

Pepperdine Dispute Resolution Law Journal

Volume 19 | Issue 2

Article 2

5-15-2019

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Recommended Citation

Lerae Ettienne, *It's Time to Pay Up, The Justification for Higher Salaries for WNBA Players: An Analysis of the WNBA's Success and Employing Mediation between the WNBA and NBA to Leverage Future Success*, 19 Pepp. Disp. Resol. L.J. 175 (2019)
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It's Time to Pay Up, The Justification for Higher Salaries for WNBA Players: An Analysis of the WNBA's Success and Employing Mediation between the WNBA and NBA to Leverage Future Success

Lerae Ettienne*

I. INTRODUCTION

The 2017 Women's National Basketball Association ("WNBA") Finals set unprecedented records for the league in terms of postseason attendance, social media engagement, viewership, and merchandise sales.¹ Yet, despite the upswing in numbers and the significantly increased level of talent, the top WNBA players' salaries are only a fraction of the minimum National Basketball Association ("NBA") player salary.² It's not just pay; there is an apparent lack of respect for women in the professional sphere, regarding the quality of the game, as opposed to their treatment at the collegiate level.³ This lack of respect for the women's game is enforced by the WNBA's big brother: the NBA.⁴ As an NBA subsidiary, the WNBA should benefit more from the organization in regards to salaries and revenue.

These discrepancies can be fixed, and great care must be taken in ensuring that there is respect for both organizations to foster a meaningful change in WNBA and NBA relations. The use of mediation as a dispute resolution tool could improve relations between the two leagues and increase the overall success of the WNBA. Mediation between the WNBA and NBA executives

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¹ Elizabeth Pehota, *Electrifying WNBA Finals Sets Massive Records in Attendance, Social Media*, SWISH APPEAL (Oct. 9, 2017), <https://www.swishappeal.com/2017/10/9/16450190/wnba-finals-massive-records-attendance-social-media-merchandise>.

² David Berri, *Basketball's Growing Gender Wage Gap: The Evidence the WNBA is Underpaying Players*, FORBES (Sept. 20, 2017), <https://www.forbes.com/sites/davidberri/2017/09/20/there-is-a-growing-gender-wage-gap-in-professional-basketball/#2002e3436e04>.

³ N. Jeremi Duru, *Hoop Dreams Deferred: The WNBA, the NBA, and the Long-Standing Gender Inequity at the Game's Highest Level*, 2015 UTAH L. REV. 559, 559–60 (2015).

⁴ *Id.* at 561.

would provide a forum for the WNBA executives to voice their grievances regarding the apparent discrepancy in player salaries and overall league revenue.⁵ Mediation would also foster a solution that would improve the current structure of the leagues so that the success of the WNBA would be mutually beneficial for both leagues.⁶ Essentially, this is akin to an employee/employer issue, of which mediation has proven to have a great track record.⁷

This article looks at the potential positive effects that mediation can have in fostering a better relationship between the two leagues and for the WNBA and its players to get their much-deserved respect and compensation. First, the article will go in depth regarding the structure of the WNBA, and its history to date. Next, the article will examine the WNBA's success despite the discrepancy in pay and the purported lack of viewership. The article will then expound on the rise of mediation as one of the major ADR tools. Next, the article will analyze the success of mediation in professional sports disputes. Lastly, the article will analyze the application of mediation to the issues concerning the WNBA, weighing both sides of the issues.

II. STRUCTURE OF THE WNBA

Created in 1996, the WNBA was comprised of eight professional teams.⁸ The WNBA began as a single-entity league, similar to the structure of Major League Soccer ("MLS").⁹ However, the major difference between the WNBA and MLS were "that the operator-investors [were] owners of NBA franchises or agents of the NBA itself,"¹⁰ as opposed to outside private ownership. The league was "formed by the NBA Board of Governors" and

⁵ *Mediation and the NBA Labor Talks-Breakthrough Communication with Results Everyone Can Live With*, MEDIATION.COM (Nov. 26, 2012), <http://www.mediation.com/articles/mediation-and-the-nba-labor-talksbreakthrough-communication-with-results-everyone-can-live-with.aspx>.

⁶ *Cf.* Rodney A. Max & Joshua J. Campbell, *Formal Mediation in Professional Sports*, AM. J. OF MEDIATION 1, 3 (2007), <http://www.acctm.org/docs/Formal%20Mediation%20in%20Professional%20Sports%20-%20MAX-CAMPBELL-Final%2012-6-06.pdf>.

⁷ See Kendall D. Isaac, *Employment ADR and the Professional Athlete*, 12 APPALACHIAN J.L. 167, 172 (2013).

⁸ Matthew Walker, Melanie Sartore, & Eric MacIntosh, *Beyond the "Business Case" for the WNBA: A Strategic Perspectives Approach for League Sustainability*, 6 J. CONTEMP. ATHLETICS 1, 1, 5 (2012) (available at https://www.researchgate.net/publication/260017685_BEYOND_THE_BUSINESS_CASE_FOR_THE_WNBA_A_STRATEGIC_PERSPECTIVES_APPROACH_FOR_LEAGUE_SUSTAINABILITY). "The leagues' eight charter teams – Charlotte Sting, Cleveland Rockets, Houston Comets, New York Liberty, Los Angeles Sparks, Phoenix Mercury, Sacramento Monarchs, and Utah Starzz – were each based in a city with an NBA team and were each directly owned by the NBA." Duru, *supra* note 3, at 572.

