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## I. INTRODUCTION

Consider the following two scenarios. Tom Jones sued his neighbor over a dispute they had regarding the boundaries of their abutting properties. Within a week of filing the suit, he received notice that a mediation had been scheduled for their case. Three weeks later he arrived at the appointed place and time of the mediation where he found his neighbor, his neighbor's attorney, and a mediator. After brief introductions, they were invited to take their seats and were provided a short overview of mediation, a process that was new and unfamiliar to Tom Jones. Two hours later, he left in frustration. In another case, a probate judge ordered two sisters, Rose and Anne, to mediate their dispute over an inheritance. During mediation, their conversations often became heated and the mediator struggled to assist them in productively addressing their differences. After provocation by Anne, Rose started to cry and left the room, the mediation ended without an agreement. These two scenarios share a common denominator, they demonstrate a lack of preparation. Tom lacked familiarity with the mediation process, while Rose and Anne had not been forewarned of the potentially jarring interactions sometimes endemic to mediation. These situations are commonplace. This article addresses parties' mediation preparedness, or more precisely unpreparedness.

Mediation operates as a facilitated negotiation, providing an opportunity for conflicting parties to develop mutually satisfying solutions to their dispute.[1] It has

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1. *See* MARK D. BENNET & SCOTT HUGHES, THE ART OF MEDIATION (2d ed. 2005); *See generally*, ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION 75-79 (2004) (conceiving mediation as a process that should primarily help parties to understand each other's perspectives and

emerged as a prevalent and preferred conflict resolution tool for many types of disputes, ranging from divorce[2] to medical malpractice,[3] from intellectual property[4] to probate concerns,[5] and from interpersonal issues between neighbors[6] to commercial matters between businesses.[7] Nevertheless, mediation remains a novel and unfamiliar process to many disputants.[8] This unfamiliarity leads to missed opportunities.[9] Disputes that might benefit from mediation are not mediated, and when disputants participate in mediation, they may not make the fullest use of the process.[10]

This article analyzes disputant preparedness for mediation and offers some suggestions to increase parties' preparedness for mediation. Following a review of relevant literature, it turns to the survey methodology and findings. Finally, the article concludes that the problem of parties' unpreparedness for mediation is generalized, and that in practice areas such as small claims, family, and community mediation this problem is most pronounced.

## II. REVIEW OF LITERATURE AND PRACTICE

Scholars, practitioners, and users generally recognize the importance of preparation for mediation. In the last few decades, several books have been published with a focus on the preparation stage of mediation.[11] Harold Abrahamson, for example, provided a highly detailed checklist of actions that lawyers should take to prepare their client and themselves before mediation takes

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improve their decision-making skills); *See* CARRIE MENKEL-MEADOW ET AL., MEDIATION: PRACTICE, POLICY AND ETHICS (Wolters Kluwer 2nd ed. 2014); *See* CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT (4th ed. 2014).

2. *See* ANN L. MILNE ET AL., DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS (J. Folberg, A. L. Milne & P. Salem eds. 2004).

3. *See generally* Carol B. Liebman, *Medical Malpractice Mediation: Benefits Gained, Opportunities Lost*,74 LAW & CONTEMP. PROBS. 135 (2011); Ralph Peeples et al. *Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases*, J. DISP. RESOL. 101 (2007); Chris Stern Hyman et al., *Interest Based Mediation of Medical Malpractice Lawsuits: A Road to Improved Patient Safety?* 35 J. HEALTH POL. POL'Y & L. 797 (2010).

4. *See* Wendy Levenson Dean, *Let's Make a Deal: Negotiating Resolution of Intellectual Property Disputes through Mandatory Mediation at the Federal Circuit*, 6 J. MARSHALL REV. INTELL. PROP. L. 365 (2007).

5. *See generally* Ray D. Madoff, *Mediating Probate Disputes: A Study of Court Sponsored Programs*, B.C. L. SCH. RES. P. NO. 32 (2004).
file:///C:/Users/16362/Downloads/SSRN-id509624.pdf

6. *See generally* Timothy Hedeen & Patrick G. Coy, *Community Mediation and the Court System: The Ties that Bind*, 17 MEDIATION Q. 351 (2000).

