

MAKING PEACE AND MAKING MONEY:  
ECONOMIC ANALYSIS OF THE MARKET FOR MEDIATORS IN  
PRIVATE PRACTICE

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I. INTRODUCTION

In 1999, Frank Sander, a pre-eminent ADR scholar, was asked to evaluate the state of ADR.<sup>1</sup> His answer was that while “we’ve made amazing progress,” we still “have a way to go.”<sup>2</sup> One of his greatest concerns was about the long-term professional issues of ADR and mediation in particular. While there was an ample supply of people trained in mediation in 1999, there was not enough paying work for them.<sup>3</sup> Training courses were plentiful, but there were few mentoring and other job opportunities. Most people interested in mediation were advised to pursue their interest on a part-time or volunteer basis at night and over weekends, while keeping their day jobs.<sup>4</sup>

To this day, making mediation a full-time career remains extremely difficult. Professor Eric Green, a law professor at Boston University and a successful commercial mediator, noted in a class lecture that there is “no career path in mediation.”<sup>5</sup> For virtually all successful private mediators, mediation is a second or third career; most are in their fifties or older.<sup>6</sup>

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<sup>1</sup> See Frank E.A. Sander, *The Future of ADR*, 2000 J. DISP. RESOL. 3 (2000). Professor Sander delivered the lecture at the University of Missouri-Columbia School of Law on April 16, 1999.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 8.

<sup>4</sup> *Id.*

<sup>5</sup> Eric D. Green, Lecture at Harvard Law School Mediation Class (Mar. 13, 2008).

<sup>6</sup> See, e.g., Stephen B. Goldberg, *The Secrets of Successful Mediators*, 21 NEGOTIATION J. 365, 366 (2005). The author surveyed successful mediators, most of whom have mediated at least 100 cases. Eighty percent of mediators in his final sample of thirty were over the age of fifty and fifty percent were over sixty years old. See also PETER LOVENHEIM, BECOMING A

More interestingly, of those who decide to become mediators, eighty percent cannot make a living solely as mediators.<sup>7</sup> Aspiring mediators are constantly scrambling for work, but often must return to their old careers.<sup>8</sup> Fifteen percent “[keep] busy, make a [decent] living, but never quite break through.”<sup>9</sup> The top five percent, however, are booked months in advance and can gross upwards of a million dollars per year.<sup>10</sup> This presents efficiency concerns regarding wasted resources on excess market entry and on mediation education, and distributional concerns regarding mediator income inequality.<sup>11</sup>

In this article, I explore the market for mediators, in particular for mediators in private practice.<sup>12</sup> I argue that the private mediator market is similar to markets for entertainers or professional athletes, instead of the professional job markets from where many mediators are drawn; a few mediators at the top of the pyramid are wealthy, while the vast majority of mediators make little or no money. I explore possible economic explanations for why the market for mediators is a “winner-take-all market.”

Since mediation is not a licensed profession, there is little reliable data on how many Americans work as mediators, in what practice areas, and how much they earn, and even less empirical research. The data in this article is drawn from public sources—Bureau of Labor Statistics, American Bar Association, Association for Conflict Resolution, and court mediator rosters—and from surveys and interviews conducted with ten successful mediators and dispute

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MEDIATOR: AN INSIDER'S GUIDE TO EXPLORING CAREERS IN MEDIATION 54, 70–71 (2002) (noting that the median age of volunteer mediators in community mediation centers is forty-six, that seventy percent of divorce and family mediators in private practice are between forty and fifty-nine years old).

<sup>7</sup> See JEFFREY KRIVIS & NAOMI LUCKS, HOW TO MAKE MONEY AS A MEDIATOR (AND CREATE VALUE FOR EVERYONE): 30 TOP MEDIATORS SHARE SECRETS TO BUILDING A SUCCESSFUL PRACTICE 9 (2006).

<sup>8</sup> *Id.* at 9–10.

<sup>9</sup> *Id.* at 10.

<sup>10</sup> *Id.* at 10, 137.

<sup>11</sup> If we believe that mediation is a skill improved over time or with frequent practice, then the large number of part-time mediators also raises concerns about the quality of mediation provided. In one of the few empirical studies ever performed, Roselle Wissler found training had no impact on settlement, but that experienced mediators were more likely to bring the case to settlement. Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 678–79 (2002). Jessica Pearson & Nancy Thoennes found that parties preferred mediators with experience. See Jessica Pearson & Nancy Thoennes, *Divorce Mediation Research Results*, in DIVORCE MEDIATION: THEORY AND PRACTICE 429, 436 (1988).

<sup>12</sup> There is no single market for mediators. See discussion *infra* Part II.A–B.

resolution scholars in private practice.<sup>13</sup> The interviews were conducted either by telephone or by e-mail in March and April 2008. Because of limited data, the article does not provide complete empirical answers, but rather asks questions to be explored further in the future.

## II. THE MARKET FOR MEDIATION SERVICES AND FOR MEDIATION PROVIDERS

The market for mediation has significantly grown and matured over the last thirty years. Data about the market for mediation services and for mediation providers suggests that supply exceeds demand. More mediators want to enter the market than there are mediation jobs. This section presents data on the two different markets and on the different types of job opportunities for mediators.

### A. *Mediation Services*

There is not one single market for mediation services in the United States. Markets differ jurisdictionally—i.e., markets in states where courts can and frequently order the parties to mediate and those states where courts do not have that authority differ markedly—and based on type of mediation—i.e., community mediation, which evolved outside the courts, and private mediation, including domestic, small claims, and commercial mediation, which is often either court-mandated or conducted in the shadow of litigation.<sup>14</sup>

Mediation is a common form of resolving disputes in many communities. Tribal communities have been using mediation for centuries,<sup>15</sup> and in China, the People's Mediation Committees

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<sup>13</sup> I would like to thank the mediators who responded to my query: Tracy Allen, William Baten, Robert Benjamin, John Bickerman, Steve Cerveris, Robert A. Creo, Eric Galton, Susan Hammer, John Lande, and John Van Winkle.

<sup>14</sup> Markets could also be divided geographically and into more categories based on type of mediation offered. In particular, domestic mediators and labor mediators tend to specialize, and the particulars of those markets differ from the market for commercial mediation. For example, fees for labor mediation are regulated and a smaller percentage of domestic and labor mediators are lawyers than is the case for commercial mediators. But, in the characteristic I analyze in this article, namely mediator income distribution, these markets are relatively similar. While income disparities might be smaller, they are still present, and both markets are as difficult to enter as the commercial mediation market. See discussion *infra* Part IV.C.2–D.

<sup>15</sup> See generally DAVID LEVINSON, *AGGRESSION AND CONFLICT: A CROSS-CULTURAL*

resolve over seven million disputes annually.<sup>16</sup> In communities where mediation is commonly used to settle disputes, senior or influential members of the community act as intermediaries.<sup>17</sup> Mediation is only one of their functions and they could by no means be called professional mediators.

The United States, on the other hand, has relied on an adversarial system of judicial dispute resolution, where each side presents its case and a jury decides the winner. As the number of court filings increased in the 1950s through the 1970s, federal and state courts began developing programs parallel to the court system, called dispute resolution programs, to deal with the flood of cases.<sup>18</sup> Frank Sander proposed the concept of the multi-door courthouse, where an aggrieved party could go to court and an attendant at the door would direct her to one of the many doors, each providing a different alternative for resolving her problem.<sup>19</sup> In the states that embraced the multi-door courthouse concept and granted judges authority to order parties to mediate (or made pre-litigation mediation mandatory), mediation has grown tremendously, including domestic mediation, small claims mediation, and high-end commercial mediation.<sup>20</sup> "Mediation generally has not developed as quickly or as pervasively in the other states."<sup>21</sup>

Mediation remains a choice that is more often than not the result of a judicial or legislative mandate than of party choice. According to a survey by the American Arbitration Association, 63% of respondents (i.e., companies) and 73% percent of *Fortune* companies attributed their use of mediation to court-mandated mediation

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ENCYCLOPEDIA 113–14 (1994) (discussing the importance of mediation in small, tight-knit communities).

<sup>16</sup> KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 25–26 (2d ed. 2000) (explaining how Confucian traditions helped shape the current practice).

<sup>17</sup> See LEVINSON, *supra* note 15, at 114.

<sup>18</sup> See Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 174–78 (2003).

<sup>19</sup> See Frank E.A. Sander, Professor of Law at Harvard Univ., *Varieties of Dispute Processing*, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976), in 70 F.R.D. 111, 131 (1976) (describing the concept of the multi-door courthouse).

<sup>20</sup> See STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 603 (5th ed. 2007) (noting that there is a marked difference between states where courts rules or legislation made mediation mandatory and those where they did not).

<sup>21</sup> E-mail from John Van Winkle, Mediator, to author (Oct. 7, 2008, 14:14:11 EST) (on file with author). John Lande reports that there is greater support in the business community for the use of mediation in states with strong ADR cultures, such as Florida, than in states with weak ADR cultures. See John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 841 n.8 (1997).

programs.<sup>22</sup> There are important differences between the states with court-mandated mediation and those without, such as in the number of mediators in private practice (many more in mandatory jurisdictions), in the types of cases they mediate (less variety in non-mandatory jurisdictions), and in who the mediators are, but there are also important similarities that justify analyzing the market for private mediators as a single one. Making a living as a mediator in private practice is difficult in both types of jurisdictions, and the income distribution of mediators in private practice as well as the reasons for the steep income distributions are similar.

In addition, and detached from the legal system, mediation was a part of the community empowerment movement in the late 1960s and 1970s.<sup>23</sup> Community justice centers were established to resolve neighborhood disputes.<sup>24</sup> These centers grew from the need to escape the institutionalization of justice and to “get away from lawyers, judges, courthouses and . . . a justice system” that has become too burdensome and costly for the average citizen.<sup>25</sup> The goal of community mediation centers was to train volunteers to mediate, not to pay them.<sup>26</sup> As a result, volunteer mediation markets and volunteer mediators are not the subject matter of this analysis.

Furthermore, as the private mediation market matures, mediators are increasingly specializing. Although general practitioners still exist, many mediators today specialize in divorce, public policy disputes (e.g., environmental) or commercial mediation. These markets are distinct and successful mediators in one market find it increasingly difficult to branch out into another market, regardless of their skills and reputation in their primary market.<sup>27</sup>

Although the market for mediation services has grown, it is still

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<sup>22</sup> See AM. ARBITRATION ASS'N, DISPUTE-WISE BUSINESS MANAGEMENT: IMPROVING ECONOMIC AND NON-ECONOMIC OUTCOMES IN MANAGING BUSINESS CONFLICTS 19 tbl.11, 28 tbl.20 (2006), available at <http://www.adr.org/si.asp?id=4124>.