⁹ GLENN M. WONG, *ESSENTIALS OF SPORTS LAW* 3 (Prager, 4th ed., 2010)

¹⁰ *Id.* at 16.

remained entirely owned by the NBA.¹¹ Originally, the NBA constructed the WNBA with the “stated purpose of embodying a completely centralized entity, with true ownership of teams and with WNBA players subject to rules unilaterally imposed by the WNBA.”¹² In 1996, the Women’s National Basketball Players Association (“WNBPA”) was formed and, in the same year, it negotiated its first collective bargaining agreement (“CBA”) with the WNBA.¹³ The NBA franchise owners exerted a great deal of control over the WNBA including overseeing its operations, regulating team ownership, and negotiating broadcasting rights and sponsorships.¹⁴

The WNBA’s affiliation with the NBA is likely the greatest reason why the league survived infancy, during which time the American Basketball League (“ABL”), a rival women’s league, threatened the WNBA viability.¹⁵ The ABL was created before the WNBA; on September 26, 1995, the ABL announced its formation as “the first significant women’s pro basketball league since the WBL.”¹⁶ The ABL had franchises in eight cities and was packed with talent, boasting “nine members of the United States Olympic Women’s Basketball team and forty-three former All-American collegians.”¹⁷ The WNBA, on the other hand, entered the market after the ABL’s inaugural season with less talented and skilled players and paid far lower salaries on average than the WBL.¹⁸ Despite these discrepancies, however, the NBA’s backing of the WNBA left the ABL with little chance of survival.¹⁹ The WNBA games were housed in the same arenas that the NBA games were played in and the league secured sponsorship deals with entities like Nike, American Express, and Coca-Cola, again thanks to the NBA’s influence.²⁰ As a result, the ABL began to look like a minor league in comparison, and several of the ABL’s best players began to migrate to the WNBA.²¹ In the middle of its third season, the ABL became financially insolvent and filed for bankruptcy, leaving the WNBA as the only premier women’s professional basketball league.²² Once the ABL crumbled, several ABL officials blamed

¹¹ MATTHEW T. BROWN, DANIEL A. RASCHER, MARK S. NAGEL & CHAD D. MCEVOY, *FINANCIAL MANAGEMENT IN THE SPORT INDUSTRY* (2d ed., 2015).

¹² Michael A. McCann, *The NBA and the Single Entity Defense: A Better Case?*, 1 HARV. J. SPORTS & ENT. L. 39, 42-43 (2010).

¹³ Brown, *supra* note 11, at 31.

¹⁴ Walker, Sartore & MacIntosh, *supra* note 8, at 1.

¹⁵ Duru, *supra* note 3, at 573.

¹⁶ James Bowman, *The Interim Leagues: Between the WBL and the WNBA*, SWISH APPEAL, (Oct. 25, 2012, 8:01 AM), <https://www.swishappeal.com/2012/10/25/3551354/nancy-lieberman-womens-professional-basketball-waba>. The Women’s Professional Basketball League (WBL) was the first professional women’s basketball league, but it only lasted three years. “[The WBL] convinced others that a successful women’s pro league was just around the corner.” *Id.*

¹⁷ Duru, *supra* note 3, at 573.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 573.

²¹ *Id.*

²² *Id.* at 574.

its demise on the NBA's involvement; the ABL asserted that the NBA illegally prevented the ABL from securing notable sponsorship deals, particularly that the league was "engaged in a 'conspiracy to monopolize women's professional basketball.'"²³ However no suits or charges were actually filed; it was deemed that just being a part of the NBA and having access to its networks and corporate partners, was more than enough to fuel the demise of the ABL.²⁴

The WNBA has since moved toward the traditional ownership structure of individually owned teams with a league office to oversee those teams.²⁵ However, half of the current twelve WNBA teams are still individually owned by their respective NBA teams, making the league a partially-owned subsidiary of the NBA.²⁶ Again, even though the league had moved toward independence,²⁷ there remained a significant advantage by having the backing of the NBA.²⁸ As a franchise, the NBA is considered "the most successful U.S. sports league overseas in attracting fans and their money."²⁹ The WNBA and the NBA also remain very closely connected; in fact, the league offices are both housed in the same New York City building, and they also frequently collaborate on marketing, sponsorship arrangements,³⁰ and even public relations initiatives, "such as diversity programs and the health and wellness platform NBA FIT."³¹

However, despite such "collaboration," the WNBA does not have nearly the same amount of monetary gain from these arrangements as the NBA does. Unlike other leagues, the individual NBA franchises share various streams of revenue, "including revenue generated by national TV contracts and licensing contracts, without regard for individual teams' contributions."³² Being that the NBA already employs the idea of revenue sharing within the men's league, it seems contradictory to not leverage the same streams of revenue to help support the women's league. In short, despite the revenue generating power

²³ *Id.* at 575.

²⁴ *Id.*

²⁵ Lacie L. Kaiser, *The Flight from Single-Entity Structured Sport Leagues*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 11 (2014). When the WNBA took its first steps toward "quasi-independence," the league had grown from eight to sixteen teams, and "the owners of the NBA teams located in cities with new WNBA teams were granted the right of first refusal to purchase their sister teams." Duru, *supra* note 3, at 576.

²⁶ McCann, *supra* note 12, at 42-43.

²⁷ Duru, *supra* note 3, at 576 (describing the "first steps toward quasi independence" when "the N.B.A. board of governors voted to change the W.N.B.A. business model from a single-entity structure to individual team ownership") (citations omitted).

²⁸ *Id.* at 11.

²⁹ McCann, *supra* note 12, at 42.

³⁰ *Id.* at 43.

³¹ Duru, *supra* note 3, at 576. Even after 2006, the NBA Commissioner David Stern continued to exercise a great deal of authority over the WNBA through the end of his tenure in 2014. "[W]hen WNBA President Donna Orender resigned in 2010, Stern was actively involved in selecting her replacement, Laurel Ritchie, and Stern made the public announcement of her hire." *Id.* at 576-77.

³² McCann, *supra* note 12, at 49.

of the NBA, the WNBA is seen as an entity that is simply not profitable.³³ But why is that?