7. *See generally* John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137 (2000) (discussing various aspect of why mediation is widely used among business attorneys and executives).

8. *See generally* Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. DISP. RESOL. 641 (2002) (providing that more studies should be conducted "to draw clearer inferences about and have a more complete picture of the effectiveness of mediation in general jurisdiction civil cases").

9. *Id.* at 674-87 (providing empirical data to suggest that the effectiveness of mediation process depends on the extent of party familiarity with and preparation for the process).

10. *Id.*

11. *See, e.g.*, HAROLD I. ABRAMSON, MEDIATION REPRESENTATION: ADVOCATING AS A PROBLEM SOLVER (3d ed. 2013); DWIGHT GOLANN, SHARING A MEDIATOR'S POWERS: EFFECTIVE ADVOCACY IN SETTLEMENT (2013).

place.[12] He pointed out that mediation works effectively not only when parties and their lawyers appreciate the importance of the negotiation approach and the ways a mediator can help to achieve a resolution, but also when parties devote enough time to develop a mediation plan.[13] Additionally, Dwight Golann considered it relevant for the parties to prepare themselves to proactively use the mediator.[14] For example, to break impasses, improve communication between parties, and ask for evaluations.[15]

Concerns about parties' mediation preparedness was also expressed by Jaqueline Nolan-Haley.[16] Nolan-Haley, seeking to ensure that parties made knowledgeable choices about the mediation process and considered any settlement offers, recommended that parties participate with "informed consent."[17] She argued that informed consent requires that parties be educated about mediation before they consent to participate in it.[18] In a study sponsored by the American Bar Association, outside counsel, in-house counsel, and non-attorneys reported that pre-mediation preparation was a critical step for an effective mediation.[19] The study emphasized the necessity for parties to be educated by their lawyers about how mediation operates.[20] The study also noted that lawyers have a duty to be knowledgeable about mediation and mindful of the importance of focusing on the interests of the parties.[21]

Roselle Wissler reported that a lack of preparation was a significant reason parties failed to reach an agreement.[22] On the assumption that represented parties are better prepared for mediation, Wissler highlighted that, in domestic relations mediation, unrepresented parties who were unfamiliar with the process of mediation sought information on mediation from the following sources: court-provided brochures, court clerks, or they found information on their own.[23] Nevertheless, Wissler pointed out that parties who obtained information from court-provided brochures, court clerks, or on their own were less likely to settle their disputes than parties that did not obtain information from these sources. Furthermore, parties with more preparation for mediation had a more favorable assessment of mediation than parties with less preparation.[24] Indeed, compared to parties with less preparation, parties with more preparation thought that mediation was more fair[25] and felt less pressure to settle, and were more likely to reach a resolution.[26]

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12. ABRAMSON, *supra* note 11, at 215-380.
13. *Id.*
14. GOLANN, *supra* note 11, at 150-155.
15. *Id.* at 169.
16. Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775 (1999).
17. *Id.* at 776.
18. *Id.* at 778.
19. ABA SEC. OF DISP. RESOL., TASK FORCE ON IMPROVING MEDIATION QUALITY: FINAL REPORT (APR. 2006-FEB. 2008) (2008), http://www.jfinklawadr.com/wp-content/uploads/2013/06/FinalTaskForceMediation.pdf.
20. *Id.* at 18-20.
21. *Id.*
22. Wissler, *supra* note 8, at 698; *see also* JULIE MACFARLANE, COURT-BASED MEDIATION FOR CIVIL CASES: AN EVALUATION OF THE ONTARIO COURT (GENERAL DIVISION) ADR CENTRE 56 (1995).
23. Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URB. L. J. 419, 434-435 (2010).
24. *Id.*
25. *Id.* at 433.
26. Wissler *supra* note 8, at 687.