<sup>23</sup> See Hensler, *supra* note 18, at 170.

<sup>24</sup> See EVAN R. SEAMONE, BRINGING A SMILE TO MEDIATION'S TWO FACES: HOW ASPIRING MEDIATORS MIGHT JUMP-START CAREERS IMMEDIATELY FOLLOWING LAW SCHOOL, § II.B., ¶¶ 5-6 (2000), <http://www.uiowa.edu/~cyberlaw/elp00/Evan/mediation/>.

<sup>25</sup> Peter S. Adler, *Lawyer and Non-Lawyer Mediation: Speculations on Brewing Controversy*, NIDR Forum, June 1997, at 47.

<sup>26</sup> See SEAMONE, *supra* note 24, at § II.B., ¶ 7.

<sup>27</sup> See Christopher Honeyman et al., *Skill Is Not Enough: Seeking Connectedness and Authority in Mediation*, 20 NEGOTIATION J. 489, 503-04 (2004).

relatively small compared to litigation.<sup>28</sup> The usual explanation is a lack of knowledge (on the part of the public) regarding mediation.<sup>29</sup> Other explanations include the principal-agent problem of lawyers as gatekeepers to mediation, who avoid mediation because they want to maintain control over the dispute and because they have a financial interest in channeling and prolonging it.<sup>30</sup> Finally, it has been suggested that the mediation market remains small because using mediation, unless court-mandated, requires consent of both parties. Without consent, the default option, litigation, will be used.<sup>31</sup>

### B. Mediation Providers

Like there is no single market in mediation services, there is also not a single market for mediation providers. The mediation profession, as it has evolved in the United States, ranges from mediators who volunteer in community mediation centers and take on a couple neighborhood disputes each year, to mediators in private practice who mediate complex business cases full-time and can gross over \$1 million per year.<sup>32</sup>

The profession is unstructured and large because there are “few formal barriers to entry,”<sup>33</sup> because it is perceived as very emotionally rewarding,<sup>34</sup> and because of entrant over-optimism that mediation is a viable career option. Unlike law, psychology, architecture, medicine, or social work, “mediators in private practice are not licensed or regulated by states.”<sup>35</sup> Most mediators are required or choose to complete only a thirty-to-forty-hour training

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<sup>28</sup> See Maurits Barendrecht & Berend R. de Vries, *Fitting the Forum to the Fuss with Sticky Defaults: Failure in the Market for Dispute Resolution Services?*, 7 CARDOZO J. CONFLICT RESOL. 83, 90 (2005).

<sup>29</sup> *Id.* at 92.

<sup>30</sup> See Sander, *supra* note 1, at 6.

<sup>31</sup> See Barendrecht & de Vries, *supra* note 28, at 85.

<sup>32</sup> LOVENHEIM, *supra* note 6, at 160.

<sup>33</sup> While there are very few formal barriers to entry, many practitioners in the field have noted that there are significant barriers to practice commercial mediation for women, ethnic and racial minorities, and non-lawyers. See Christopher Honeyman et al., *New York Moveable Feast: Boundaries to Practice*, 2 CARDOZO J. CONFLICT RESOL. 147, 147–48, 150–51 (2004).

<sup>34</sup> One mediator I interviewed said it was a privilege to be able to help people resolve disputes.

<sup>35</sup> Diane Levin, *Mediation Certification and Credentialing: Getting Accurate Information on Becoming a Mediator*, MEDIATION CHANNEL, <http://mediationchannel.com/2007/01/21/mediation-certification-and-credentialing-getting-accurate-information-on-becoming-a-mediator> (last visited Sept. 22, 2008).

course.<sup>36</sup> Mediation is also seen “as ‘fun,’ as opposed to the drudgery of much of law practice.”<sup>37</sup> As a result, there are a lot more mediators than there are mediation jobs.<sup>38</sup> One mediator observed that as the mediation business doubles, the number of people wanting to be mediators quadruples.<sup>39</sup>

Mediators hail from a variety of backgrounds: social work, human resources, psychology, labor relations, business, accounting, and religion.<sup>40</sup> Mental health practitioners commonly serve as mediators in family disputes, human resources specialists commonly serve as in-house mediators for employment disputes, and diplomats commonly serve as mediators in international disputes.<sup>41</sup> But, lawyers dominate the mediation market, in particular for cases that are litigated or about to be litigated, including domestic and commercial disputes.<sup>42</sup>

Experienced practitioners estimate that more than 100,000 people have received some sort of mediation training, including training in community mediation centers, but not counting peer and school programs, including at the university and college levels.<sup>43</sup> Of those trained, relatively few actually practice mediation and even fewer make a living as full-time mediators. Sometimes, mediating part-time is a choice: some attorneys offer dispute resolution services in addition to their legal services; some therapists mediate in addition to counseling families and couples. But, for the most part, mediators mediate part-time because they cannot support

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<sup>36</sup> Marty Nemko, *Mediator: Executive Summary*, U.S. NEWS & WORLD REPORT, Dec. 19, 2007, available at <http://www.usnews.com/articles/business/best-careers/2007/12/19/mediator-executive-summary.html>.

<sup>37</sup> Christopher Honeyman et al., *Washington, D.C. Moveable Feast: The Odds on Leviathan—Dispute Resolution and Washington, D.C.’s Culture*, 5 CARDOZO J. CONFLICT RESOL. 159, 165 (2004).

<sup>38</sup> Nemko, *supra* note 36.

<sup>39</sup> KRIVIS & LUCKS, *supra* note 7, at 12 (observation by Robert A. Creo).

<sup>40</sup> See LOVENHEIM, *supra* note 6, at 52 tbl.3.1.

<sup>41</sup> Telephone Interview with Prof. John Lande, Univ. of Mo.-Columbia Sch. of Law (Mar. 28, 2008).

<sup>42</sup> Mediation practitioners estimate that 90 to 95% of commercial mediators are lawyers.

<sup>43</sup> Since only Virginia, Texas, New Hampshire and Florida certify mediators, there is little available data on the number of mediators that have been trained and the number that practice. I would like to thank Robert A. Creo for the estimate. E-mail from Robert A. Creo, Mediator, to author (Apr. 6, 2008, 14:56:10 EST) (on file with author). The United States Postal Service offers its employees a voluntary alternative dispute resolution program, called REDRESS, as part of the Postal Service’s Equal Employment Opportunity (EEO) complaint process. United States Postal Service, REDRESS, <http://www.usps.com/redress/> (last visited Sept. 22, 2008). A number of people have received mediation training through the program and over 1,500 mediators are currently on the REDRESS roster. United States Postal Service, Mediators, <http://www.usps.com/redress/mediators.htm> (last visited Sept. 22, 2008).

themselves solely with mediation.<sup>44</sup>

The vast majority of people who enter the mediation market drop out within two years.<sup>45</sup> Of those who persist, about 8,500 earn \$56,000 or more per year from mediation.<sup>46</sup> Many of those are employed in salaried positions either with state or local governments, the courts, or with private organizations, including labor organizations, insurance carriers, law firms, or private companies.<sup>47</sup>

### C. *Where Do Mediators Work?*

By and large, mediators practice in five types of workplaces: community mediation centers; government programs; corporate, association, and specialty programs; court-connected programs; and private practice, including private dispute resolution companies (panels).<sup>48</sup> Mediators in community mediation centers usually provide their services for free. Mediators working for the government, corporations and other associations are often salaried, while most court-connected programs and private mediation services are offered by mediators in private practice as independent contractors. As the latter are the focus of this article, the analysis of their work environment is more detailed than for volunteer and salaried mediators.

#### 1. Volunteer Mediators

In 2006, twenty-five thousand individuals mediated in six hundred community mediation centers around the United States, mostly as volunteers.<sup>49</sup> Most mediators in community mediation centers provide services to their clients on a part-time basis free of

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<sup>44</sup> See Nemko, *supra* note 36.

<sup>45</sup> E-mail from Eric Galton, Mediator, to author (Mar. 28, 2008, 11:33:55 EST) (on file with author).

<sup>46</sup> Nemko, *supra* note 36. See also BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, 2008–09 EDITION: JUDGES, MAGISTRATES, AND OTHER JUDICIAL WORKERS, <http://www.bls.gov/oco/ocos272.htm> (last visited Nov. 24, 2008) [hereinafter OCCUPATIONAL OUTLOOK HANDBOOK] (estimating that there are about 8,500 mediators, arbitrators, and conciliators in the United States). These mediators, arbitrators, and conciliators earn on average \$56,380. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL EMPLOYMENT AND WAGES, MAY 2007, 23-1022 ARBITRATORS, MEDIATORS, AND CONCILIATORS <http://www.bls.gov/oes/current/oes231022.htm> (last visited Nov. 24, 2008) [hereinafter OCCUPATIONAL EMPLOYMENT AND WAGES].

<sup>47</sup> See OCCUPATIONAL OUTLOOK HANDBOOK, *supra* note 46.

<sup>48</sup> LOVENHEIM, *supra* note 6, at 51.

<sup>49</sup> GOLDBERG ET AL., *supra* note 20, at 591.



charge, though “[a] few centers pay their mediators a small stipend” (\$25 per case), and there are very few salaried positions.<sup>50</sup> But, community mediation centers remain one of the best ways to get training and to become known to mediation colleagues.<sup>51</sup>

## 2. Salaried Mediators

Federal, state, and local governments employ around two thousand mediators.<sup>52</sup> Their average annual salaries range from \$56,580 for local governments, \$60,080 for state governments, and \$109,490 for the executive branch of the federal government.<sup>53</sup> The Department of Agriculture, for example, has thirty full-time employees involved in ADR.<sup>54</sup> The Federal Mediation and Conciliation Service, a federal agency promoting stable labor-management relations, employs about 120 full-time mediators.<sup>55</sup> Furthermore, the federal government operates a Shared Neutrals Program where government employees are trained as mediators and are reassigned for a short time to a different agency to mediate workplace disputes in that agency.<sup>56</sup> They generally receive only their salary and are not additionally compensated for mediation work.<sup>57</sup>

Corporations, insurance companies, labor organizations, universities, and law firms employ an additional several thousand mediators.<sup>58</sup>

Most trial courts around the country have established mediation programs to try to resolve civil disputes. In some states, such as Florida, mediation is mandatory in many cases: a judge may order parties to mediate and they are required to appear in at least one session or risk being held in contempt.<sup>59</sup> Courts in some states, like California, where mediation in child custody and visitation cases is required, employ full-time salaried mediators to handle divorce

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<sup>50</sup> See LOVENHEIM, *supra* note 6, at 129 tbl.6.1, 130.

