in a joint session." "I explain my mediation approach favoring joint sessions for efficient and effective resolution and why they should consider joint session. After I coach them on how to function in the joint session, everyone is usually (not always) willing to sit at a table together." "A separate caucus at the very beginning is usually used in my practice to help each side prepare for the joint session—to get clear about what kind of joint session it will be (will it include opening remarks? about what? by whom? or confined to discussion about the process, ground rules, shaking hands and connecting a little)." "If there are going to be opening statements by the parties in joint session, this is my opportunity to preview the statements and do what I can, if warranted, to encourage changes to make the presentations more productive and likely to be heard by the other side." "I . . . am better able to coach the advocates to turn down their advocacy."

101. There was no difference in the proportion of civil and family mediators who listed "other" benefits ( $p = .10$ ).

102. A sample of "other" responses: "Nothing I can think of, other than satisfying the lawyers or parties who don't want a joint session." "If current employees are involved, helps to preserve the employment relationship." "Letting the parties be heard (subject to their attorney's direction and advice)." "The mediator can take control." "Entire process works better if separate."

and/or where there is intimidation, coercion, a power imbalance, or possible violence. When the mediators elaborated on the need for initial separate caucuses in these types of cases, they said it was to ensure the parties' safety; avoid statements that further inflame emotions, entrench positions, or derail the mediation; help the parties feel more comfortable and reduce tensions so they can participate more constructively; or allow the parties to speak more freely with the mediator. Many of these benefits listed for cases involving violence or extreme emotions were also mentioned as benefits of initial separate caucuses for all cases more broadly.

Second, mediators saw initial joint sessions as improving the disputants' understanding of the dispute by allowing the parties to hear each other's interests and goals, positions and legal arguments, and/or general perspectives on the dispute. Mediators also noted that initial joint sessions have the benefit of the parties being able to present and hear their interests and positions directly, without filtering by the mediator or the lawyers. Fewer mediators said that initial joint sessions allow the mediator to learn more about the dispute, to better define and prioritize the issues to be addressed, or to assess the parties and lawyers to help inform the conduct of the mediation.

By contrast, mediators saw initial separate caucuses as enabling *the mediator* to learn more about the parties' positions and arguments, their interests, or other information about the dispute. Reasons for this were that the mediator can get more information, particularly more candid information, because the parties feel more comfortable and can speak more freely when they are not together. Few mediators mentioned that *the disputants* themselves can learn more about the dispute in initial separate caucuses.

Third, a sizeable number of mediators said that they can better explain the mediation process, and the parties can better understand the process, during initial joint sessions. By contrast, only a small number of mediators listed the mediator explaining the process as a benefit of initial separate caucuses.

Fourth, mediators mentioned multiple benefits associated with both parties hearing the *same* information about the process and the dispute together in initial joint sessions. Mediators noted that this enables the parties to start the mediation with a shared understanding of the process as well as the facts and issues. Moreover, this transparency eliminates concerns about



what the other party says to the mediator during separate caucuses and how the mediator conveys what they say to the other side, enhancing the parties' trust. In addition, a smaller number of mediators noted as a benefit of initial joint sessions that the parties can see the mediator treating both sides equally and feel that the mediator is neutral and unbiased. Importantly, these benefits of common information, transparency, and experienced neutrality noted by mediators in the present survey for initial joint sessions have received little mention in the literature.

Interestingly, mediators ascribed some of the same benefits to both initial joint sessions and initial separate caucuses, though generally for different reasons. Some mediators thought that initial joint sessions are faster and more efficient because everything can be said only one time and any disagreements about basic information can be resolved quickly. By contrast, other mediators thought that initial separate caucuses are more efficient because the mediator can learn about and focus on the real issues and the negotiations more quickly. In addition, some mediators said they can better develop rapport and trust with the parties and build the parties' confidence in the mediation process in initial joint sessions, while others said they can better build trust in initial separate caucuses.

Mediators listed several other benefits for both approaches. Some mediators said that initial joint sessions give the mediator a better opportunity to assess the parties and their lawyers because they can see them interacting together and can get a feel for their dynamics and the emotional climate. By contrast, other mediators said that they can better assess the parties in initial separate caucuses because they get a truer picture of the parties' capacity to mediate and the existence of abuse or coercion from speaking with each party privately. A few mediators said that initial joint sessions are better at allowing the parties to vent directly to the other party so they can get past their emotions and be able to start problem solving. By contrast, other mediators said that the parties can vent and work through their emotions better during initial separate caucuses because the parties vent only to the mediator, thereby preventing a blow-up that might occur if they express their feelings directly to the other party.