On the other hand, Wissler's study underlined that represented parties are not necessarily better prepared for mediation, thus refuting the abovementioned assumption about representation in mediation.[27] Wissler pointed out that only 57% of represented parties in domestic relations mediation[28] received information about mediation from their lawyers before mediation began.[29] Additionally, Julie MacFarlane and Michaela Keet reported that represented parties also felt under-prepared for their mediation session.[30] They noted that clients indicated that their preparation was often limited to a short conversation in the car with their lawyer on the way to the mediation.[31] These research studies provide evidence that under-preparedness of parties in mediation is a problem occurring for both represented and unrepresented parties.

Jean Poitras and Susan Raines observed that under-prepared parties, as well as under-prepared attorneys, frequently undermined the opportunity for fruitful discussion and problem-solving.[32] Based on surveys of more than 200 experienced mediators, they reported that mediators identified under-prepared attorneys as a significant barrier to settlement.[33] Poitras and Raines emphasized that a common example of under-preparedness was attorneys that did not inform their clients of the fundamental differences between mediation and traditional litigation.[34] Surveyed mediators explained that under-preparedness may take many forms, ranging from a party's unfamiliarity with the mediation process, failure to obtain adequate information, or an apparent lack of coordination or communication between the parties and their legal or financial advisors.[35]

Mediation preparedness is critical to clarify the role of mediators and the nature of the mediation process to the parties.[36] Indeed, some studies reported that parties believed that the mediator's role was to persuade the opposing party to give serious consideration to their own views.[37] In other studies, parties mistakenly believed that the goal of family mediation was to save the marriage, and thus the mediator's task was to urge parties to give marriage another chance.[38]

The significance of mediation preparation may be found in negotiation literature, as mediation is considered a form of moderated or facilitated

27. *Id.* at 686.

28. *Id.* at 654. But Wissler reported that in general civil mediation only 6% of represented parties received little or no preparation from their lawyers, thus implying how represented parties' preparation for mediation may differs based on the area of practice.

29. *Id.* at 732-33.

30. *See* Julie MacFarlane & Michaela Keet, *Civil Justice Reform and Mandatory Mediation in Saskatchewan: Lessons for a Maturing Program*, 42 ALTA L. REV. 677, 693 (2005).

31. *Id.* at 692.

32. JEAN POITRAS & SUSAN S. RAINES, EXPERT MEDIATORS: OVERCOMING MEDIATION CHALLENGES IN WORKPLACE, FAMILY, AND COMMUNITY CONFLICTS 52 (2012) (quoting Bruce E. Meyerson, *Preparing for Mediation*, http://brucemeyerson.com/articles/a_001.html (last visited Oct. 30, 2020)).

33. POITRAS & RAINES, *supra* note 32, at 48.

34. *Id.* at 52.

35. *Id.*

36. *See generally* ABRAMSON, *supra* note 11; GOLANN, *supra* note 11.

37. *See* Nancy Welsh, *Stepping Back Through The Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 621-622 (2004).

38. Jessica Pearson & Nancy Thoessen, *Divorce Mediation: An Overview of Research Results*, 19 COLUMBIA J. L. AND SOC. PROBS, 451, 466 (1985).

negotiation.[39] In their widely-used textbook *Negotiation*, Lewicki, Barry, and Saunders opened their discussion of negotiation best practices with the header, "Be prepared."[40] They stated, "We cannot overemphasize the importance of preparation."[41] In Chester L. Karrass's *The Negotiating Game*, the first imperative is to prepare a negotiation plan.[42] Linda Babcock and Sara Laschever's advice for negotiators also holds true for mediation disputants: "If you learn a few basic principles, plan carefully and practice, you can become an effective [mediator] pretty quickly."[43]

In early research regarding the distinguishing characteristics of negotiators that were rated as above average by their professional peers, Neil Rackham and John Carlisle found no distinction in the amount of time spent planning.[44] Instead, they found a distinction in how that time was utilized, with those recognized as above average spending a greater proportion of preparation time considering their opponents' goals, interests, and alternatives.[45] The above-average rated negotiators explored a wider range of options, focused more on points of common ground, did not presume a sequence in which issues would be negotiated, and set their targets as broad ranges instead of specific points.[46] As legendary UCLA basketball coach John Wooden remarked, "Failure to prepare is preparing to fail," which emphasizes the importance of preparation.[47]