<sup>51</sup> See *id.* at 131.

<sup>52</sup> See OCCUPATIONAL EMPLOYMENT AND WAGES, *supra* note 46. The total number is 2,540, but includes conciliators and arbitrators.

<sup>53</sup> *Id.*

<sup>54</sup> LOVENHEIM, *supra* note 6, at 135.

<sup>55</sup> *Id.* at 136.

<sup>56</sup> See U.S. Office of Personnel Mgmt., Alternative Dispute Resolution: A Resource Guide 133, <http://www.opm.gov/er/adrguide/section3-shared-neutrals.asp> (last visited Oct. 2, 2008).

<sup>57</sup> See *id.*

<sup>58</sup> See OCCUPATIONAL EMPLOYMENT AND WAGES, *supra* note 46. The total number is 2,560, but includes conciliators and arbitrators.

<sup>59</sup> See LOVENHEIM, *supra* note 6, at 131.

disputes.<sup>60</sup> In most states, where judges are authorized to refer cases to mediation, however, mediators are self-employed professionals who provide their services for a fee.<sup>61</sup>

### 3. Mediators in Private Practice

Some mediators in private practice work alone as solo practitioners, others form partnerships, still others are on panels.<sup>62</sup> As independent contractors, they are paid depending on how much business they generate.<sup>63</sup>

The number of mediators in private practice is difficult to estimate because there are no licensing requirements. The ABA Section of Dispute Resolution now has over 17,000 members,<sup>64</sup> but that number is both overinclusive and underinclusive: it includes lawyers who mediate only a few times a year or are just interested in alternative dispute resolution, yet it includes few non-lawyer mediators. Observers speculate that there are between five and ten thousand full-time providers of ADR services in the United States today.<sup>65</sup> While the number may seem large, it is dwarfed by 1,143,358 lawyers admitted to practice in the United States.<sup>66</sup>

More accurate figures come from court rosters in states where mediators are paid for court-referred work (as opposed to volunteering). Many mediators in private practice, particularly in states with mandatory mediation programs, rely on court references as their primary source of mediation work.<sup>67</sup> Mediators who want

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<sup>60</sup> *Id.* at 131–32.

<sup>61</sup> Florida Rules of Civil Procedure allow parties to select their own mediator within ten days of being ordered to mediate, FLA. R. CIV. P. 1.720(f), and more than ninety percent of parties agree on a mediator. See Florida State Courts, Alternative Dispute Resolution, [http://www.flcourts.org/gen\\_public/adr/adrintro.shtml](http://www.flcourts.org/gen_public/adr/adrintro.shtml) (last visited Oct. 2, 2008).

<sup>62</sup> Private alternative dispute resolution companies, such as JAMS, keep a list of seasoned mediators, and clients choose their mediator from the list. JAMS mediators are predominantly retired judges, who work exclusively with JAMS. See LOVENHEIM, *supra* note 6, at 142. They handle high-stake disputes and earn between \$150,000 and \$1,000,000 per year. *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See ABA SECTION OF DISPUTE RESOLUTION, YEAR IN REVIEW 2006-2007 1 (2007), available at [http://www.abanet.org/dispute/documents/Year\\_in\\_ReviewFINAL2006\\_7.pdf](http://www.abanet.org/dispute/documents/Year_in_ReviewFINAL2006_7.pdf).

<sup>65</sup> The number is based on discussions with ACR and experienced mediators in private practice.

<sup>66</sup> See AM. BAR ASS'N, NATIONAL LAWYER POPULATION BY STATE 3 (2007), available at [http://www.abanet.org/marketresearch/2007\\_Natl\\_Lawyer\\_FINALonepage.pdf](http://www.abanet.org/marketresearch/2007_Natl_Lawyer_FINALonepage.pdf). Since mediators deal with disputes and are often trained as lawyers, the comparison is appropriate.

<sup>67</sup> I am grateful to Robert Benjamin and Robert A. Creo for this observation. See also AM. ARBITRATION ASS'N, *supra* note 22, at 28 (noting that seventy-three percent of surveyed Fortune companies used mediation because it was court-mandated).

to be on the court roster usually have to be certified.<sup>68</sup> They must complete a certain number of hours of mediation training and meet specified standards.<sup>69</sup> Many court-connected mediation programs are limited to lawyers.<sup>70</sup> In some states, judges will select certified mediators on a rotating basis, but most court programs allow the parties to choose their mediator.<sup>71</sup>

For example, in Florida, which probably has the largest and the most developed court-connected mediation program, there are 5,377 registered mediators as of December 2005.<sup>72</sup> But, according to a court administrator, probably ten percent of the state's registered mediators do ninety percent of the work.<sup>73</sup> Some states regulate mediator fees, but many do not, and mediators charge their market rate.<sup>74</sup> The rates for mediation services vary depending on the quality of the mediator and on the local market: in California, the median divorce mediator on the court roster charges \$300 per hour, and not one charges less than \$150 per hour;<sup>75</sup> in Virginia, on the other hand, the median mediator charges less than \$125 per hour, and only the top five percent charge more than \$200 per hour.<sup>76</sup>

The vast majority of mediators offer their services on a part-time basis, either by choice or, more commonly, because of lack of demand. One notable group of part-time mediation practitioners by choice is university professors.<sup>77</sup> Unlike most aspirant mediators, they have little or no overhead, are presumed to be neutral and competent, frequently publish and testify about ADR, and have a ready pool of potential clients from the students they taught.<sup>78</sup>

Of the few thousand mediators in private practice who are able to mediate full-time, the majority earn \$50,000 or less. There are

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<sup>68</sup> See LOVENHEIM, *supra* note 6, at 133.

<sup>69</sup> *See id.*

<sup>70</sup> *Id.* at 58, 133.

<sup>71</sup> *See id.* at 134.

<sup>72</sup> See Florida State Courts, *supra* note 61.

<sup>73</sup> LOVENHEIM, *supra* note 6, at 134–35.

<sup>74</sup> See Deborah Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, 6 DISP. RESOL. MAG. 15, 17 (1999).

<sup>75</sup> See, e.g., Superior Court of California, County of Santa Barbara, CADRe Mediator Fee Schedule (2008), [http://www.sbcadre.org/fees\\_med.htm](http://www.sbcadre.org/fees_med.htm) (listing mediator fees for court administered dispute resolution).

<sup>76</sup> See Virginia's Judicial System, Virginia Court Certified Mediators Search Results, [http://www.courts.state.va.us/drs/searchable\\_mediator\\_directory.html](http://www.courts.state.va.us/drs/searchable_mediator_directory.html) (follow "Search for a Mediator with Specific Qualifications" hyperlink; then select "over \$200" under "Customary Hourly Fee" and search for mediators) (last visited Oct. 2, 2008).

<sup>77</sup> E-mail from Robert A. Creo, Mediator, to author (Apr. 6, 2008 18:11:25 EST) (on file with author).

<sup>78</sup> *Id.*

fewer than a thousand mediators, and possibly a few hundred, who make a good living, grossing \$200,000 or more per year.<sup>79</sup> Only a couple dozen or so mediators, primarily former judges practicing with JAMS<sup>80</sup> and a few high-end commercial mediators in markets where the cost of living is high and, as a result, so are mediation fees, are able to consistently bill over \$1,000,000 per year.<sup>81</sup>

### III. WHY DO SO FEW MEDIATORS MAKE MONEY?

The previous section reviewed where mediators work. Those mediating in community centers usually volunteer, while salaried mediators are usually employed by the government and organizations.<sup>82</sup> Neither group directly competes with mediators in private practice, although their existence may reduce the size of the market for privately compensated mediation services.

This section analyzes the reasons for socially suboptimal excess entry of mediators in private practice, and suggests that over-optimism and the lack of formal barriers to entry cause it. Since mediators in private practice are the focus of this article, this section explores the determinants of supply and demand for mediation services in that market alone.<sup>83</sup> While it is true that a “massive amount of . . . mediation work”<sup>84</sup> is going on in organizations, little of it is compensated and purchased separately, and is instead part of a managerial or government job. This section then analyzes the characteristics of labor markets and applies economic theory of labor markets to the mediation profession.

#### *A. Demand and Supply in the Market for Mediation*

The market for private mediation services works like any other

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<sup>79</sup> Most of the mediators I interviewed provided similar estimates.

<sup>80</sup> JAMS is the country's largest private dispute resolution provider, with mediators practicing all around the United States. LOVENHEIM, *supra* note 6, at 141–42. It lists over 200 mediators who work for JAMS as independent contractors, and are all experienced judges or attorneys with a track-record in dispute resolution. JAMS, THE RESOLUTION EXPERTS, FACT SHEET 1, [http://www.jamsadr.com/images/PDF/corporate\\_fact\\_sheet.pdf](http://www.jamsadr.com/images/PDF/corporate_fact_sheet.pdf) (last visited Oct. 3, 2008).

<sup>81</sup> Telephone Interview with Robert A. Creo, Mediator, in Pittsburgh, Pa. (Mar. 21, 2008).

<sup>82</sup> See LOVENHEIM, *supra* note 6, at 128–29 tbl.6.1.

<sup>83</sup> As explained *supra* in Part II.A, there is not one single mediation market in the United States. But, for the purposes of this article, the different markets can be lumped together because the analysis applies equally to each market separately. There are important differences between different jurisdictions and different subject matters of mediation, but they are not the focus of this article.

<sup>84</sup> Honeyman et al., *supra* note 27, at 505.

market, and is a function of demand for and supply of mediation services. Demand for mediation services depends on consumer income (e.g., wealthier clients can purchase more mediation services, and a wealthier country can pay for more mediation services), the price of substitutes (e.g., cost of litigation) and complements (e.g., legal fees), tastes (e.g., court-mandated mediation, and efforts at marketing mediation), expectations about the future (e.g., longer trials), and the number of consumers (e.g., court delays may increase demand for mediation). Supply of mediation services depends on the cost of production (e.g., training, certification), technology (e.g., BlackBerry, ease of travel, government policy, such as mandating mediation for divorce all increase the supply of mediation services), expectations (e.g., of future price changes), and the number of sellers (e.g., many enter the mediation market because it is appealing to offer services as a peace-maker).