There is one major potential reason for this lack of profitability that most critics of the league seem to ignore: the WNBA has only completed its twenty-first season. In terms of women's professional sports, a league remaining viable for such a length of time is a landmark.³⁴ In fact, new leagues struggle in the early years and many result in failure, be it women's or men's leagues.³⁵ Yet despite these norms, the WNBA is still here, twenty-one years later. The typical arguments that dominate some of the particularly harsh criticisms of the WNBA focus on three ideas: the league attracts far fewer fans than the NBA; several franchises within the WNBA have folded or relocated; and the WNBA franchise as a whole is losing money.³⁶ However, such blanket statements about the league do not paint an accurate picture of its current situation. If we were to look at the viability of the NBA after 20 years in existence, its situation at that time would mirror the WNBA's situation today.

When the NBA was 20 years old, it barely averaged 6,000 fans per game, whereas in 2015 (the WNBA's 19th year), the WNBA averaged 7,318 fans per game.³⁷ That figure rose in the 2017 season when the league averaged 7,716 fans per game.³⁸ Also, at the 21-year mark, the NBA had ten teams in its league, whereas the WNBA has twelve.³⁹ Those numbers contrast starkly to the more than 17,500 fans that the NBA attracts per game today, and certainly give a new outlook on overall league viability.⁴⁰ Thus in the same 20-year period, the NBA was not as successful as the WNBA is today, and the same could be argued for the NFL and MLB.⁴¹ Numbers don't tell the entire story, however, and fans are typically scarce in the early years of a league's history for three reasons:

- It takes time for fans to become familiar with the teams and players.

³³ See Richard Sandomir, *After Two Decades, W.N.B.A. Still Struggling for Relevance*, NY TIMES (May 28, 2016), <https://www.nytimes.com/2016/05/28/sports/basketball/after-two-decades-wnba-still-struggling-for-relevance.html>.

³⁴ "For a league in women's team sports to exist this long with the same name and many of the same franchises is not common." David Berri, *Think the WNBA is in Trouble? Let's Talk Some NBA History*, HUFFINGTON POST (June 4, 2017), https://www.huffingtonpost.com/david-berri/think-the-wnba-is-in-trouble-lets-talk-nba-history_b_10279354.html. See Lamar Johnson & Andi Cwieka, *How the WNBA Recovered from its Worst Ever Season*, SB NATION (2017), <https://www.sbnation.com/a/wnba-preview-2017/strong-2016> (thriving past the twentieth season is a landmark for women's sports in America).

³⁵ Berri, *supra* note 34.

³⁶ Sandomir, *supra* note 32.

³⁷ Berri, *Think the WNBA is in Trouble? Let's Talk Some NBA History*, *supra* note 34.

³⁸ Jacob Bogage, *For the WNBA, Business isn't as Bad as it Looks*, THE WASHINGTON POST (December 6, 2017), https://www.washingtonpost.com/news/early-lead/wp/2017/12/06/for-the-wnba-business-isnt-as-bad-as-it-looks/?noredirect=on&utm_term=.809c163975d0.

³⁹ Bogage, *supra* note 38.

⁴⁰ Berri, *Think the WNBA is in Trouble? Let's Talk Some NBA History*, *Huffington Post*, *supra* note 34.

⁴¹ *Id.*

- History is a big part of the fan experience (i.e., we like comparing today's players to players from earlier time periods). Obviously, history takes time.
- And it helps to have other fans to talk to about your favorite sport. So, a lack of fans actually diminishes the experience for existing fans.⁴²

Looking at these reasons in conjunction with some of the criticisms mentioned prior, the status of the WNBA doesn't look as bleak. These problems are simply part of the growing pains of sports, which eventually get worked out one way or another—it just takes time. The folding and relocation of teams is inevitable;⁴³ owners will always complain that they aren't making any money.⁴⁴ In young professional sports leagues, “market volatility is routine.”⁴⁵

This overall message of patience has been preached by two-year WNBA President Lisa Borders.⁴⁶ In an interview, Borders opined that twenty-one years is not a long time and that “[o]ur big brother, the NBA, is 50 years older than us, which is two generations. Those sports leagues have had a much longer time horizon to sell teams, to expand teams, and have all the time of a maturing business.”⁴⁷

III. WNBA SUCCESS VS. DISCREPANCY IN PAY AND VIEWERSHIP

Culminating its twentieth season in October of 2017, the WNBA proved that new outlooks on traditional aspects of the game and the perception of the league, in general, could improve its success. In January of 2017, the league announced that it would change the playoff structure, eliminating the Eastern and Western conference confines that characterize the NBA playoffs.⁴⁸ In addition to changing its playoff structure, the WNBA has also taken a different approach in its marketing strategy in order to garner more visibility by highlighting a variety of star players, as opposed to focusing only on one

⁴² *Id.*

⁴³ *Id.* Relocation is a feature that was very common in the beginning of the NBA and still plays a factor in decisions today, as half of all NBA teams have relocated. In its early history, when the NBL (National Basketball League) and the BAA (Basketball Association of America) merged to form the NBA, “[fifteen] different franchises started and went out of business in the first 10 years of BAA/NBA history.” *Id.*

⁴⁴ *Id.* NBA owners have long claimed that they are losing money, but there are likely strategic reasons for doing so. NBA owners have a huge incentive to claim losses because they can claim more money from league generated revenue if they argue that the amount of revenue they currently receive does not adequately cover their expenses. See Bogage, *supra* note 38. The same can be said for the WNBA owners, “who have an incentive to maintain that the league is in the red . . . it gives them better bargaining position when negotiating with players.” Bogage, *supra* note 38.