In light of the consensus among scholars and practitioners that preparation is key to successful mediation, it is surprising that a considerable proportion of disputants arrive at mediation without a complete understanding of either the mediation process or their role in it.[48] Since mediation can be one of the most important events in a person's life and the result can potentially impact them and their families forever, it seems clear that proper mediation preparation is an absolutely necessary part of the process. Many court-based mediation programs have recognized the importance of mediation preparation and have developed preparatory courses to address this dynamic through materials and programming.[49] These preparatory courses are commonly called "mediation orientation."[50] Existing

39. *See* ROY LEWICKI ET AL., NEGOTIATION 568 (2015); *see also* WILLIAM URY, GETTING PAST NO: NEGOTIATING IN DIFFICULT SITUATIONS (2007).

40. *See* LEWICKI, *supra* note 39, at 593.

41. *Id.*

42. *See* CHESTER L. KARRASS, THE NEGOTIATING GAME 148-69 (1970).

43. LINDA BABCOCK & SARA LASCHEVER, ASK FOR IT: HOW WOMEN CAN USE NEGOTIATION TO GET WHAT THEY REALLY WANT 77 (2008).

44. *See* Neil Rackham & John Carlisle, The Effective Negotiator — Part 2: Planning for Negotiations, 2 J. EUR. IND. TRAIN. 2 (1978).

45. *Id.*

46. *Id.*

47. TERRY L. BOLES. & LON D. MOELLER, THE ROAD TO SUCCESS: LEARNING HOW TO BECOME AN EFFECTIVE NEGOTIATOR 72 (2012).

48. MacFarland & Keet, *supra* note 30, at 692 ("Almost 50 percent of clients told us that they felt ill-prepared for their mediation session. Many went into their mediations not knowing, or confused about, what to expect. Several said that their preparation was limited to a short conversation with their lawyer in the car on the way to the session, meeting their lawyer fifteen minutes in advance of the session or receiving a letter that told them only where to be and when to be there. Very few remembered receiving the literature that has been developed by the Dispute Resolution Office for the preparation of clients.").

49. *See* Larry Lehner, *Mediation Parent Education Programs in the California Family Courts*, 30 FAM. & CONCIL. CTS. REV. 207 (1992).

50. Hugh McIsaac, *Orientation to Mediation in Portland, Oregon*. 32 FAM. & CONCIL. CTS. REV. 55 (1994).

research on these programs suggest that they are successful in familiarizing disputants with mediation.[51] However, familiarity with the mediation process may not be sufficient preparation, as merely knowing the mediation process and the mediator's role would not have helped the parties in this article's opening scenarios.

Given the attention paid to preparation in the negotiation literature,[52] this article seeks to describe how mediators consider party preparedness. After all, mediators are typically the only observers of participants' mediation behaviors and are likely to discern effective preparation for a process they routinely manage.

## III. METHODOLOGY AND LIMITATIONS

Mediators are well-situated to assess mediation participants' preparedness because the mediator interacts with participants throughout the process.[53] Mediators also undertake specific training to understand the dynamics of conflict, elicit relevant information, manage the pace and emotional climate of dialogue and deliberation, facilitate constructive problem-solving, and support disputants in the decision-making process.[54] For these reasons, mediators are equipped to understand whether parties are adequately prepared to mediate their dispute. Thus, this study focused on the perceptions, observations, and experiences of mediators.

Consistent with standards of research involving human subjects, the researchers conducted an online survey of mediators between September and December 2013. No individually identifying information was collected, instead, respondents indicated the sectors in which they provide mediation and the number of cases they have mediated. Invitations to participate in the study were forwarded to the members of the largest associations of mediators in the United States: the American Bar Association's Section of Dispute Resolution, the Association for Conflict Resolution, the Association of Family and Conciliation Courts, and the National Association for Community Mediation. A second round of invitations were made through state or local associations in Georgia, Michigan, and New York, as local court offices or professional chapters indicated their interest in supporting the researchers in locating prospective participants.