Private demand for mediation has been underwhelming as most people “remain leery of negotiation as a means of settling disputes.”<sup>85</sup> Some mediators have suggested that the “relatively low usage [of mediation results] from the fact that . . . people [do not] know [about] mediation . . . or how it could be used to solve their [disputes].”<sup>86</sup> Others retort that demand for mediation has been flagging because the marketing message for mediation has been ineffective.<sup>87</sup> Mediators do not offer clients what they are looking for: a process where the prerequisite is not to be trusting, reasonable, or logical, but a process where they can be angry and resentful, yet one that works and one where they will not be exploited.<sup>88</sup> In a survey of New Jersey residents, only 2 out of 400 respondents mentioned mediation as a possible means of resolving disputes, and neither spoke positively about it.<sup>89</sup> The study suggests that American citizens are committed to litigation and “are not anxious to give up courts for mediation.”<sup>90</sup> “Low rates of voluntary usage” and the existence of court-initiated mediation

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<sup>85</sup> Robert Benjamin, *Guerilla Mediation: The Use of Warfare Strategies in the Management of Conflict*, Mediate.com, (Aug. 1999), <http://www.mediate.com/articles/guerilla.cfm>.

<sup>86</sup> FORREST S. MOSTEN, *MEDIATION CAREER GUIDE: A STRATEGIC APPROACH TO BUILDING A SUCCESSFUL PRACTICE* 194 (2001).

<sup>87</sup> Benjamin, *supra* note 85.

<sup>88</sup> *See id.*

<sup>89</sup> Susan S. Silbey, *The Emperor's New Clothes: Mediation Mythology and Markets*, 2002 J. DISP. RESOL. 171, 174.

<sup>90</sup> *Id.*

programs support the argument that mediation is almost entirely a “supply side . . . phenomenon.”<sup>91</sup> Mediation programs did not begin to flourish until mandated by legislation.<sup>92</sup> An alternative explanation is that litigation as a default makes it less likely that the parties will mediate, since mediation requires their consent.<sup>93</sup> There are also concerns that mediation is becoming second-class justice: quick and cheap, but more likely to result in one party being taken for a ride.<sup>94</sup> Finally, a large percentage of disputes, perhaps as many as half, are mediated in free public programs, further reducing demand for private mediation at the low end of the market.<sup>95</sup>

On the supply side, the market for private mediation is inundated with would-be mediators because of the low formal barriers to entry—entering the market requires little more than forty hours of training and a new shingle—aspirant mediator over-optimism, and the fact that mediation is viewed as a more satisfying profession than law, from where most mediators hail.<sup>96</sup>

Whereas lawyers help their clients win a case at the expense of the other party, mediation is viewed as “helping parties reach a mutually satisfying resolution,”<sup>97</sup> as a “kinder-gentler” alternative to lawyering. Furthermore, over-optimism of aspirant mediators coupled with mediation training, which may make it appear that entering the market is easier than it really is, results in inefficient excess entry into the market.<sup>98</sup> Many mediators who cannot find work become mediation trainers.<sup>99</sup> The profession trains too many

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<sup>91</sup> *Id.* at 174 n.14.

<sup>92</sup> *Id.* See also AM. ARBITRATION ASS'N., *supra* note 22, at 28 (noting that the vast majority of *Fortune* companies used mediation because it was court-mandated).

<sup>93</sup> See Barendrecht & de Vries, *supra* note 28, at 83.

<sup>94</sup> Telephone Interview with Robert Benjamin, Mediator, Mediation and Conflict Management Services, in Portland, Or. (Mar. 28, 2008).

<sup>95</sup> Telephone Interview with Robert A. Creo, *supra* note 81. Many federal and state cases “are siphoned from the private sector market” by the federal government’s Shared Neutrals Program and other similar programs. E-mail from Robert A. Creo, Mediator, in Pittsburgh, Pa., to author (Apr. 6, 2008, 22:06:21 EST) (on file with author). See also U.S. Office of Personnel Mgmt., *supra* note 56, at 133.

<sup>96</sup> “ADR is seen as ‘fun,’ as opposed to the drudgery of much of law practice. And it still enjoys a romanticized public image . . .” Honeyman et al., *supra* note 37, at 165–66.

<sup>97</sup> KRIVIS & LUCKS, *supra* note 7, at 17.

<sup>98</sup> See generally ROBERT H. FRANK & PHILLIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY* 8–9 (1995) (arguing that an unjustified degree of confidence prevails among entrants to competitive employment fields, resulting in an undesirable abundance of job candidates).

<sup>99</sup> E-mail from John Bickerman, Mediator, to author (Mar. 23, 2008, 16:37:58 EST) (on file with author).

people for jobs that do not exist.<sup>100</sup> Market entrants invest their time and money in mediation based on an overly optimistic calculation of their odds of success.<sup>101</sup> Many beginner mediators, except for retired judges, simply cannot offer clients what they are looking for: a person with experience, reputation, and authority. This produces individual and social waste: there are direct costs because individuals spend money on mediation training, and opportunity costs because individuals spend time pursuing a career that was illusory instead of a different career.<sup>102</sup>

As a result of weak demand and excessive supply, there are more mediators than there are mediation jobs.<sup>103</sup> While the above rationales begin to explain why so few of the more than 100,000 trained mediators are able to make a living as mediators, they do not explain why income distribution in private mediation is a “steep pyramid.”<sup>104</sup> The following section provides possible answers.

### *B. Characteristics of the Mediation Labor Market*

Human capital theory predicts that pay for labor will depend on observable employee productivity, which will in turn depend on effort and talent.<sup>105</sup> There is mounting evidence that a number of labor markets no longer operate in accordance with the human capital theory, but rather as “winner-take-all” markets.<sup>106</sup> In those markets, pay depends on relative performance, rather than absolute performance, and tends to be concentrated.<sup>107</sup> The best performers are wealthy, whereas second-best receive only a tiny fraction of the best performer’s pay, even though they might be only marginally less productive.<sup>108</sup> There is evidence to suggest that the market for private mediation services is a winner-take-all market.

#### 1. Economic Theory of Labor Markets

Human capital theory, the dominant economic theory of wages,

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<sup>100</sup> *Id.*

<sup>101</sup> See FRANK & COOK, *supra* note 98, at 8–9.

<sup>102</sup> See generally *id.* at 8–9 (arguing that an overcrowding of job applicants leaves most candidates worse off, due to wasted resources and potential opportunities foregone).

<sup>103</sup> See Nemko, *supra* note 36.

<sup>104</sup> Bickerman, *supra* note 99.

<sup>105</sup> See FRANK & COOK, *supra* note 98, at 89–90.

<sup>106</sup> See *id.* at 2–4, 92–94.

<sup>107</sup> *Id.* at 24.

<sup>108</sup> See *id.* at 94.

“explains [the] differences in wage rates by differences in education, training, experience, intelligence, [talent,] motivation, and other human factors that [affect] productivity.”<sup>109</sup> The theory predicts that workers (or providers of services) will be “paid in proportion to the value of their productive contributions.”<sup>110</sup> In other words, in “markets that economists normally study, . . . reward depends . . . on absolute performance.”<sup>111</sup> Pay is distributed based on talent (education, training, experience) and on the willingness to expend effort (motivation).<sup>112</sup> A veterinarian’s pay, for the most part, depends on how many animals she sees. An hourly employee’s pay, while lower than that of a veterinarian who may have spent an additional ten years in school, depends not only on talent but also on the number of hours worked. As a result, someone who works ten percent harder or is ten percent more talented should receive ten percent more pay.<sup>113</sup>

In winner-take-all markets, however, reward depends on relative performance and tends to concentrate rewards in the hands of few.<sup>114</sup> In those markets, a ten percent increase in talent or effort can cause pay to differ by ten thousand percent or more.<sup>115</sup> While those near the top win big, everyone else is far behind, and their reward “bear[s] little relationship to how close they were to winning.”<sup>116</sup> The difference in pay received by the star of a Broadway show and “her understudy is almost always far more than proportional to the differences in their [ability to sing and dance].”<sup>117</sup>

“[This] reward structure has long been common in entertainment, sports, and the arts.”<sup>118</sup> In Mozart’s time, musician compensation for the best performers was much greater than for less renowned performers.<sup>119</sup> However, technology (radio, records, and later video) allowed a single entertainer to reach many more people, increasing

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<sup>109</sup> *Id.* at 89.

<sup>110</sup> *Id.* at 17.

<sup>111</sup> *Id.* at 24.

<sup>112</sup> *See id.* at 17.

<sup>113</sup> Note that firms will only pay for productivity that is observable. Hence, unobservable differences in productivity or effort will not be compensated.

<sup>114</sup> FRANK & COOK, *supra* note 98, at 24.

<sup>115</sup> *See id.* at 17.

<sup>116</sup> Martin J. McMahon, Jr. & Alice G. Abreu, *Winner-Take-All Markets: Easing the Case for Progressive Taxation*, 4 FLA. TAX REV. 1, 3 (1998).

<sup>117</sup> *Id.* at 5.

<sup>118</sup> FRANK & COOK, *supra* note 98, at 3.

<sup>119</sup> *See id.* at 45.



demand for the best performer and reducing demand for the second-best performer.<sup>120</sup> As a result, today the very best musicians are millionaires, while the second-best earn a modest salary in orchestras or play music only as a hobby.

In their book, *The Winner-Take-All Society*, economists Robert H. Frank and Phillip J. Cook argue that an increasing number of labor markets have come to resemble the entertainment market.<sup>121</sup> Although income disparity in the market for mediation services is increasing, it will likely never be as uneven as it is in the market for musical performance, because mediation cannot be easily reproduced. Nevertheless, for the reasons explored in the next subsection, income in the market for mediation services is and will likely continue to be very unevenly distributed.

## 2. Winner-Take-All Markets for Services<sup>122</sup>

“Some winner-take-all markets arise because of special conditions on the supply side, [which] influence [the] cost[] of production.”<sup>123</sup> “Other[s] . . . arise because of special conditions on the demand side, [which] influence the [price] buyers are willing to pay.”<sup>124</sup>

The first winner-take-all markets, such as the market for musical performance, arose because the services of best performers could easily be reproduced.<sup>125</sup> Economies of scale in production and distribution resulted in a natural tendency for one product—for example, CD of *La Bohème* by Luciano Pavarotti—to dominate the market, even when there exist close substitutes.<sup>126</sup> Mediation is quite the opposite of the musical performance market. A mediator’s service is very personal, cannot be reproduced, nor can it easily be delegated or divided into smaller pieces. Yet, for a number of reasons, incomes of mediators, while not as divergent as those of musicians, are nevertheless uneven.

One of the supply-side sources of winner-take-all markets are lock-ins through learning or investment (i.e., path dependencies).<sup>127</sup>

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<sup>120</sup> See *id.* at 1–2.

