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Making Peace AND Making Money

By Urska Velikonja

There is a considerable gap between what novice mediators expect and what mediating for a living is like. Many are drawn to mediation because they expect the job will provide deep satisfaction that comes with helping others.

Making a living as a mediator, however, is anything but fun for many of those trying. Training courses are plentiful, but there are few mentoring and other job opportunities.¹ Many of us interested in mediation are advised to pursue our interest on a part-time or volunteer basis at night and over weekends, while keeping our day jobs. Those making a go as independent mediators spend a substantial amount of their time engaging in “relentless marketing” because, as one experienced mediator put it, it is “harder sometimes to get cases than to settle cases.”²

But then there are some mediators who are busy enough to gross a million dollars per year or more. In 2008, I conducted a study of the market for commercial mediation, hoping to explain the income gap between the few high-income mediators and the many mediators who made little or no money mediating. 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 that I conducted with a dozen established mediators in private practice and managers of ADR organizations.³ I found 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.

The Market for Mediation Services and for Mediation Providers

The market for mediation has grown and matured significantly over the last 30 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.

Mediation Services

Although the market for mediation services has grown, it is still small compared to litigation. Mediation remains a choice that is more often the result of a judicial or

legislative mandate than of party choice. According to a study by the American Arbitration Association, 63 percent of respondents (i.e., companies) and 73 percent of surveyed *Fortune* 1,000 companies attributed their use of mediation to court-mandated mediation programs.⁴

The usual explanation is a lack of knowledge (on the part of the public) regarding mediation. Other explanations include the fact that lawyers, not their clients, decide whether a dispute will be mediated, and lawyers have a financial interest in retaining control over the dispute. 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.

Mediation Providers

Experienced practitioners estimate that more than 100,000 people have received some sort of mediation training.⁵ Of those trained, relatively few actually practice mediation, and even fewer make a living as full-time mediators.⁶ There are about 10,000 full-time providers of ADR services in the United States today.⁷ While the number may seem large, it is dwarfed by 1.14 million lawyers admitted to practice in the United States.⁸

The vast majority of people who enter the mediation market drop out within two years, according to one mediator I interviewed.⁹ 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

\$200,000 or more per year. Only a couple dozen or so mediators, primarily former judges practicing with JAMS and a few high-end commercial mediators in markets where the cost of living and, as a result, mediation fees are high, are able to consistently bill more than \$1 million per year.¹³

Why Do So Few Mediators Make Money?

Two factors explain the income structure: flagging demand for mediation services and a winner-take-all market for mediation providers.

A Function of Supply and Demand

The market for private mediation services works like any other market, and is a function of demand for and supply of mediation services. While there exist many willing mediators, private demand for mediation has been underwhelming. Most people remain leery of negotiation as a way of settling disputes. If they know about mediation, they are concerned that mediation is second-class justice: quick and cheap, but more likely to result in them being taken for a ride. The fact that a large percentage of disputes, perhaps as many as half, are mediated in free public programs further dampens demand for private mediation at the low-price end of the market.

Winner-Take-All

Human capital theory predicts that pay for work will depend on observable employee productivity, which will in turn depend on talent and effort. The theory predicts that someone who works 10 percent harder or is 10 per-

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because they cannot support themselves solely with mediation.

Many mediators in private practice, particularly in states with mandatory mediation programs, rely on court references as their primary source of mediation work. In Florida, which probably has the largest and the most developed court-connected mediation program, there are currently almost 6,000 registered mediators (up from under 5,500 in 2008).¹⁰ But, according to a court administrator, probably 10 percent of registered mediators do 90 percent of the work.¹¹

Of the few thousand mediators in private practice who are able to mediate full-time, the majority earn \$50,000 or less.¹² The neutrals I interviewed agreed that there are fewer than a thousand mediators, and possibly only a few hundred, who earn high incomes, grossing

cent more talented should receive 10 percent more pay.

But winner-take-all markets do not operate in accordance with the human capital theory. In those markets, pay depends on relative performance, rather than absolute performance, and tends to be concentrated. A 10 percent increase in talent or effort can cause pay to differ by 10,000 percent or more. The (perceived) best performers are wealthy, whereas second-best receive only a tiny fraction of the best performer's pay, even though



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they might be only marginally less productive.

This reward structure has long been common in entertainment, sports, and the arts, but also seems to be present in the mediation profession. There are several causes. First, buyers of mediation services are repeat players (e.g., lawyers). They maintain closed lists of mediators that they call when needed. Unless a mediator is on

quietly signal to their clients that if the dispute can be settled, they are the ones who can settle it. They are also good businesspeople who market themselves well; not by using traditional marketing channels, but by always performing well in front of clients and their attorneys. Many, if not most, top mediators have formal or informal business plans and excellent case managers, who they

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the list, he or she will not be selected. Second, variations in quality of mediation are hard to observe, and clients must rely on the few sources of information available, often word of mouth. A mediator who was selected to mediate a large commercial dispute and performed well is much more likely to be selected to mediate again, even though he or she may be only marginally better (or perceived as such) than the second-best choice.