The online survey began by seeking the respondents' general impression of past parties' level of preparation. The survey focused on what proportion of parties appeared to have spent sufficient time or effort preparing for mediation, and what proportion have not. Importantly, the survey questions targeted only the preparation of the parties to the dispute, not the preparation of attorneys, mediators, or any other interested parties. The term "parties" or "party" used herein means the disputants or litigants, without regard to whether they are represented or not.

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51. Richard D. Mathis, Zoe Tanner & Flo Whinery, *Evaluation of Participant Reactions to Premediation Group Orientation*, 17 MEDIATION Q. 153 (1999); Katherine M. Kitzman, Gilbert R. Parra & Lisa Jobe-Shields, *A Review of Programs Designed to Prepare Parents for Custody and Visitation Mediation*, 50 FAM. CT. REV. 128 (2012).

52. *See generally* ROGER FISHER & DANNY ERTEL, GETTING READY TO NEGOTIATE. THE GETTING TO YES WORKBOOK (1995); LEWICKI ET AL., *supra* note 39; ABRAMSON, *supra* note 11; GOLANN, *supra* note 11.

53. Lande, *supra* note 7.

54. *Id.*

The survey contained an item aimed at assessing if and how parties sufficiently consulted, or coordinated, with professionals, including lawyers. Twenty-six dimensions of preparedness were organized into five groups:

1) knowledge of the mediation process and respective roles in the process (five questions),
2) understanding of parties' own goals, pertinent legal and financial issues, strengths and weaknesses of their case, and their alternatives to settlement in mediation (eight questions),
3) preparation to make decisions informed by their interests, to refer to relevant materials they may have brought to the mediation, and to manage their emotions during the process (five questions),
4) prior consultation with relevant professionals, prior coordination or consultation with other individuals whose input was important to them (four questions), and
5) consideration of the other party's goals, strengths and weaknesses of the other party's case, and alternatives to agreement available to the other party (four questions).

Mediators were asked to estimate what proportion of parties, rounded to the nearest tenth of a percent, came to mediation prepared along each dimension. Mediators were also asked to identify which five preparation elements they perceived parties to have overlooked most often, as well as which five elements the mediators considered most valuable to parties entering mediation. Finally, the survey inquired about the areas of mediation in which respondents practiced and the number of cases they mediated. Areas of mediation included family (divorce, custody, and visitation), small claims courts, civil courts (other than family and small claims), private dispute resolution (commercial and civil non-court), workplace dispute resolution, education, community, restorative/criminal courts, and environmental public policy.

The survey sought to capture the impressions of mediators across a variety of practice areas. The abovementioned preparation dimensions were selected to be relevant to mediation generally. To tap survey participants' experience across cases—instead of asking about a single case, such as the most recent or another, otherwise randomly-selected sample—the survey invited mediators to estimate what percentage of the mediation parties within their primary area of practice exhibited preparation along the twenty-six items included in the survey. This study relied on mediators' perceptions of the parties in mediation to gauge preparedness for mediation. A limitation of this study was that it was not based on direct observation. Nevertheless, an advantage of this methodological approach is that mediators are trained and uniquely positioned to answer the above outlined questions because of their interactions with parties in mediation.

## IV. DATA ANALYSIS AND DISCUSSION: PARTIES' PERCEIVED PREPARATION FOR MEDIATION

A total of 372 mediators participated in the online survey. A significant portion of the participants were focused primarily on mediating disputes in family, civil

disputes, and private dispute resolution matters.[55] Other areas of mediation practice included: workplace,[56] small claims,[57] community,[58] public policy,[59] restorative justice,[60] and education.[61] The participants' level of experience varied. Participants who mediated more than 300 cases accounted for 39.1% of the sample. Other participants mediated cases within the ranges of 101-300,[62] 51-100,[63] 26-50,[64] and 1-25.[65]

Survey responses revealed that mediators across all sectors perceived large proportions of parties to be insufficiently prepared for mediation, with an average estimation that nearly half of disputants come to mediation unprepared.[66] These proportions varied significantly between practice areas. For instance, in workplace mediations and in mediations that involved issues of public policy, a significant portion of the parties arrived prepared for mediation, 60.5% and 75.0%, respectively. By contrast, in family and small claims mediations the percentage of parties that were sufficiently prepared to mediate their cases were considerably lower, at 45.3% and 43.0%, respectively.