<sup>121</sup> See *id.* at 3–4.

<sup>122</sup> Frank and Cook describe a number of sources of winner-take-all markets. I deliberately chose to include only those that affect markets for services, rather than goods, because they are the only ones relevant to the market for mediators.

<sup>123</sup> FRANK & COOK, *supra* note 98, at 32.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> See *id.* at 33.

<sup>127</sup> See *id.* at 34–35.

Graduates of the best undergraduate institutions are likely to be admitted to the best law schools, and are more likely to be elected or appointed as judges. After they retire, they—as former judges—are more likely to be invited to join the JAMS panel of mediators, and as such are much more likely to command high fees from the outset and get a steady flow of cases.<sup>128</sup> Although JAMS is very successful, path dependencies in education are not the most important source of mediator winner-take-all markets. While many successful mediators have attended top law schools, many did not.<sup>129</sup> But, path dependencies contribute to winner-take-all markets by lowering the costs of acquiring information. Users of mediation are likely to use the same mediator over and over again, not necessarily because the mediator is the best, but because they are already familiar with her.

In addition to path dependencies, other positive-feedback processes, where success breeds success, create winner-take-all markets.<sup>130</sup> These include network economies (e.g., PC machines are more popular than Unix machines because more people have PC machines) and perceptions of quality.<sup>131</sup> E-mail, for example, has significantly reduced information costs and has created closed networks of mediators that operate at a much higher level of efficiency than other networks. But, unless a mediator is in the network, she will not be selected.<sup>132</sup> In addition, when information is costly to acquire, consumers of services tend to rely on proxies for quality:<sup>133</sup> a person who was selected to mediate a large commercial

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<sup>128</sup> JAMS is the largest for-profit ADR firm in the United States. JAMS get the highest-stake and best-paid mediation cases and many, if not most, of the mediators on the JAMS panel are among the highest earners in the profession. At the time of writing this article, JAMS has 251 mediators on its panel, 159 of whom are retired judges (63%). See LOVENHEIM, *supra* note 6, at 141–42; JAMS, JAMS Arbitrator(s)/Mediator(s), <http://www.jamsadr.com/ neutrals/ neutrals.asp> (last visited May 10, 2008). According to the American Arbitration Association (AAA) study, companies received mediator nominees from private ADR providers, such as JAMS or AAA, in 30% of cases. This number understates the number of cases decided by those providers, since they are likely included in other categories as well (e.g., previous experience (24%), court (19%), mutual proposal from both parties (5%)). See AM. ARBITRATION ASS'N, *supra* note 22, at 10 tbl.6.

<sup>129</sup> For example, fewer than half of the mediators I interviewed attended a top-twenty law school, yet all are very successful.

<sup>130</sup> See FRANK & COOK, *supra* note 98, at 36.

<sup>131</sup> See *id.*

<sup>132</sup> National Employment Lawyers Association (NELA), an organization that represents individual employees in cases involving employment discrimination and other employment-related matters, maintains a list of mediators and hires almost exclusively from the list by sending out an e-mail inquiring who is available. Unless the mediator is on the list, she will never be hired by NELA. I thank David Hoffman for this observation.

<sup>133</sup> See FRANK & COOK, *supra* note 98, at 36–37.

dispute and performed well is much more likely to be selected to mediate again for the same client or to be referred to another client, even though she may be only marginally better (or perceived as such) than the second-best choice. Variations in quality of mediation are hard to observe, and clients must rely on the few sources of information available, often word-of-mouth. "Competence is . . . necessary, but . . . not sufficient, [to develop] a strong reputation" and a massive income.<sup>134</sup>

The demand for a top-notch service may also stem from the desire to avoid adverse outcomes from having bought the second-best. Even if the service fails, the buyer can comfort herself by knowing that she purchased the best.<sup>135</sup> But, if the service performs well, there is no way of knowing if the second-best would have performed just as well. This skews consumer choice towards the best service available, particularly when the stakes are high. For example, Richard Scruggs, one of the best-known plaintiffs' lawyers, hired John Kecker, one of the most prestigious white-collar lawyers, to defend him in the criminal contempt charge for attempted bribery of a judge.<sup>136</sup> Hiring Kecker, who is based in San Francisco, was many times more expensive than hiring an only marginally less qualified local attorney. But, facing seventy-five years in prison, Scruggs was apparently unwilling to risk hiring the second-best attorney.<sup>137</sup> Similarly, an experienced mediator reports that when an attorney with a high-value case refers it to mediation, he is "never going to be criticized for selecting a well-known mediator."<sup>138</sup>

Lastly, concentration of wealth in the hands of few will create winner-take-all markets.<sup>139</sup> For example, attorneys with rich clients will be able to charge much higher fees than their counterparts with poorer clientele. Similarly, commercial mediators are able to charge higher fees than domestic mediators.<sup>140</sup> Diminishing marginal utility of money means that individuals or entities with "very high incomes attach . . . little value to tens of thousands, or even millions, of dollars."<sup>141</sup> Alternately, clients tend

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<sup>134</sup> *Id.* at 93.

<sup>135</sup> *See id.* at 42-43.

<sup>136</sup> Jenny Jarvie, *The Nation Katrina Lawyer at the Eye of a Storm*, L.A. TIMES, Nov. 30, 2007, at 15.

<sup>137</sup> *Id.*

<sup>138</sup> Bickerman, *supra* note 99.

<sup>139</sup> FRANK & COOK, *supra* note 98, at 43.

<sup>140</sup> *See* e-mail from William Baten, Mediator, to author (Mar. 25, 2008, 22:19:12 EST) (on file with author).

<sup>141</sup> McMahon & Abreu, *supra* note 116, at 35.

to compare transaction costs (i.e., legal fees, filing fees, mediator fees) to the value of their claim and think in percentage terms. In a \$200 million dispute, a million dollars does not seem like much. But in a divorce, where the parties are dividing \$250,000 in assets, a fee of a few thousand dollars can be significant. As a result, wealthier clients (or clients with larger claims) are willing to pay much larger sums for the same service than more budget-constrained individuals.

### 3. Success Breeds Success in the Market for Mediators in Private Practice

Economists have reported increasing incomes of top performers in a number of professions, including lawyers, dentists, accountants, doctors, and salespeople.<sup>142</sup> One possible explanation based on the human capital theory described above is “that the [top] performers have [become] ‘better’ relative to their colleagues.”<sup>143</sup> If distribution of human capital changed, income distribution should change also. But, no one has been able to identify the improvement in quality or explain why it came about.<sup>144</sup>

An alternative explanation is that winner-take-all markets have spread to the non-celebrity professions, such as mediation. Only a small fraction of cases support fees of \$10,000 per day or more, and a small “inner circle” of top mediators get the call for those cases.<sup>145</sup> They get selected because they have a solid track record, because they have been mediating for long enough to have name recognition as mediators and be members of closed networks,<sup>146</sup> but also because they are perceived by potential clients as good because of their personal or other qualities (e.g., having been a judge, being a speaker at an ADR conference, or publishing).<sup>147</sup> Furthermore, in high-stake cases with multiple parties it is easier for lawyers and

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<sup>142</sup> See FRANK & COOK, *supra* note 98, at 86–88.

<sup>143</sup> *Id.* at 89.

<sup>144</sup> *Id.* at 98–99.

<sup>145</sup> Baten, *supra* note 140.

<sup>146</sup> E-mail from Steve Cerveris, Mediator, to author (Apr. 1, 2008, 12:34:02 EST) (on file with author).

<sup>147</sup> Perception of quality is not the same as quality. In being selected as a mediator, perceptions and reputation often matter more than objective quality, which—by any measure—is difficult if not impossible to measure. Many former judges, for example, are in high demand, although they may not have much experience as mediators, and sometimes pressure clients to reach an agreement they would not have agreed to with a less evaluative mediator.

parties to agree on using a mediator with a national reputation.<sup>148</sup> This way, if mediation fails, the lawyers can tell their parties that they tried everything to avoid litigating and incurring additional legal fees, and company bosses can assure their directors and shareholders that they did the best they could.

#### IV. WHY DO SOME MEDIATORS MAKE SO MUCH MONEY?

The previous section explored the determinants of demand and supply in the market for mediation services, and looked into possible causes for why so few mediators in private practice can make a good living. This section further analyzes the reasons for mediator income distribution, including product non-homogeneity, organizational structure of the profession, de facto barriers to entry, such as mediator selection and market segmentation, and elasticity of demand.

##### *A. Non-homogeneity: Characteristics of the Highest-Paid Mediation Professionals*

One of the main requirements for a perfectly competitive market is that the product is homogeneous, that is, largely the same as all other products on the market. Based on the foregoing discussion, the market for private mediation does not satisfy this requirement. As a result, top mediators do not directly compete against second-tier commercial mediators (who may still be making a very comfortable living), who, in turn, do not compete against subsequent tiers. There is relatively little price sensitivity and the highest-paid mediation professionals are able to charge high fees without fear of losing business to lower-cost providers.

A good mediator is hard to describe and is usually referred to as “you’ll know it when you see it.”<sup>149</sup> The reason is that, as one mediator put it, “mediation is much more complex than litigation.”<sup>150</sup> It requires excellent mediation skills, complex analytical skills, and the ability to quickly process a substantial amount of information. It requires the ability to move cases relatively swiftly toward settlement. It also requires excellent interpersonal skills: the best mediators are good listeners, who can

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<sup>148</sup> Baten, *supra* note 140.

<sup>149</sup> Telephone Interview with Robert A. Creo, *supra* note 81.

<sup>150</sup> *Id.*

“read” people and have the intuitive ability to sense the things that are not being said.<sup>151</sup> They are compassionate and empathetic, and can focus all their intellectual energy on the dispute in front of them.<sup>152</sup> They are trustworthy and able to convey their trustworthiness to the parties. They enjoy and are comfortable communicating with all types of people, and they are likeable.<sup>153</sup> Great mediators are creative and able to teach parties how to mediate during the mediation without controlling the process.<sup>154</sup> They are “chameleon-like”: usually evaluative, but able to adjust their demeanor and mediation style to the party and the dispute.<sup>155</sup> They are also calm and patient, and have both a sense of humor and a “sense of drama.”<sup>156</sup> They can quietly signal to their clients that if the dispute can be settled, they are the ones that can settle it.<sup>157</sup> They are also good businessmen, who market themselves well—not by using traditional marketing channels, but by always performing well in front of clients and their attorneys.<sup>158</sup> Many, if not most, top mediators have formal or informal business plans and excellent case managers, who they pay well.<sup>159</sup> Great mediators also tend to be the most hard-working and committed to the profession of mediation. They are “mediation activists”: they found, lead, and join professional mediation associations; publish; and teach.<sup>160</sup> And most importantly, the mediators who are frequently selected by attorneys are the ones who have been able to stay in the field long enough to develop reputations as great mediators.<sup>161</sup>

As is readily apparent from the above list of great mediator skills and qualities, very few of them can be taught in a mediation training class or a graduate program. A mediation trainer cannot train would-be mediators to be smart. She cannot “teach empathy.”<sup>162</sup> She cannot teach the natural instinct and intuition.