The demand for a top-notch service may also stem from the desire to avoid adverse outcomes from having bought the (perceived) second-best. When an attorney with a high-value case refers it to mediation, he or she is never going to be criticized for selecting a well-known mediator. Even if the mediation fails, buyers can comfort themselves by knowing that they purchased the best. But, if the mediation works well, there is no way of knowing if the second-best would have worked just as well.

Why Do Some Mediators Make So Much Money? *Nonhomogeneity: Characteristics of the Highest-Paid Mediation Professionals*

Best-paid mediators do not compete directly against second-tier commercial mediators (who may still be making a very comfortable living), who, in turn, do not compete against the rest.

A good mediator is hard to describe and is usually referred to as “you’ll know it when you see it.” The reason is that, as one mediator put it, “mediation is much more complex than litigation.”¹⁴ 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 can “read” people and have the intuitive ability to sense the things that are not being said. They are compassionate and empathetic, and can focus all their intellectual energy on the dispute in front of them. They are “chameleon-like”: usually evaluative, but able to adjust their demeanor and mediation style to the party and the dispute. They are also calm and patient, and have both a sense of humor and a sense of drama. They can

pay well. And most importantly, the mediators who are frequently selected are the ones who have been able to stay in the field long enough to develop a reputation as great mediators.

Although mediation training is necessary to become an effective mediator, hands-on experience is the most important factor predicting high settlement rates (the rate of settlement is one of the few objective performance criteria in mediation). 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.”¹⁵ While this may sound like little, many full-time mediators—which means they are more successful than 80 or more percent of all mediators—only mediate 100 or so cases per year.¹⁶ Because 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.

Organizational Structure of the Mediation Profession

Mediation is a lonely profession: many mediators in private practice work alone and join forces only for practical reasons (e.g., sharing administrative staff). Even the largest mediation firm, JAMS, employs only a few associates, while its mediators are independent contractors.

Although the majority of full-time commercial mediators are lawyers, few practice in law firms because of conflicts of interest, both existing and potential, according to mediators I interviewed. Because mediation will generate limited fees, few law firms would trade mediation income for the client’s other legal work.

Mediation is a hands-on skill that cannot easily be delegated to junior associates. Unlike law firms, whose work requires the simultaneous efforts of an army of associates, mediation work is less time-consuming and cannot be broken into small pieces. Mediators cannot delegate substantive work, such as reading party

submissions, to associates or paralegals because they themselves must be familiar with all the material.

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 (20–25 percent of gross revenues), and each mediator keeps the majority of the revenues without the need or the incentive to employ junior mediators. As a result, there is virtually no demand for junior mediators, and there are few opportunities to gain experience and exposure to practice alongside seasoned mediators while receiving a salary. This characteristic tends to limit entry to the market for mediation providers and results in a few mediators getting the bulk of the work.

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. Commercial mediators get most of their cases from practicing attorneys and courts. Attorneys are the gatekeepers to mediation: parties rely on their attorneys to decide whether a dispute will be mediated and who will mediate it. Unless a mediator is on the attorneys' short list, he or she will not be selected to mediate commercial disputes. It is very difficult to be added to the list. A mediator needs a stellar reputation in the legal community and a solid track record, which takes time. Many of today's top mediators spent five or more years mediating before they finally broke even, let alone made good money. Furthermore, the fact that attorneys

Elasticity of Demand

Compared to litigation, mediation is cheap. One commentator estimates that it costs each party at least \$100,000 to litigate a straightforward business claim.¹⁸ Mediation of a similar dispute, on the other hand, usually costs a fraction of that amount, and the parties ordinarily share mediator fees. Even high-end mediators usually do not charge much more than \$10,000 per day, and a straightforward business claim usually takes a day or two to settle in mediation. Mediator fees in high-value commercial disputes may be inconsequential to the value of settling the matter, and hence clients will pay for the mediator they want, not one they can afford.

In domestic cases, mediator fees are usually lower overall, and mediators tend to charge by the hour because clients are more price-sensitive. Divorce mediation fees are also more commonly regulated, either directly by legislation or court rules, or indirectly by lower filing and legal fees for domestic disputes. As a result, demand is more elastic than in commercial mediation, and hence, family mediators can compete by charging a lower price.

Much of paid mediation is billed to clients on an hourly basis.¹⁹ Hourly fees vary by geography and by quality or reputation of the mediator. In smaller markets mediation services are available at \$50 per hour at the low end. Larger mediation markets support higher fees, often in excess of \$500 per hour at the high end.

Only a minority of high-end commercial mediators in competitive markets can charge flat per-diem fees or per-case fees. Because it is difficult to measure mediator quality by objective measures other than settlement rates, media-

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select mediators has been suggested as one of the reasons why the profession is not more diverse: most financially successful mediators are white males with legal training in their fifties or older.¹⁷

In addition to selection bias in favor of established mediators, the market for mediation providers has become more specialized and segmented as it matured. Some of the most respected public policy mediators have essentially no high-end commercial cases, even though they have a proven track record in work that is at least as complex. There are increasingly fewer opportunities for 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.

tors use per-diem fees to signal quality, and that they are in high-demand. Per-diem fees are used for two additional reasons. First, mediators not only want to charge high fees, but also want to be consistently busy. Per-diem fees with relatively long cancellation periods enable the busiest mediators to schedule efficiently without gaps, and to be paid even if a party cancels or reschedules the mediation. 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.