### *A. Mediators' Perceptions of Disputants' Preparedness*

The data addressing the disputants' knowledge regarding the mediation process and mediator's role suggested that only half of all disputants understood the mediation process and a similar proportion understood the role of the mediator. In some contexts, far fewer disputants understood these fundamental elements: in community mediation settings, only 41.5% of disputants were perceived to understand the process, and the same proportion to understand the mediator's role. And in small claims court mediations, only 31.4% of disputants appeared to understand the process and only 29.5% appeared to understand the mediator's role.

Disputants participating in workplace mediation were perceived to be the most knowledgeable about the mediation process[67] and the role of the mediator.[68] Close

55. For the purpose of this paper, the authors intend family mediation as a process where parties are typically divorced or separated couples or parents. Civil courts mediation deals with civil disputes other than family and small claims disputes. Private dispute resolution mediation typically comprehends commercial and non-court-ordered civil disputes law. Participants reporting that they practiced primarily in family disputes were 92 (25.9%); those primarily practicing in civil disputes were 90 (25.4%), and those practicing primarily in private dispute resolution were 63 (17.7%).

56. 13.5%; Workplace mediation includes disputes emerging in the workplace setting such as those between employees and employers or among employees.

57. 5.9%; Small claims mediation involves disputes with no large amounts of money or not complicated issues.

58. 5.4%; Community mediation serves the purpose to solve disputes among members of social groups such as neighbors.

59. 2.5%; Public policy mediation takes place with the aim of resolving social conflicts that are the results of the actions or inertia of authorities such as governments, locals, states, and federals.

60. 2.5%; Restorative justice aims at repairing the harm caused by crimes, and education mediation refers to those mediations that typically involve parents and school districts.

61. 1.1%.

62. 20.3%.

63. 13.2%.

64. 11.2%.

65. 16.2%.

66. Participants in the survey reported 46.96% of parties were underprepared.

67. 60%.

68. 59.1%.

behind were disputants participating in private dispute resolution, where mediators reported that 55.1% were knowledgeable about the mediation process and 56.2% understood the mediator's role.

Examining responses related to parties' interests, goals, and financial issues, the survey suggests that a slim majority are perceived to arrive with an understanding of their interests,[69] their goals,[70] or the financial issues pertinent to their dispute.[71] In some areas fewer than half were perceived to be prepared in these dimensions, with only 46.7% of community mediation parties perceived as understanding their interests, and only 46.5% of family disputants perceived as knowledgeable about pertinent financial issues.

Along dimensions related to making decisions and managing emotions, slight majorities were prepared to make decisions consistent with their goals[72] or to make decisions related to financial issues,[73] while half were prepared to manage their emotions during mediation. In some mediation contexts, the proportions were more pronounced: on the dimension of managing emotions, only 47.6% of small claims participants, 45.3% of family participants, and 40.5% of community mediation participants were perceived as being prepared to manage their emotions.

Dimensions concerning parties' preparation with professionals who might support their mediation efforts, whether in advance of, or at the mediation—attorneys, accountants, therapists—suggested that large proportions of parties arrived without sufficient consultation or coordination. Across all sectors, mediators estimated that 39.1% of parties had consulted sufficiently with professionals who would not be attending the mediation, while they estimated that just over half[74] had consulted with professionals that would be present at mediation. In family mediation, which may involve attorneys as well as professionals such as family therapists, mental health specialists, and financial experts, these proportions were lower on both dimensions: only 38.9% had consulted with non-attending professionals and only 44.8% had prepared with professional who would attend the mediation.