⁴⁵ Bogage, *supra* note 38.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Lindsay Gibbs, *Men's Pro Leagues Could Learn Something from the WNBA's Historic 20th Season*, THINK PROGRESS (Oct. 21, 2016, 3: 21PM), <https://thinkprogress.org/mens-pro-leagues-could-learn-something-from-the-wnba-s-historic-20th-season-c20abfdc9613/>.

gem.⁴⁹ Fast forward to the end of the 2017 season, the WNBA surpassed 24 million views on all of its social media platforms.⁵⁰ This figure comes a year after some equally impressive numbers that the WNBA tallied in attendance, viewership, subscriptions to WNBA League Pass, and digital and social media.⁵¹

The market potential is there. As opposed to twenty years ago, “women’s basketball has already carved out a place in the American sports media landscape.”⁵² Women’s college basketball serves as the best example of that. The NCAA dynasties of Connecticut, Tennessee and emerging power players like Mississippi State and South Carolina have all proven that filling up arenas is not an issue, particularly when a team’s brand is recognizable.⁵³ Over 3.8 million people watched the 2017 NCAA’s Women’s Division 1 National Championship: “[t]hat’s more than ten times the size of the viewership of a locally broadcast Major League Baseball game.”⁵⁴

In fact, the market seems so promising that some think expansion is a viable next step for the league.⁵⁵ One such person is WNBA president Lisa Borders, who responded to the possibility of league expansion with this statement: “We want to make sure that everybody is on stable footing in the given markets that we have . . . I’d rather have incremental, sustainable growth than to have a spike. We don’t want to expand too quickly. We will do it slowly and carefully.”⁵⁶ It is no secret that the WNBA houses some of the best basketball talent in the world, and with only 144 players in total, there is certainly a wealth of untapped potential.⁵⁷ Especially considering the numerous talented teams in the women’s college basketball, there is a significant lack of teams where that talent reigns.⁵⁸

⁴⁹ Nina Mandell, *The WNBA Gave Itself a Chance to Succeed When it Stopped Looking for a Savior*, FOR THE WIN (May 10, 2016, 1:09 PM), <https://ftw.usatoday.com/2016/05/the-wnba-gave-itself-a-chance-to-succeed-when-it-stopped-looking-for-a-savior>.

⁵⁰ Chris Bullock, *Expansion: Is the WNBA Ready for it?*, SWISH APPEAL (Jun 27, 2017, 11:00 AM), <https://www.swishappeal.com/2017/6/27/15824876/wnba-expansion-2017>.

⁵¹ Mike Robinson, *WNBA Sees Record Attendance, Viewership in 2016*, SWISH APPEAL (Sep 21, 2016, 3:30 PM), <https://www.swishappeal.com/2016/9/21/13004460/wnba-record-attendance-viewership-2016>. In the 2016 season, the league registered the highest attendance at 1,561,530 and teams like “[t]he Chicago Sky and Indiana Fever both led the league in record-breaking numbers with franchise records for average attendance and single game crowd.” *Id.* “[V]iewership on ESPN and ESPN2 increased by 11% from 202,000 views” to 224,000 views. *Id.* Also the season opener between the Minnesota Lynx and Phoenix Mercury “delivered 505,000 viewers, making that game the highest-rated, regular season game” on ESPN. *Id.* In digital, the WNBA site “saw 22% more visitors and 50% more video views than [the previous] year.” *Id.* The WNBA saw a record 24% increase in subscriptions to WNBA League Pass. *Id.*

⁵² Bogage, *supra* note 38.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Bullock, *supra* note 50.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* When looking at NCAA women’s rankings following the 2016 season, thirteen of the top twenty-five teams came from states where there is “no WNBA team (Florida, Iowa, Kentucky,

With that being said, the WNBA has begun to make some strides in tapping into lucrative markets. The newest professional sports franchise, the Las Vegas Aces, announced in November of 2017 that it was moving from its home in San Antonio to Las Vegas.⁵⁹ MGM Resorts International, looking to add a live sports component to its entertainment portfolio, announced that it would pour a whopping \$10 million into upgrading its events center in preparation for the Aces' arrival, demonstrating its commitment to make this team work.⁶⁰ The commitment to success is also evident in the hiring of Bill Laimbeer, one of the WNBA's most accomplished coaches.⁶¹ Regarding revenue building potential, the Las Vegas move looks like the start of the careful and slow growth that Lisa Borders hinted at.

Despite all of this potential and the significant advantage of having the backing of one of the most financially-endowed leagues, WNBA teams only benefit from revenue generated by the NBA's sponsorship and national television deals.⁶² In the 2016 season, the WNBA received \$25 million from ESPN, only a tiny fraction of the \$930 million the NBA received from ESPN and TNT.⁶³ As a result, many top WNBA players spend their off-season playing overseas to earn a decent salary.⁶⁴ For example, four-time WNBA champion Tina Thompson indicated that she would forgo the WNBA altogether to play exclusively in Moscow, where she was paid three times as much as her maximum WNBA salary.⁶⁵

There are other factors that contribute to the revenue. In particular, the structure of splitting generated revenue is markedly different. Because getting a full financial picture of the league is almost impossible, some writers have estimated that the WNBA only pays players "roughly 20 percent of league

Mississippi, North Carolina, Ohio, Oregon, South Carolina and West Virginia)." Nine of that twenty-five come from "basketball-rich states" where there is significant dominance in girl's high school basketball (California, Florida, Indiana, Maryland and Texas). Of these states, California, the sixth largest economy in the world, only has one team, and Florida has none. *Id.*

⁵⁹ Bill Bradley, *Las Vegas Aces' WNBA Schedule Released*, LAS VEGAS REVIEW-JOURNAL (Feb 22, 2018), <https://www.reviewjournal.com/sports/basketball/aces-wnba/las-vegas-aces-wnba-schedule-released/?returnUrl=https://www.reviewjournal.com/sports/basketball/aces-wnba/las-vegas-aces-wnba-schedule-released/?clearUserState=true&clearUserState=true>. The San Antonio Stars were the team that was in Texas and were then renamed and relocated.