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.

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Advice for Aspiring Mediators

Although this article paints a somewhat bleak picture for those hoping to join the mediation profession, there is room for dedicated mediators to make a name for themselves, and a living, practicing what they love. Despite the knee-jerk inclination to provide general mediation services, novice mediators may be able to create a market for themselves by focusing on a narrow niche. Specialize in a particular field that you already know well, such as environmental law or construction, and gain a solid reputation among lawyers and/or business people in that field before starting a mediation career. Novice mediators should learn as much as they can about the market they are about to enter. Keep in mind that mediation is particularly well suited for situations where maintaining a healthy relationship is important, but conflict is common. For example, one novice mediator started a successful practice by providing prewedding mediation for couples, their families and in-laws, and the wedding consultant. Finally and most importantly, choose mediation because you love the work, not because you hate the job you currently have. ♦

Endnotes

1. Some successful mediators (for example Robert A. Creo, Jeffrey Krivis, and Eric Green) have reported hiring and mentoring junior mediators in their offices, but the practice is not common. See, e.g., Telephone Interview with Robert A. Creo, Mediator, in Pittsburgh, PA (Mar. 21, 2008); 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 112–14 (2006).

2. PETER LOVENHEIM, BECOMING A MEDIATOR (2002).

3. A longer version of this study appeared as the following: Urska Velikonja, *Making Peace and Making Money: Economic Analysis of the Market for Mediators in Private Practice*, 72 ALB. L. REV. 257 (2009).

4. See AMERICAN ARBITRATION ASSOCIATION, DISPUTE-WISE BUSINESS MANAGEMENT: IMPROVING ECONOMIC AND NON-ECONOMIC OUTCOMES IN MANAGING BUSINESS CONFLICTS 19, 28 (2006), available at www.adr.org/sp.asp?id=29431.

5. Currently only Florida, New Hampshire, North Carolina, South Carolina, and Virginia certify mediators, so much of the information is estimated. Robert A. Creo, David Hoffman, and John Bickerman suggested the figure 100,000 trained mediators, extrapolating from the number of available mediation courses.

6. Marty Nemko, *Mediator: Executive Summary*, U.S. NEWS & WORLD REP., Dec. 19, 2007, available at www.usnews.com/

articles/business/best-careers/2007/12/19/mediator-executive-summary.html.

7. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, 2009–10 EDITION: JUDGES, MAGISTRATES, AND OTHER JUDICIAL WORKERS, www.bls.gov/oco/ocos272.htm [hereinafter OCCUPATIONAL OUTLOOK HANDBOOK] (estimating that there are about 9,900 arbitrators, mediators, and conciliators in the United States and noting that 26 percent of them work for state and local governments).

8. See American Bar Association, National Lawyer Population by State (2007), available at www.abanet.org/marketresearch/2007_Natl_Lawyer_FINALonepage.pdf.

9. Email from Eric Galton to author (Mar. 28, 2008, 11:33:55 EST) (basing his observation on his 25 years of experience in the profession).

10. See Florida State Courts, *Alternative Dispute Resolution*, www.flcourts.org/gen_public/adr/index.shtml.

11. See LOVENHEIM, *supra* note 2, at 134–35.

12. See OCCUPATIONAL OUTLOOK HANDBOOK, *supra* note 7, available at www.bls.gov/oes/current/oes231022.htm (estimating the median salary for employed mediators at \$52,770; note that the salary information includes a substantial number salaried government jobs that pay more than the median, suggesting that median private jobs must pay less than the overall median).

13. Telephone Interview with Robert A. Creo, *supra* note 1.

14. *Id.*

15. Kathy Fragnoli, *Ideas for Creating a Market for Your Services*, in ADR PERSONALITIES AND PRACTICE TIPS 13 (James J. Alfini & Eric R. Galton eds., 1998).

16. Email from Steve Cerveris, Mediator (Apr. 1, 2008, 12:34:02 EST). 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. Interview with David A. Hoffman, Mediator in Boston, MA (May 1, 2008).

17. Telephone Interview with Robert Benjamin, in Portland, OR (Mar. 28, 2008); EVAN R. SEAMONE, BRINGING A SMILE TO MEDIATION'S TWO FACES: HOW ASPIRING MEDIATORS MIGHT JUMP-START CAREERS IMMEDIATELY FOLLOWING LAW SCHOOL, § III.B (2000), www.uiowa.edu/~cyberlaw/elp00/Evan/mediation.

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

19. Most court rosters that list mediator fees list hourly fees, and some markets, like Michigan, do not support per-day fees. 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. 19, 2010) (listing hourly fee rates for various mediators); email from Tracy Allen, Mediator (Mar. 22, 2008, 09:43:48 EST) (noting that she charges per-diem fees when she mediates out-of-state, but not in Michigan).