Consultation with other individuals whose input was important to the parties—such as relatives, neighbors, or business partners—was reported as sufficient for fewer than half of the disputants, whether or not those individuals attended mediation with the party or not. Mediators observed that 47.3% of parties had consulted sufficiently with such individuals who did not attend mediation, and only 44.4% had done so with individuals who accompanied the parties to mediation. Remarkably, the proportion of parties who had coordinated with accompanying persons was considerably lower for small claims mediation,[75] community mediation,[76] and family mediation.[77]

While the negotiation literature suggested that considering the other party's interests and alternatives is valuable, empirical studies suggest that only some

69. 56.6%.
70. 54.9%.
71. 51.9%.
72. 57.1%.
73. 53.6%.
74. 51.3%.
75. 36.7%.
76. 36.3%.
77. 33.3%.

professional negotiators do so.[78] The concluding group of questions concerned just such actions, and expectedly yielded lower proportions of parties: mediators perceived that only 33.6% of parties had considered their counterparts' goals, 31.6% their interests, 34.9% the strengths or weaknesses of their cases, and 32.4% their alternatives to agreement.

The troubling proposition that fewer than half of disputants arrive at mediation prepared—which means more than half arrive unprepared—was observed across many elements for the full sample of mediators' parties. Alongside only 49.6% understanding the mediator's role, 46.9% were perceived to understand the parties' own role, 47.6% to have considered alternatives to a mediated agreement, 43.8% to understand the legal issues pertinent to their dispute, and a mere 41.2% to have considered relevant objective criteria or standards.

In small claims and community mediation, fewer disputants were represented by an attorney. This might explain why disputants in these areas of practice were perceived as having a poorer understanding of the relevant legal issues, and of the strengths and weakness of their cases than other areas of practice. Indeed, in areas where parties tend to have representation, such as private dispute resolution, mediators reported that greater proportions understood the role of professionals present at the mediation,[79] were more knowledgeable of their alternatives to agreement in mediation,[80] and the legal issues relevant to their dispute.[81] This was true for public policy mediation participants as well, mediators perceived 57.8% were educated on the role of professionals present at the mediation and 52.2% were knowledgeable of the legal issues pertinent to their dispute. Across the full sample, however, representation did not necessarily correlate with preparation, as will be discussed below.

In sum, there is evidence that a significant portion of parties were under-prepared for mediation. In some areas of mediation practice, namely small claims, community, and family mediations, this lack of preparation was more evident. In the remaining areas of practice studied, the chance of parties being prepared for mediation was not significantly higher. Ultimately, preparation not only differed among areas of practice but also among specific dimensions of preparation outlined in the survey.

### *B. Opportunities Missed: Mediators' Ranking of the Most Overlooked Actions*

Survey respondents were asked to identify which five of the twenty-six dimensions are most often overlooked by their parties. Understanding the strengths and weaknesses of their case, were it decided by a judge or arbitrator, was the preparation step most often on mediators' top-five lists.[82] The next two most-commonly observed oversights were considering the other party's interests[83] and

78. *See* Rackham & Carlisle, *supra* note 44.
79. 54.9%.
80. 52.4%.
81. 51.1%.
82. 147 mediators reported that disputants overlooked the strengths and weaknesses of their case, were it decided by a judge or arbitrator.
83. 126 mediators reported that disputants overlooked the interests of the other parties in the dispute.

considering the strengths and weaknesses of the other party's case.[84] Rounding out the top five were party's understanding of their own interests[85] and knowing the role of the mediator.[86] Notably these are all actions or considerations that may be undertaken by a party, without reference to others who might be involved in their dispute. Consultation with individuals whose input is important to the disputant—whether those individuals attended mediation or not—was not among the most overlooked, nor was consultation with professionals (including attorneys).