⁶⁰ Mike Grimala, *How the WNBA Could Be a Winner for MGM*, LAS VEGAS SUN (Dec. 17, 2017), <https://lasvegassun.com/news/2017/dec/17/how-the-wnba-could-be-a-winner-for-mgm/>.

⁶¹ *Id.* Laimbeer was a four-time NBA All-Star and two-time NBA champion prior to getting into coaching; he won three WNBA championships with the Detroit Shock. Adam Hill, *Bill Laimbeer Bringing Chips to the WNBA Table in Las Vegas*, LAS VEGAS REVIEW-JOURNAL (Oct. 19, 2017), <https://www.reviewjournal.com/sports/basketball/bill-laimbeer-bringing-chips-to-the-wnba-table-in-las-vegas/>.

⁶² Sandomir, *supra* note 32.

⁶³ *Id.*

⁶⁴ Marc Edelman & C. Keith Harrison, *Analyzing the WNBA's Mandatory Age/Education Policy from a Legal, Cultural, and Ethical Perspective: Women, Men, and the Professional Sports Landscape*, 3 NW. J. L. & SOC. POL'Y 1, 31 (2008).

⁶⁵ *Id.* at 31.

revenue,” which equates to about \$11 million split between every player.⁶⁶ “In contrast, the NBA’s split with its players is 50-50,”⁶⁷ taken from the \$3 billion in the league’s revenue.⁶⁸

The discrepancy in pay is staggering. For example, Diana Taurasi, one of the greatest point and shooting guards that has ever played in the league—a living legend—made the WNBA’s First Team in 2014 and helped lead the Phoenix Mercury to win the championship that same year.⁶⁹ That season, Taurasi was paid the league maximum salary of \$107,500.⁷⁰ Compare that to Dionte Christmas’s 198 minutes of employment with the Phoenix Suns in the 2013-14 season, the only minutes Christmas ever played in the NBA, in which he was paid the league minimum of \$490,180.⁷¹ Another example, the 2016 NBA MVP Stephen Curry made \$11.4 million during the 2016 season.⁷² Meanwhile, the 2016 WNBA MVP Nneka Ogwumike earned only \$95,000, making her one of the highest paid WNBA players that season.⁷³ Another example, during the 2017 season, the WNBA veteran Sylvia Fowles led the league in field goal percentage, “finished second in rebounding per game, tied for second in blocks per game and ranked fifth in points per game,” even after being in the league for ten years.⁷⁴ The Minnesota Lynx, Fowles’ team for the past three seasons, also finished with the best record in the WNBA for the 2017 season.⁷⁵ Fowles earned a whopping \$109,000.⁷⁶ On the other hand, NBA veteran Leandro Barbosa “is scheduled to earn \$500,000 from the Phoenix Suns” for the 2017-18 season.⁷⁷ However, in July of 2017, Barbosa was waived by the Suns and thus has not and will not play a minute for the Suns during the 2017-18 season.⁷⁸ Yet he will be paid almost five times the salary of the four-time WNBA All-Star and 2017 WNBA MVP.⁷⁹ The list goes on. And these are only the exemplary stars. The reality is much worse for rookies and those who are not all-star caliber players. The average WNBA

⁶⁶ Bogage, *supra* note 38.

⁶⁷ Berri, *Think the WNBA is in Trouble? Let's Talk Some NBA History*, *Huffington Post*, *supra* note 34.

⁶⁸ Bogage, *supra* note 38.

⁶⁹ David Berri, *Basketball's Gender Wage Gap Is Even Worse Than You Think: While NBA players Are Paid About 50 Percent of League Revenue, WNBA Players Appear to Earn 33 Percent*, VICE SPORTS (Aug. 12, 2015), https://sports.vice.com/en_uk/article/wn3mmy/basketballs-gender-wage-gap-is-even-worse-than-you-think.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Selena Hill, *Top WNBA Salaries vs. NBA Salaries: Who Earns More [2017 Update]*, BLACK ENTERPRISE (June 14, 2017), <https://www.blackenterprise.com/wnba-salaries-nba-salaries-earn/>.

⁷³ *Id.*

⁷⁴ Berri, *Basketball's Growing Gender Wage Gap*, *supra* note 2.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

rookie earned a disappointing \$36,500 for that year, and players who have at least three years of experience can expect a minimum of \$55,000 per year.⁸⁰ In the NBA, however, the rookie minimum for the 2017-18 season is \$815,615, and a veteran of ten years can expect a minimum of \$2,328,652,⁸¹ \$2.2 million more than Sylvia Fowles, a ten-year veteran.

Based on these numbers, it is obvious that the players want more money. In response to some articles detailing some of the above findings, Ogwumike noted “specifically that the players should set a goal of receiving 50% of league revenue, telling ESPN: ‘Knowing how far we need to go, that’s a good marker. If you think of it from a principle standpoint, it makes sense. Hopefully we can work toward that.’”⁸² While this paper is not focused solely on principle arguments, Ogwumike certainly has a good point: the principle that women should not be paid drastically different from men for the same or similar job is certainly established. However, there is another principle, particularly from those who are in charge of the league, which comes into play. An argument that has consistently been raised in response to justifying higher pay for athletes is that high salaries would destroy a sports league.⁸³ Not only has this argument been consistently raised, but it had prevailed long before even the NBA came into existence. Consider the following statement: “We believe that players insisting on exorbitant prices are injuring their own interests by forcing out of existence clubs which cannot be run and pay large salaries except at a personal loss.”⁸⁴ While this may seem like something recently quoted by some league owner from a SportsCenter broadcast, it actually comes from baseball’s National League in 1879.⁸⁵

Being that owners, both NBA and WNBA alike, seem to always claim that teams are losing money, how true can that be? For the WNBA, there is certainly reason to doubt that business is that bad, considering that the league only pays its players an estimated twenty percent of league revenue.⁸⁶ Also, there is no way to know for sure the financial status of a league because there is no obligation to make its books public.⁸⁷ It has also been argued that there is a significant incentive to cry wolf when it comes to a league’s financial status: less money claimed means that players cannot demand more than they already receive.⁸⁸ And while this may be true, the opposite may actually serve the WNBA better in the long run.