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<sup>151</sup> LOVENHEIM, *supra* note 6, at 90.

<sup>152</sup> *See* Creo, *supra* note 95; Baten, *supra* note 140.

<sup>153</sup> Cerveris, *supra* note 146.

<sup>154</sup> *See id.*

<sup>155</sup> *Id.*

<sup>156</sup> *See* LOVENHEIM, *supra* note 6, at 92–93, 95–96.

<sup>157</sup> *See* Creo, *supra* note 95.

<sup>158</sup> Telephone Interview with Robert A. Creo, *supra* note 81.

<sup>159</sup> *See* Creo, *supra* note 95; E-mail from Robert A. Creo, Mediator, to author (Apr. 7, 2008, 10:28:26 EST) (on file with author). *See also* KRIVIS & LUCKS, *supra* note 7, at 150 (discussing the importance of mediators’ assistants and how they deserve to be compensated well).

<sup>160</sup> Creo, *supra* note 95.

<sup>161</sup> *See* Baten, *supra* note 140.

<sup>162</sup> Stephen B. Goldberg & Margaret L. Shaw, *The Secrets of Successful (and Unsuccessful) Mediators*, 8 DISP. RESOL. ALERT 1, 6 (2008), <http://www.jamsadr.com/images/PDF/DRA-2008->

But, she can teach good technique, while good judgment is acquired with age and through practice.<sup>163</sup> Although mediation training is necessary to become an effective mediator, hands-on experience is the most important factor predicting high settlement rates.<sup>164</sup> One successful mediator observed that “it usually takes about 30 mediations to even approach a point where you are ready to charge for your services.”<sup>165</sup> While this may sound like little, many full-time mediators—which means they are more successful than eighty or more percent of all mediators—only mediate 100 or so cases per year.<sup>166</sup> Since beginners are less busy, it might take a beginner mediator a full year or longer to get enough experience to start charging. Hence, without paid internship programs for beginner mediators, private mediation will remain a possibility as a second or third career, after the mediator has sufficient financial resources to survive a few years with little or no income.<sup>167</sup>

Furthermore, mediation training sessions do not teach the business skills necessary to survive in the cutthroat profession. While reputation, one of the most important sources of mediation caseload, and hence income, cannot be taught or bought, many successful mediators are very active in the mediation community, are most active in ADR associations, frequently speak publicly about mediation, and publish relevant articles in professional and business journals.<sup>168</sup> What this means for mediation training, is that it should not oversell its potential and create expectations that cannot be realized.<sup>169</sup> Finally, what this means is that unless cultural notions about dispute resolution profoundly change and people are willing to pay for mediation of all kinds of disagreements, only those who love to mediate should continue doing so, without

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<sup>163</sup> Telephone Interview with Robert Benjamin, *supra* note 94.

<sup>164</sup> See Ignazio J. Ruvolo, *Appellate Mediation—“Settling” the Last Frontier of ADR*, 42 SAN DIEGO L. REV. 177, 216–17 (2005).

<sup>165</sup> Kathy Fragnoli, *Ideas for Creating a Market for Your Services*, in ADR PERSONALITIES AND PRACTICE TIPS 11, 13 (James J. Alfani & Eric R. Galton, eds., 1998).

<sup>166</sup> See Cerveris, *supra* note 146. There is a group of full-time environmental mediators who might mediate only half a dozen cases per year, each of which might last several years.

<sup>167</sup> As discussed *supra* Part II.C., there exist salaried positions for beginner mediators, either as mediators, or as party representatives in mediation. Insurance companies, in particular, may be a good career starting point for would-be mediators. There, they can gain the necessary experience in mediation, albeit as a party representative, to be able to later move on to full-time private mediation practice.

<sup>168</sup> Many of the mediators I interviewed confirmed this.

<sup>169</sup> See Howard S. Bellman, *Some Reflections on the Practice of Mediation*, 14 NEGOTIATION J. 205, 207 (1998).

the pressure and the expectation of a paycheck.

### *B. Organizational Structure of the Mediation Profession*

Mediation is a lonely profession; many mediators in private practice work alone. Even the largest mediation firm, JAMS, employs only a few associates, while its mediators are independent contractors.<sup>170</sup> As a result, there are few private practice opportunities for beginner mediators.<sup>171</sup>

A leading casebook on dispute resolution asserts that the reason that mediators generally practice as solo practitioners is because mediation is “a hands-on skill” that cannot easily be delegated to junior associates.<sup>172</sup> Practicing mediators agree. Unlike law firms, which need an army of associates to review documents and draft motions, mediation work is individualized and generally cannot be broken into small pieces.<sup>173</sup> “Mediators work alone” and perform “all substantive work.”<sup>174</sup> They do not and cannot delegate professional work, such as reading party submissions, to associates or paralegals, because they themselves must be familiar with the material in order to perform their task as mediators.<sup>175</sup> “The bulk” of the work is spent “in direct communication with the parties.”<sup>176</sup>

Furthermore, mediation is less time consuming than legal work. Clients buy mediation services only when they have a large enough dispute to justify hiring an external mediator, and the work is usually completed within a couple of days or less. Legal services, on the other hand, are complex and “require the simultaneous efforts of a number of . . . attorneys.”<sup>177</sup>

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<sup>170</sup> See JAMS, JAMS Career Center, <http://www.jamsadr.com/contactus/careers.asp> (last visited Nov. 24, 2008).

<sup>171</sup> Several of the mediators I interviewed noted that while recent law school graduates cannot just hang their shingle and open up a practice, they can slowly work their way into the profession by volunteering in community mediation centers, by settling cases referred by the court, or by working for an insurance company and representing it in disputes it decides to mediate (i.e., working as a party representative and not as a mediator).

<sup>172</sup> See GOLDBERG ET AL., *supra* note 20, at 597.

<sup>173</sup> Telephone Interview with Prof. John Lande, *supra* note 41.

<sup>174</sup> See ROBERT A. CREO, COMPREHENSIVE MEDIATION FEE SCHEDULE (2007), <http://www.mediate.com/creo/docs/March 14 2007 FeeSchedule NonMedMal.pdf>.

<sup>175</sup> See *id.*

<sup>176</sup> *Id.*

<sup>177</sup> James B. Rebitzer & Lowell J. Taylor, *When Knowledge is an Asset: Explaining the Organizational Structure of Large Law Firms*, 25 J. LAB. ECON. 201, 215 (2007). A large law firm associate will usually bill in excess of 2,000 hours per year. A full-time mediator, on the other hand, will bill between 600 and 1,200 hours per year. See Cerveris, *supra* note 146. This is not to say that mediators do not work hard, but rather that the nature of the work is



Mediation is also a very personal and people-oriented service: clients and lawyers do not only look for a mediator who can settle their case, but also for someone who they can relate to on a personal level, someone who comes across as genuine.<sup>178</sup> Clients book a mediator because they want to hire her specifically, and not just any mediator. They believe that she is the one who can assist them in their dispute.<sup>179</sup>

Although the majority of full-time mediators in private practice are lawyers, few practice in law firms. A number of law firms have ADR departments that also offer mediation, but most lawyers in law firms cannot make a living solely as mediators because of conflicts of interest, both existing and potential. Also, since mediation generates less income than other legal work, most law firms avoid mediating for clients.<sup>180</sup>

Finally, many mediators are “lone rangers.”<sup>181</sup> They like and prefer working on their own, and form partnerships only for practical reasons: so that they do not have to turn away clients when they are sick or go on vacation, so that they can share the costs of administrative staff and marketing, and so that they have someone to socialize with.<sup>182</sup>

All of these reasons combined encourage mediators to practice alone or in a small-firm setting, where the only staff might be an administrative assistant. Mediators’ overhead is low (twenty to twenty-five percent of gross revenues, and no more than thirty percent)<sup>183</sup> and each mediator keeps the majority of the revenues without the need or the incentive to employ junior mediators.<sup>184</sup> As a result, there is virtually no demand for junior mediators, and there exist few opportunities to gain experience and exposure to practice alongside seasoned mediators while receiving a salary.

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very different.

<sup>178</sup> See KRIVIS & LUCKS, *supra* note 7, at 33–34.

<sup>179</sup> See *id.* at 35.

<sup>180</sup> Telephone Interview with Robert A. Creo, *supra* note 81.

<sup>181</sup> Telephone Interview with Robert Benjamin, *supra* note 94.

<sup>182</sup> See KRIVIS & LUCKS, *supra* note 7, at 110.

<sup>183</sup> E-mail from Robert A. Creo, Mediator, to author (Apr. 6, 2008, 14:56:10 EST) (on file with author).

<sup>184</sup> Some top mediators, for example Robert A. Creo and Jeffrey Krivis, have employed and mentored junior mediators in their offices, but the practice is not common. See Robert A. Creo, Arbitrator and Mediator, ADR Mentorship, <http://www.rcreo.com/pg90.cfm> (last visited Sept. 20, 2008); KRIVIS & LUCKS, *supra* note 7, at 112–14. Robert A. Creo noted that he established his mentorship program with the hope that other mediators would adopt mentoring as a model, and make it as another way for younger mediators to get into the profession. Creo, *supra* note 95.

This characteristic tends to limit access to the market for mediation services and results in a few mediators getting the bulk of the work.

### *C. De Facto Barriers to Entry*

Although there are few formal barriers to entry in the market for private mediation, there are high de facto barriers to entry. Mediators get most of their cases from attorneys, and unless they are on the attorneys' short list, they will not be selected to mediate commercial disputes.<sup>185</sup> And to be added to the short list, a mediator needs a solid track record and a stellar reputation in the legal community. In addition, market specialization makes branching out into other markets difficult even for existing successful mediators, let alone beginners. Both reasons combine to increase the cost of entry in the market for mediator services, protect existing providers from competition, and reduce the opportunities for beginner mediators.