### *C. Recommended Practices: Mediators' Ranking of the Most Valuable Actions*

When asked which preparatory actions are most valuable for parties entering mediation, most survey respondents emphasized elements related to parties' goals, prospects, and decision-making. In descending order from most often to least often, the elements most often suggested by mediators were as follows: parties should understand their own interests,[87] their own goals for mediation,[88] the strengths and weaknesses of their own case,[89] and how to make decisions consistent with their own goals.[90] Only the fifth-most cited step involved the other party: parties should consider the interests of their opponent.[91]

By recognizing the value of considering a counterpart's interests, surveyed mediators are displaying insight consistent with that of Rackham and Carlisle's above-average negotiators.[92] And with their emphasis on parties taking stock of their interests, goals, and strengths and weaknesses, their recommended list aligns well with the many negotiation textbooks cited previously.[93]

### *D. Assistance Helps (or Does it?): Legal Representation and Preparation*

The survey engaged the issue of representation in multiple ways. Alongside questions related to coordination with professionals (including attorneys) who might accompany parties to mediation, or consultation with professionals who would not be attending mediation, the survey asked mediators to indicate what proportion of parties in the mediator's primary area of practice were self-represented and which were represented. Mediators serving primarily in civil courts (other than family or small claims) indicated that 80.1% of parties were represented, while those in private dispute resolution estimated that 79.6% of parties were represented. Expectedly, these differ greatly from the estimates from mediators in family courts where 43.6% of parties were represented, and small claims courts and community mediation where 15.0% and 12.7% were represented, respectively.

84. 101 mediators reported that disputants overlooked the strengths and weaknesses of the other party's case, were it decided by a judge or arbitrator.

85. 97 mediators reported that disputants overlooked their own interests in the dispute.

86. 86 mediators reported that disputants overlooked the role of the mediator (as distinct from judge or arbitrator).

87. Reported by a total of 170 mediators.

88. Reported by a total of 162 mediators.

89. Reported by a total of 134 mediators.

90. Reported by a total of 118 mediators.

91. Reported by a total of 103 mediators.

92. *See* Rackham & Carlisle, *supra* note 44.

93. Fisher & Ertel, *supra* note 52.

Quite unexpectedly, however, was the finding that mediators' perceptions of parties' preparedness for mediation did not correlate with legal representation.

While over eighty percent of civil mediation parties were represented, only 53.7% were perceived to be prepared for mediation, and while nearly eighty percent of private dispute resolution parties were represented, only 56.7% were perceived as prepared. These disparities suggest that representation does not ensure preparation, which in turn leads to the question, "Do attorneys believe it to be their responsibility to prepare clients for mediation?" That preparation may not be closely linked to representation can be seen in other ways as well. The surveyed mediators perceived that 43.1% of small claims parties were prepared, while only 15.0% were represented. Half of the community mediation parties were perceived as prepared, but only 12.7% were represented.

## V. CONCLUSION

Parties' preparation for mediation has many implications for the effectiveness of the mediation process. Indeed, the process achieves its fullest potential when all the subjects involved—mediators, parties, and their attorneys or others involved—arrive prepared to exercise their respective roles in the mediation, to achieve the full benefits of joint deliberation and decision-making.[94] The findings of this research suggest that almost one in two mediations proceed with at least one party unprepared to make full use of the process. The promise of mediation, its potential to provide disputants an opportunity to negotiate differences constructively and creatively, and perhaps to reach informed and integrative agreements, is hamstrung when parties arrive at the table without sufficient preparation.

Implications of this study include the need to develop mediation preparation materials or programs that are accessible to disputants across a range of mediation contexts. Building on previous efforts to introduce parties to the process of court-based mediation[95] and downloadable guides such as those prepared by the American Bar Association's Section on Dispute Resolution,[96] courts and other mediation providers should develop print and online resources that integrate a mediation process overview with key steps of negotiation preparation as well as coordination and consultation with individuals related to or invested in the dispute, and with attorneys, accountants, or other professionals supporting or representing a disputant. For parties and institutions to realize mediation's potential, disputants must be prepared to maximize their use of the process. With effective preparation, they can—and will—do so.

94. *See* ABRAMSON, *supra* note 11, at 215-380.

95. *See e.g.*, Lehner, *supra* note 49; McIsaac, *supra* note 50; Mathis, Tanner, & Whinery, *supra* note 51.

96. *See* American Bar Association, Section of Dispute Resolution, *Preparing for Mediation* (2012); *see also* American Bar Association, Section of Dispute Resolution, *Preparing for Family Mediation* (2012); *see also* American Bar Association, Section of Dispute Resolution, *Preparing for Complex Civil Mediation* (2012).