⁸⁰ Hill, *supra* note 72.

⁸¹ Jim Alexander, *WNBA Can Do Better for its Players*, THE OC REGISTER (Oct. 2, 2017), <https://www.oregister.com/2017/10/02/alexander-wnba-can-do-better-for-its-players/>.

⁸² David Berri, *The Future of the WNBA Would Be Helped by Higher Pay Today*, FORBES (Dec. 14, 2017), <https://www.forbes.com/sites/davidberri/2017/12/14/the-future-of-the-wnba-would-be-helped-by-higher-pay-today/#39c81b551137>.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

As noted by WNBA President Lisa Borders, the history of sports leagues indicates that leagues become much more profitable after several decades have elapsed.⁸⁹ One of the reasons for this, as noted earlier, is that it takes time for a significant number of people to become interested in the sport and to establish a fan base.⁹⁰ However, the expansion of the talent pool can also help speed up the process.⁹¹ In short, “more talent definitely improves the product a sports league offers.”⁹² By not paying the players adequately, not only does it force them to seek income overseas, but it also significantly limits the potential pool, becoming the least viable option for those looking to maximize their earning potential.⁹³ A perfect example of this is Diana Taurasi, who was paid by her team in Russia to sit out the 2015 WNBA season.⁹⁴ Because most players are forced to play overseas to earn a substantial income, it results in them having less significant breaks between seasons, thus further putting their body and health at risk.⁹⁵ And if you are as good as Taurasi, you might as well rest for the team that pays you based on your value.⁹⁶

The plea to pay the female players more has always been refuted by the arguments, usually sexist driven, that the women should not be paid more because no one watches them anyway, or that their games are nowhere near as exciting as the men's.⁹⁷ The numbers quoted highlighting NCAA viewership and the increase in the WNBA viewership, serves as an adequate response to that argument.⁹⁸ However, viewership still does play a significant role in how the league is viewed.⁹⁹ It is settled that WNBA viewership is significantly less than that of the NBA.¹⁰⁰ However, the issue is less about viewership as opposed to coverage.¹⁰¹ It would be highly unlikely that a league that plays thirty-four games in a regular season acquires the same frequency of viewership as a league that plays eighty-two, more than double

⁸⁹ *Id.*.

⁹⁰ *Id.*

⁹¹ *See id.* (“For example, it is not unreasonable to argue that baseball got much better after 1947: racial integration gave baseball teams access to more talent.”).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* “To make a living commensurate with their stature as their sport’s best players, the stars of women’s basketball have to play 12 months a year and risk early burnout.” Alexander, *supra* note 81.

⁹⁶ Alexander, *supra* note 81.

⁹⁷ *See generally*, Alexander, *supra* note 81; *see Berri, Basketball’s Gender Wage Gap Is Even Worse Than You Think*, *supra* note 69.

⁹⁸ Lyndsey D’Arcangelo, *Why Aren’t Women’s Basketball Fans Following Their Players To The Pros?*, DEADSPIN (May 10, 2017), <https://deadspin.com/why-arent-womens-basketball-fans-following-their-player-1795024988>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

the amount of games.¹⁰² The discrepancy in the number of games is often used to justify the low salaries of female players but such an argument is still not valid.¹⁰³

Doing some simple math, the men play about 2.5 times more games than the women during the regular season.¹⁰⁴ Multiplying 2.5 by the WNBA maximum salary for 2017 (\$109,000)¹⁰⁵ would equal \$272,500. The \$272,500 figure serves as a representation of what the men *should* make in comparison before factoring the general league revenue from the various broadcasting deals. According to the current NBA CBA, the minimum annual salary for contracts signed during the 2017-18 season is \$815,615.¹⁰⁶ Based on the prior calculation, again assuming that the women's low salaries should be justified, that would mean that \$543,115 of the 2017-18 salary accounts for league revenue from the various media and broadcasting deals.¹⁰⁷ Multiplying \$543,115 by 491 (the number of players on the opening day roster list of the 2017-18 season),¹⁰⁸ results in a figure of \$266,669,465, over \$250 million. While the NBA certainly generates a great deal of broadcasting revenue, it does not generate that much. Additionally, such a high figure could not accurately account for the discrepancy because the majority of the men playing in the NBA do not earn the league minimum, thus resulting in a figure even greater than \$250 million.¹⁰⁹

Another common argument in favor of the discrepancy is that the NBA generates more revenue and thus those players should be paid more.¹¹⁰ But that argument ignores the fact that the viewership is directly dependent on coverage.¹¹¹ If there is more coverage, then there will likely be more viewership.¹¹² Thus, if there was more coverage of the WNBA, then there would be more viewership.¹¹³ And while this article does not directly address the discrepancies in media coverage, being that the NBA negotiates deals for coverage, similar efforts should be employed for the WNBA.¹¹⁴

¹⁰² *Frequently Asked Questions: WNBA*, WNBA (2018), <http://www.wnba.com/faq/>; Kevin Arnovitz, *Why is There an 82 Game Schedule?*, ESPN (Mar. 21, 2017), http://www.espn.com/blog/truehoop/post/_id/32294/why-is-there-an-82-game-schedule.

¹⁰³ Alexander, *supra* note 81.

¹⁰⁴ $82 \div 34 = 2.41$.

¹⁰⁵ Berri, *Basketball's Gender Wage Gap Is Even Worse Than You Think*, *supra* note 69.