Civil mediators were more likely than family mediators to mention some benefits, less likely to mention others, and did not differ on yet others. Some of the differences in what civil and family mediators said can be better achieved by each approach parallel differences in the features of civil and

family cases that might make different benefits more relevant, but others do not. For instance, civil mediators were more likely than family mediators to list introducing all mediation participants, seeing the other party as a person, and allowing the parties to assess the other side as benefits of initial joint sessions, consistent with fewer parties knowing each other as well in civil cases as in family cases. However, there were no differences between civil and family mediators in saying that speaking directly and being heard, facilitating civil communication, or developing trust between the parties are benefits of initial joint sessions, despite the parties in civil cases being less likely than those in family cases to expect to have future dealings with each other and have goals of restoring or preserving their relationship and talking directly to the other party and feeling heard.<sup>103</sup>

There are two potential limitations of the present findings. First, because fewer than one-fourth of the mediators in the present survey routinely use initial separate caucuses in their usual practice,<sup>104</sup> they might see fewer or different benefits of initial separate caucuses than mediators who use initial separate caucuses more extensively. Second, the findings are based on *mediators' views* about what *they think* can be better achieved using each approach. Parties and lawyers might mention different benefits than mediators do, or they might mention the same benefits but with different relative frequency. Moreover, mediators' beliefs that certain things can be better achieved with one approach than the other does not mean that those benefits are in fact more likely to be achieved using that approach.

To see whether we could begin to shed some light on the latter issue, we compared a few of the benefits the mediators listed with what this same group of mediators said took place during initial joint sessions and initial separate caucuses. Mediators said that initial joint sessions allow more direct dialogue between the parties. While initial separate caucuses preclude direct party communication, fewer than half of disputants in civil cases and three-fourths of disputants in family cases interacted directly with the other side during initial joint sessions.<sup>105</sup> Mediators said that the parties can learn more about the dispute in initial joint sessions than in initial separate caucuses. Parties and their lawyers were more likely to make an opening statement or presentation in initial joint sessions than in initial separate

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103. See Wissler & Hinshaw, *supra* note 6, at 422-23.

104. See *supra* note 14 and accompanying text.

105. See Wissler & Hinshaw, *supra* note 2, at 25-26, 28-29.

caucuses in civil cases, but there was no difference in family cases.<sup>106</sup> Further, mediators in both civil and family cases were actually *less likely* to discuss a range of substantive matters during initial joint sessions than during initial separate caucuses, with the exception that there was no difference between initial joint sessions and initial separate caucuses in whether mediators in family cases explored the issues and the parties' interests and goals.<sup>107</sup> Taken together, these comparisons present a mixed picture. This might suggest that what mediators say can be better achieved with each approach should be thought of as the *potential* benefits of each approach rather than *actual* benefits achieved.

In sum, mediators probably would say that both initial joint sessions and initial separate caucuses enhance the mediation process, but in different ways for different cases. Questions about the relative benefits of the two approaches remain for future research to explore. Future surveys need to include mediators who regularly use initial separate caucuses, as well as parties and lawyers, to see which benefits they list for each approach. In addition, studies ought to examine if the benefits ascribed to each approach differ depending on whether the mediators had pre-session communications with the parties. Importantly, studies need to examine if the asserted benefits are in fact achieved, such as whether parties who participate in initial joint sessions gain a better understanding of the mediation process and the dispute than parties who participate in initial separate caucuses. Finally, future research needs to examine whether the benefits achieved using each approach are related to the overall quality of the mediation process and its outcomes.

## CONCLUSION

The present findings should encourage mediators and mediation trainers to revisit their views about the benefits they typically associate with initial joint sessions and initial separate caucuses and engage in learning discussions with each other about the dichotomy between parties' and mediators' needs during the initial mediation session, new potential benefits of each approach, and the ways in which each approach might be better suited to different types of cases and mediation contexts. Such discussions

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106. *Id.* at 25-30.

107. *Id.* at 20-24.

may also encourage mediators to weigh a broader set of considerations with the parties and the lawyers when deciding how to begin the initial mediation session, allowing them to better tailor the mediation process to the needs of the particular case.<sup>108</sup> Future research that examines initial joint sessions and initial separate caucuses in more depth would further inform these considerations and discussions.

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108. See *MEDIATION QUALITY*, *supra* note 6, at 7, 12-13.