#### 1. Mediator Selection

Mediators in private practice get most of their cases, in some places, such as Southern California, as many as ninety or ninety-five percent, through referrals from attorneys and courts.<sup>186</sup> A fair number of domestic cases are referred by family therapists, but attorneys remain the predominant source of mediation business. Most parties do not get into disputes frequently enough to be a source of business, and even in-house counsel or adjusters, who regularly mediate, do not appear to be a common source of referrals.<sup>187</sup> Mediators also get referrals from colleagues with whom they share bar functions, committees, and ADR functions, and former trainees,<sup>188</sup> but these tend to be less common sources of clients.

The main reason for attorney domination of the mediator selection process is that most of the private mediators' caseload is disputes already in litigation or about to be litigated.<sup>189</sup> Parties

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<sup>185</sup> See Cerveris, *supra* note 146.

<sup>186</sup> See *id.*

<sup>187</sup> See E-mail from Tracy Allen, Mediator, to author (Mar. 22, 2008, 09:43:48 EST) (on file with author).

<sup>188</sup> *Id.*

<sup>189</sup> See E-mail from Steve Cerveris, Mediator, to author (Apr. 6, 2008, 13:18:37 EST) (on file with author).

with a problem first consult an attorney to help them decide how to pursue the case, and do not consider mediation.<sup>190</sup> Unless ordered by court, relatively few parties are willing to mediate before pursuing a complaint through pre-trial motions.<sup>191</sup> This is the result of asymmetric information and risk-aversion: parties are unwilling to begin negotiations until they have some information on how good is the other side's case. In addition, there is a principal-agent problem as lawyers themselves are unwilling to lose control and potential legal fees from litigation by referring the case to mediation.<sup>192</sup>

Attorneys as gatekeepers not only decide whether and when a case will be mediated, but also who will mediate it. Selecting a mediator is "an important and difficult task."<sup>193</sup> Attorneys, as repeat players, are more familiar with practitioners in the community and clients rely on their attorneys to shop for mediation services.<sup>194</sup> If the case is referred to mediation by a court, mediator selection is often limited to certified mediators on the court roster, but this requirement only rarely restricts mediator selection, since most mediators, full- or part-time, are certified.<sup>195</sup> Typically when parties decide to mediate the dispute, attorneys for each side submit a list of names, from which the parties select their mediator.<sup>196</sup> Unless the mediator is on the attorney's short list, she will never get selected, and getting on the list is very difficult.<sup>197</sup> It requires excellent mediation skills, personal characteristics, and name recognition.<sup>198</sup> Above all, it requires time. Many top mediators, unless they were celebrities in their own right or retired judges, who

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<sup>190</sup> A number of mediators have noted this practice. *See id.* (noting that the market could expand if the public became more familiar with mediation and individuals would choose the mediation forum before retaining lawyers to see if they could resolve their disputes more quickly and efficiently).

<sup>191</sup> Interestingly, fewer than five percent of filed cases get to trial, and mediation is only fifth on the list of reasons for the "vanishing trial." Most cases get disposed of by or settled after summary judgment. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 483-84, 545 tbl.A-10 (2004).

<sup>192</sup> *See* Sander, *supra* note 1, at 6.

<sup>193</sup> Lande, *supra* note 21, at 847.

<sup>194</sup> *Id.*

<sup>195</sup> Mediators I interviewed confirmed that virtually all mediators in their community were listed with the court and only one said he refused to be included in the court roster. Certification usually requires training and sometimes a test, but is a low barrier to entry.

<sup>196</sup> Cerveris, *supra* note 146.

<sup>197</sup> *See id.*

<sup>198</sup> *See* discussion *supra* Part IV.A.

have “a certain amount of built-in trust and respectability,”<sup>199</sup> spent five or more years mediating before they finally broke even, let alone made good money.<sup>200</sup> Furthermore, the fact that attorneys select mediators has been suggested as one of the reasons why the profession is not more diverse: most mediators are white males, with legal training, in their fifties or older.<sup>201</sup>

As the “winner-take-all” model predicts, attorneys will choose from the short list for a number of reasons, but the primary ones are that it saves them time and gives them the assurance that they are buying a provider with a solid reputation.<sup>202</sup> Proposing a mediator with national name recognition also makes it more likely that the other side will agree to mediate.<sup>203</sup> As a result, the few mediators who are the survivors have a steady flow of cases, while the rest mediate for free or leave the profession.

## 2. Market Segmentation and Income Distribution

An additional barrier to entry is market segmentation and specialization.<sup>204</sup> As the market for private mediation services matures, it is becoming more specialized or segmented. Honeyman et al. observe that it is not only difficult to enter the market for private mediation services, but also to switch between markets.<sup>205</sup> Some of the most respected public policy mediators had essentially no high-end commercial cases, even though they had a proven “track record in work that is . . . at least as” complex.<sup>206</sup> Honeyman et al. suggest that mediators are limited to markets in which they have the requisite reputation, that is—as they suggest—in the markets where they can demonstrate authority and connectedness.<sup>207</sup> This finding is consistent with data for the commercial mediation market, where attorneys select the mediators, and only those with name recognition in the relevant market will be on their short-list.

As a result, there are increasingly fewer opportunities for

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<sup>199</sup> KRIVIS & LUCKS, *supra* note 7, at 139.

<sup>200</sup> *See id.* at 159–61.

<sup>201</sup> Telephone Interview with Robert Benjamin, *supra* note 94. *See also* SEAMONE, *supra* note 24, at § III. B.

<sup>202</sup> *See* FRANK & COOK, *supra* note 98, at 37, 42–43, 93.

<sup>203</sup> *See* E-mail from William Baten, *supra* note 140.

<sup>204</sup> *See* Honeyman et. al, *supra* note 33, at 154.

<sup>205</sup> *See id.*

<sup>206</sup> *See* Honeyman et al., *supra* note 27, at 503–04.

<sup>207</sup> *See id.* at 504.

mediation generalists. Aspirant mediators must thus have experience in a particular subject matter—family disputes, environmental work, business—in order to be able to succeed in the market for private mediation services.

#### *D. Elasticity of Demand: Fee Setting*

Compared to litigation, mediation is cheap.<sup>208</sup> One commentator estimates that it costs each party at least \$100,000 “to litigate a straightforward business claim.”<sup>209</sup> Mediation of a similar dispute, on the other hand, usually costs a fraction of that amount, and the parties ordinarily share mediator fees.<sup>210</sup> Even high-end mediators do not charge much more than \$10,000 per day, and a straightforward business claim usually takes a day to settle in mediation.<sup>211</sup> As a result, most clients in high-end commercial mediation cases are not price-sensitive,<sup>212</sup> and demand for commercial mediation services is highly inelastic. One mediator noted that mediator fees in high-value commercial disputes are “inconsequential to the value of settling the matter,” and hence clients will pay for the mediator they want, not one they can afford.<sup>213</sup>

In domestic cases, mediator fees are usually lower overall, and mediators tend to charge by the hour because clients are more price-sensitive.<sup>214</sup> Divorce mediation fees are also more commonly regulated, either directly by legislation or court rules, or indirectly

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<sup>208</sup> See *The Price Is Wrong!*, THE MEDIATOR MAG., <http://www.themediator Magazine.co.uk/features/10-survey/32-wrong> (last visited Nov. 24, 2008) (suggesting that mediator pricing is too low: since mediation is a “nascent market” where information about the quality of services is difficult to obtain, prices have been kept too low).

<sup>209</sup> See Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 957 (2000).

<sup>210</sup> See Cerveris, *supra* note 189. In addition to mediator fees, each party will usually pay her own legal fees. Since an average mediation is completed within a day or two, even fees of the highest paid attorneys are unlikely to exceed \$10,000.

<sup>211</sup> See Cerveris, *supra* note 146 (noting that the average mediation takes six hours).

<sup>212</sup> Telephone Interview with Robert A. Creo, *supra* note 81.

<sup>213</sup> Bickerman, *supra* note 99. While the relative low cost of mediation is relevant when parties are deciding whether to mediate or litigate a particular dispute, it may be irrational to consider the high cost of litigation when deciding between different mediators. After the decision to mediate has been made, a conservative economist would predict that the decision on which mediator to choose would be made by comparing prices of different mediators, and not by considering the cost of litigation. Recent research in behavioral economics indicates, however, that framing plays an important role in decision-making.

<sup>214</sup> See Allen, *supra* note 187; E-mail from Susan Hammer, Mediator, to author (Mar. 20, 2008, 21:31:42 PST) (on file with author).

by lower filing and legal fees for domestic disputes.<sup>215</sup> As a result, demand is more elastic than in commercial mediation, and hence, lower fees and hourly fees are more common in divorce mediation than flat day fees.<sup>216</sup>

Most paid mediation is billed to clients on an hourly basis. Most court rosters that list mediator fees, list hourly fees, and some markets, like Michigan, do not support per-day fees.<sup>217</sup> Hourly fees vary by geography and by quality or reputation of the mediator. Smaller markets, such as Virginia or Oregon, support lower fees.<sup>218</sup> In Virginia, low-end mediation services are available at under \$50 per hour and the high-end of the market begins at \$200 per hour.<sup>219</sup> Larger and more competitive mediation markets support higher fees, often in excess of \$500 per hour at the high end.<sup>220</sup>

Only a minority of high-end commercial mediators in competitive markets can charge flat per-diem fees or per case fees,<sup>221</sup> and even fewer charge success fees.<sup>222</sup> The decision to charge per-diem fees signals mediator's quality and reputation. Because it is difficult to measure mediator quality by objective measures, other than settlement rates, mediators use per-diem fees to signal quality, and that they are in high demand.<sup>223</sup> Per-diem fees are used for two

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<sup>215</sup> See Bickerman, *supra* note 99.

<sup>216</sup> See Allen, *supra* note 187.

<sup>217</sup> *Id.* (noting that she charges per diem fees when she mediates out of state, but generally not in-state).

<sup>218</sup> See Virginia's Judicial System, Virginia Court Certified Mediators Search Results, <http://208.210.219.102/cgi-bin/mediation/search.cgi/g> (last visited Nov. 24, 2008) (listing hourly fee rates for various mediators). See, e.g., State of Oregon 16<sup>th</sup> Judicial District, Mediation, <http://www.ojd.state.or.us/dou/mediation.htm> (last visited Nov. 30, 2008) (stating that the mediation costs \$75 per hour, payable directly to the mediator).

<sup>219</sup> See Virginia's Judicial System, *supra* note 218 (listing the customary hourly fees for various mediators, including Susan W. Ballentine and Thomas E. Albro). In Oregon, high-end mediators charge \$400 per hour or more, and often charge flat per diem fees. See E-mail from Susan Hammer, Mediator, to author (Apr. 6, 2008, 16:52:08 EST) (on file with author).