¹⁰⁶ 2017 CBA Minimum Annual Salary Scale, *Minimum Annual Salary for Contracts Signed During the 2017-2018 Season*, REALGM.COM (2017), https://basketball.realgm.com/nba/info/minimum_scale.

¹⁰⁷ $\$815,615 - \$272,500 = \$543,115$.

¹⁰⁸ *Where NBA Players Come From*, RPI RATINGS.COM (2018), <http://rpiratings.com/NBA.php>.

¹⁰⁹ 2017 CBA Minimum Annual Salary Scale, *supra* note 105.

¹¹⁰ Berri, *Basketball's Gender Wage Gap Is Even Worse Than You Think*, *supra* note 69.

¹¹¹ Lyndsey D'Arcangelo, *supra* note 98.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

As opposed to other league extensions, which have historically garnered little success,¹¹⁵ the WNBA possesses key attributes that will help its sustainability and thus increase its viewership: the rise in professional sports opportunities for women; the low-cost comparability to the NBA games; and the untapped female viewership population for the NBA.¹¹⁶ In addition to other reasons mentioned earlier, the WNBA has begun to make strides to tap into their potential strengths and thus work toward league expansion.¹¹⁷ One way in which the league has certainly taken an untraditional route is its commitment to bringing awareness to social and political issues.¹¹⁸

The sociological landscape of the WNBA and the professional sports community also cannot be ignored. “The limited opportunity for women to perform as professional athletes in a male-dominated culture is well documented regarding resources devoted to, popularity of, and historical discrimination against women’s athletics.”¹¹⁹ There is a disparity in revenue, games, TV ratings, and, of course, salary.¹²⁰ In fact, the disparity makes the societal gender pay gap, where women make eighty cents to every dollar a man makes, look relatively generous.¹²¹ Even access to the league is markedly different depending on your gender: “[M]ale basketball players are allowed to enter the NBA only one year after graduating from high school, whereas female basketball players have to wait four years before entering the WNBA.”¹²² The WNBA’s mandatory age/education policy is the only policy, in any of the established professional sports leagues, that limits a potential player’s entry into the league until her expected date of college graduation.¹²³ Being that the WNBA is the most successful women’s sports league in the United States, this policy only “highlights the extreme differences in bargaining power between American male and female athletes.”¹²⁴ Furthermore, “this inequity is not merely an academic matter. Rather, the female player is profoundly disadvantaged in real-world tangible terms.”¹²⁵ Going into more depth about the issues with the age/education policy would

¹¹⁵ Other league extensions include the NFL’s World League of American Football (WLAF), which later became NFL Europe; the World Wrestling Federation (now World Wrestling Entertainment) formation of the XFL; and the NBA’s NBA Developmental League (D-League). Walker, Sartore & MacIntosh, *supra* note 8, at 2.

¹¹⁶ Walker, Sartore & MacIntosh, *supra* note 8, at 2.

¹¹⁷ *Id.*

¹¹⁸ *Id.*; Edelman & Harrison, *supra* note 64.

¹¹⁹ Edelman & Harrison, *supra* note 64, at 3.

¹²⁰ Alexander, *supra* note 81.

¹²¹ *Id.*

¹²² Edelman & Harrison, *supra* note 64, at 4. “In essence, this age/education policy mandates that any American-born player wait until age twenty-two or complete four years of college before entering the WNBA.” *Id.* at 3.

¹²³ *Id.* at 3.

¹²⁴ *Id.* at 3.

¹²⁵ Duru, *supra* note 3, at 577. “The WNBA’s age eligibility rule subjects the female player to an increased likelihood of injury during her college career and a decreased likelihood of financially capitalizing on her athletic talent.” *Id.*

turn this paper into a novel; however, it is likely a factor in the already significant gap between the two leagues.¹²⁶

IV. THE RISE OF MEDIATION AND WHY IT'S WELL-SUITED FOR PROFESSIONAL SPORTS

Mediation is one of the fastest developing forms of alternative dispute resolution (“ADR”).¹²⁷ It is a “voluntary, non-binding, ‘without prejudice’ process that uses a neutral third-party (mediator) to assist the parties in dispute to reach a mutually agreed settlement without having to resort to a court.”¹²⁸ Mediation has also been deemed an “extension of negotiation” where an unbiased mediator helps the parties foster their own solutions.¹²⁹ As opposed to other forms of ADR, mediation is a more “flexible, informal, and non-confrontational process,” allowing parties to not only have more control over the process but also have active participation.¹³⁰

According to the American Bar Association, “mediations end in agreement 70 to 80 percent of the time,” thus making it a worthwhile endeavor solely based on its success rate.¹³¹ The personal nature of mediation is ideal for the settlement of sports disputes because it can preserve personal and business relationships,¹³² and thus “provides the best forum for open communication.”¹³³ As a recent development in sports, mediation is attractive in that it is both voluntary, yet confidential,¹³⁴ taking a great deal of

¹²⁶ See Edelman & Harrison, *supra* note 64, at 9. “[O]ne notion of this policy is that talented female athletes must delay their personal gratification and first achieve academic pursuits prescribed to them by society and the corporate sport structure. This reinforces an old and dangerous stereotype of women as being necessarily philanthropic creatures (i.e. caring, passive, and non-aggressive). Conversely, men are allowed to be individualistic.” *Id.*

¹²⁷ Timothy J. Bucher, *Inside the Huddle: Analyzing the Mediation Efforts in the NFL’s Brady Settlement and its Effectiveness for Future Professional Sports Disputes*, 22 MARQ. SPORTS L. REV. 211, 211 (2011).

¹²⁸ *Id.* at 212 (quoting IAN S. BLACKSHAW, SPORT, MEDIATION AND ARBITRATION 19 (2009)).

¹²⁹ *Id.*

¹³⁰ Susan T. Mackenzie, *A Mediator’s Perspective on Effective Mediation Advocacy*, 12 PRAC. LITIGATOR 17, 17 (2001).