<sup>220</sup> See, e.g., Bickerman, *supra* note 99; U.S. District Court for the Western District of Pennsylvania, Alternative Dispute Resolution, <http://coldfusion.pawd.uscourts.gov/adr/pages/ADRNeutralSearch.cfm> (last visited Nov. 24, 2008).

<sup>221</sup> Average per day fees range from \$1,800-\$3,500 in Texas to \$4,000-\$8,000 in California. E-mail from Eric Galton, Mediator, to author (Mar. 28, 2008, 11:33:55 CST) (on file with author). The very high end of the commercial mediation market command fees of \$10,000 per day, and the highest is \$15,000 per day. See Baten, *supra* note 140.

<sup>222</sup> Eric Green, for example, charges a success fee on top of the day fee for the most "complex or other exceptional cases requiring extraordinary effort." Resolutions LLC, Rates, Eric D. Green, <http://www.resolutionsllc.com/rates.htm> (last visited Nov. 24, 2008).

<sup>223</sup> See Cerveris, *supra* note 146. Mediators use those fees, whether or not they are in fact in high demand. A number of mediators confirmed that although they are very successful, they are constantly looking for business, and that the only reason they turn business away is

additional reasons. First, mediators do not only want to charge high fees, but they also want to be consistently busy. The best mediators tend to not only charge the highest fees, but they are also booked a few months in advance.<sup>224</sup> Per-diem fees with relatively long cancellation periods enable these mediators to schedule efficiently without gaps, and to be paid even if a party cancels or reschedules the mediation.<sup>225</sup> Since mediation is a personal service that cannot be delegated or postponed, mediators cannot schedule more than one mediation at any given time.<sup>226</sup> Second, commercial mediators charge per-diem fees instead of hourly fees so that they can get paid before, or at, the mediation session and avoid collection problems.<sup>227</sup> Since demand for large clients in high-stakes disputes is relatively inelastic, top commercial mediators are able to charge high per-diem fees, and have long cancellation periods.<sup>228</sup>

Mediators who are unable to charge per-diem fees are faced with the problems that cause mediators to charge such fees: they do not get compensated for cancellations and often have more difficulty with collection after the mediation. This makes entering the profession more difficult and precarious, and many return to steady paychecks because they cannot afford to wait until they have acquired the necessary reputation to charge per-diem fees.<sup>229</sup>

## V. IMPLICATIONS FOR MEDIATION TRAINING

Mediation training programs have grown significantly over the years. There exist the thirty–forty-hour basic mediation courses that span a week and cost as much as \$2,000;<sup>230</sup> advanced programs

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if they are already booked on that day.

<sup>224</sup> “If I get to the point where my calendar is eighty percent booked for two months in advance, I start to think about raising my rates. My experience is that a lot of high-end cases need to be mediated within two months, so it doesn’t pay to have your calendar completely booked two months in advance or booked out over two months.” Baten, *supra* note 140.

<sup>225</sup> In particular, labor mediators whose fees are compressed, distinguish themselves by longer cancellation fees. They generate a substantial amount of their revenue from cancellation fees. For mediators who are lawyers, there are serious ethical concerns with “double billing” their time.

<sup>226</sup> See CREO, *supra* note 174, at 2.

<sup>227</sup> See Galton, *supra* note 45.

<sup>228</sup> See, e.g., KRIVIS & LUCKS, *supra* note 7, at 143 (noting that top mediators, such as Robert Creo, know that their time is valuable and therefore they can bill in advance for per-diem fees and be strict about cancellation fees).

<sup>229</sup> See *id.* at 157–58.

<sup>230</sup> See, e.g., Mediation Training Institute International, Mediator Certification, <http://www.mediationworks.com/medcert3/register.htm> (last visited Nov. 24, 2008) (listing the cost of a regular forty-hour certification program at \$2,495 or \$1,995 if the candidate applies

in family, housing, and civil mediation;<sup>231</sup> and, increasingly, mediation course offerings at colleges and universities.<sup>232</sup> By 2003, twenty-four law schools had provided dispute resolution programs.<sup>233</sup> There now exist masters and Ph.D. programs in dispute resolution.<sup>234</sup> Course offerings and an increasing number of specialized dispute resolution journals indicate that there is indeed a growing demand for dispute resolution education.<sup>235</sup>

As this article explains, while the mediation market has grown and the need to be acquainted with mediation as a method of dispute resolution has increased, opportunities to make a living as a mediator remain scarce. Many people attend training programs or obtain degrees in mediation expecting that there exist career opportunities to match the skills for which they are being trained. They get trained because they are hoping to make the career change to mediation.<sup>236</sup> Many of the training programs include marketing techniques in their curriculum, but few honestly describe the status and availability of job opportunities in mediation.<sup>237</sup>

The failure by mediation trainers to provide accurate information about opportunities to make money in mediation contributes to excess entry in the market for mediation services. As this article explains, inaccurate information about the availability of mediation jobs as well as over-optimism lead aspirant mediators to spend money on mediation training and starting mediation practices, and to incur opportunity costs by foregoing other career opportunities. Not only may the failure of mediation trainers to fully disclose the pros and cons of mediation practice and correct trainee misapprehensions be unethical,<sup>238</sup> it also leads to socially inefficient

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more than thirty days in advance).

<sup>231</sup> See, e.g., Mediation Training Group, Inc., Registration, <http://mediationtraininggroup.com/registration.php> (last visited Nov. 24, 2008) (listing the different mediation training programs they offer); Mediation Works Incorporated, MWI's Training Programs and Workshops, <http://www.mwi.org/training/index.htm> (last visited Nov. 24, 2008) (listing divorce and housing mediation as available training programs offered by MWI).

<sup>232</sup> See Sharon Press, *Institutionalization of Mediation in Florida: At the Crossroads*, 108 PENN ST. L. REV. 43, 56–57 & n.94 (2003). See also MOSTEN, *supra* note 86, at 229–42 (listing more than sixty schools that offer undergraduate and/or graduate degrees in alternative dispute resolution).

<sup>233</sup> See Press, *supra* note 232, at 56 n.94.

<sup>234</sup> See MOSTEN, *supra* note 86, at 236–42.

<sup>235</sup> See Press, *supra* note 232, at 56.

<sup>236</sup> David Plimpton, *Ethical Duties of Mediation Trainers in the Promotion of Training Programs*, 24 SPIDR NEWS 1, 1 (2000).

<sup>237</sup> See *id.* at 1, 3.

<sup>238</sup> See *id.* at 3.



outcomes.<sup>239</sup> To correct this misallocation of resources, mediation training programs should disclose information about “the known opportunities, limits, and obstacles in mediation employment and professional practice opportunities.”<sup>240</sup> While it is true that mediation may be a useful skill in our work and familial lives,<sup>241</sup> it is likely that fewer people would spend hundreds or thousands of dollars on mediation training without the expectation that training could lead to a career change.<sup>242</sup>

Course offerings at colleges, universities, and law schools, on the other hand, are less problematic economically, because graduates take them for reasons other than career change. Often, law students take mediation classes because they want to learn about a method of dispute resolution that they expect to come across as practicing attorneys, or simply because they want a class that is different. Furthermore, students of mediation rarely expect to work as mediators after they graduate, and are better able to learn about the market for mediation services over the course of the semester as they take the course than someone who signs up for a forty-hour crash course. Offices of career services will also soon put an end to any serious misconceptions about mediation careers. Finally, mediation courses legitimize mediation and give it credibility.<sup>243</sup> Assuming that mediation is overall more cost-effective than litigation, it is socially efficient to spread common knowledge about its benefits, and perhaps provide universal mediation training in schools and in workplaces.<sup>244</sup> But, as the section explains, it is socially inefficient to charge large sums of money on the pretense that mediation is a viable career option for a large number of people.

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<sup>239</sup> See analysis of excess entry, *supra* Part III.A., at 121–22.

<sup>240</sup> Plimpton, *supra* note 236, at 4.

<sup>241</sup> There are an increasing number of attorneys who get trained in mediation without the aspiration of becoming mediators. One Boston law firm, for example, hired a group of mediators to train them, even though only one or two of the attorneys had aspirations of providing mediation services. The reason the firm paid for mediation training is to enable their attorneys to better understand the practice and provide better legal advice to their clients. I thank David Hoffman for this observation.

<sup>242</sup> See Plimpton, *supra* note 236, at 4.

<sup>243</sup> See *id.*

<sup>244</sup> See David A. Hoffman, *The Future of ADR Practice: Three Hopes, Three Fears, and Three Predictions*, 22 NEGOTIATION J. 467, 468–69 (2006).

## VI. CONCLUSION

Mediation has grown tremendously in the last three decades, yet only a small number of mediators have been able to benefit financially from its growth. The supply of willing mediators by far exceeds the demand for their services. Mediator trainee over-optimism and the lack of formal barriers to entry result in excess entry in the market for mediators. However, the lack of a formal barrier, but the existence of de facto barriers to entry, such as mediator selection practices and specialization, combined with excessive individual optimism, creates inefficiently high levels of entry. This is socially suboptimal: many aspirant mediators spend money pursuing what is likely an illusory career and forego other career options, even though they were never going to be able to make money as mediators.

This article presents data showing that income distribution in the market for private mediation is uneven, and suggests that the market is a winner-take-all market, where a few mediators at the top of the pyramid are busy and well-paid, while the vast majority of aspiring mediators is constantly looking for work, yet makes little or no money. This article proposes economic reasons that contribute to this phenomenon: non-homogeneity of the product (i.e., mediation services); de facto barriers to entry, including mediator selection preferences and specialization; organizational structures; and inelastic demand for mediator services. Since mediation consumers often compare the cost of mediation to the cost of litigation instead of comparing costs of different mediators, new mediators are unable to compete for work on price.

Information problems, in particular the lack of objective measures of mediator quality, other than settlement rates, and attorneys' control of access to clients, have made reputation the most important factor for mediator selection, making it difficult for new entrants to gain a foothold in the private mediation market. Small firm size further reduces the number of opportunities for new mediators to learn skills and acquire the necessary reputation to be able to practice on their own.

Since experience and reputation are essential for success, only celebrity mediators, mediators with authority—such as former judges—and those with sufficient resources and stamina are able to survive in the market long enough to make a living as mediators. As a result, mediation is a second or third career for virtually all full-time mediators in private practice.

This has important implications for aspirant mediators and for the design of mediation training programs. Aspirant mediators would be well-advised to specialize in a particular field, such as environmental issues or construction, and gain a solid reputation among lawyers and/or business people in that field before starting a mediation career. In addition, mediation training programs ought to be redesigned to convey to aspirant mediators the realities of mediation practice.