¹³¹ Mark Grabowski, *Both Sides Win: Why Using Mediation Would Improve Pro Sports*, 5 HARV. J. SPORTS & ENT. L. 189, 196 (2014) (quoting Denise A. Davenport & Lisa A. Stegink, *Should You Try Mediation Instead of Filing Suit?*, ASS’NS NOW (July 2011), <http://www.asaecenter.org/Resources/ANowDetail.cfm?ItemNumber=98679> [http://perma.cc/BD8H-BNJP]). A 2011 study found that mediation was the preferred ADR process amongst Fortune 1,000 companies. *Id.* One of the main reasons for this preference was that mediation “was generally more satisfying in terms of process and outcomes.” *Id.* (quoting Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 16 (2014)).

¹³² Bucher, *supra* note 127, at 213.

¹³³ Jeremy Corapi, *Huddle Up: Using Mediation to Help Settle the National Football League Labor Dispute*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 789, 826 (2011).

¹³⁴ Kevin Carpenter, *NFL and NBA Lockouts: A U.K. Lawyer’s Legal Retrospective*, 20 SPORTS L.J. 1, 17 (2013).

overwhelming media coverage out of the picture. Mediation also “saves face” for the side less willing to compromise in contentious dealings, thus helping preserve the fans’ confidence.¹³⁵ Fan perception, particularly in the major U.S. sports leagues, cannot be ignored, as there is an “obvious eroding trust between players and management this decade.”¹³⁶ Probably the most attractive option for both leagues and players alike is the fact that mediation gives the respective parties a significant amount of control over the outcome, taking their fate out of the hands of a judge or arbitrator.¹³⁷ As a result, mediation could significantly improve player management relations and player performance, ultimately strengthening the confidence of fans in professional sports as a whole, and their ability to resolve issues without affecting the quality of the game.¹³⁸

However, mediation can have its drawbacks if it is not approached properly. While it can be a very effective tool, “mediation is likely to fail if the dispute contains high levels of conflict, low motivation to reach a solution, low commitment to mediate, a shortage of resources, or involves parties with significantly unequal bargaining power.”¹³⁹ Thus, the positive attitudes of the respective parties are imperative to ensure a beneficial process; without it, the process is pointless.

A. *The Success of Mediation in Professional Sports Disputes*

Mediation is certainly not new to professional sports, and although it should be employed more frequently, it has proven to be a strong and effective tool for fostering solutions.¹⁴⁰ Several of the major sports leagues in the recent years have utilized mediation to resolve disputes, which makes sense considering the number of “labor, disciplinary, salary, and broadcasting disputes” that leagues engage in regularly.¹⁴¹ In addition to the ease of

¹³⁵ Grabowski, *supra* note 131, at 194.

¹³⁶ Peter B. Kupelian & Brian R. Salliotte, *The Use of Mediation for Resolving Salary Disputes in Sports*, 2 T.M. COOLEY J. PRAC. & CLINICAL L. 383, 389 (1999). “A neutral third party, one who is trained in various mediation techniques, would reduce this distrust, and assist the parties in reaching a speedy settlement.” *Id.*

¹³⁷ Grabowski, *supra* note 131, at 194. “Depending on the type of mediation used, the parties have the ability to control the following: (1) the selection of a mediator; (2) the scheduling and duration of the sessions; (3) the topics to be discussed; and (4) confidentiality of the sessions and related negotiations.” *Id.*

¹³⁸ *See id.* at 189.

¹³⁹ Bucher, *supra* note 127, at 213.

¹⁴⁰ Katie Shonk, *How Mediation Can Help Resolve Pro Sports Disputes*, HARV. L. SCH. PROGRAM ON NEGOT. DAILY BLOG (June 16, 2016), <https://www.pon.harvard.edu/daily/mediation/how-meditation-can-help-resolve-pro-sports-disputes>.

¹⁴¹ Isaac, *supra* note 7, at 188. “Given the millions of dollars of player salaries, broadcasting revenues, and ticket sales at stake in pro sports if settlements are not reached quickly, it is only sensible to seriously consider mediation.” Grabowski, *supra* note 115, at 197.

communication, one of the benchmarks of mediation is the expeditious resolution of disputes.¹⁴²

The NBA, the National Football League (“NFL”),¹⁴³ and the National Hockey League (“NHL”) have all experienced the benefits of this ADR tactic during their respective lockouts.¹⁴⁴ Sports disputes are particularly unique in that several extraneous factors, including the media, the legal process, and monetary gain, affect party motivation and alter the respective strategies.¹⁴⁵ Thus an effective means of resolving them must be tailored to the unique needs presented by the leagues and players.¹⁴⁶ The result of this specially tailored process: a solution that both sides could live with, without impeding the success of the league any further.¹⁴⁷

The use of a professional third party to facilitate dialogue between the two entities is a “recognition that changing the dynamic of the discussion in this way enhances the prospects of getting a satisfactory deal”¹⁴⁸ To suggest that fostering a concrete solution between the two leagues would be simple would be wholly incorrect. The industry built around sports activities is both valuable and commercialized, thus making the issues “varied and difficult.”¹⁴⁹ It is also acknowledged that there are significant legal, commercial and personal issues at stake on both sides of the table, and all of these issues must be handled with care.¹⁵⁰ Thus a dynamic discussion is needed where both parties can get a clear understanding of where one another’s interests lie and the relative strengths and weaknesses of each point.¹⁵¹

Although mediation is not yet regularly utilized by some major sports organizations, “it is anticipated that mediation will, and should, gain greater acceptance and usage amongst” these major organizations as an initial means

¹⁴² Kupelian & Salliotte, *supra* note 136, at 389.

¹⁴³ See Isaac, *supra* note 7, at 188.

¹⁴⁴ Grabowski, *supra* note 131, at 190. Also, an important difference present in sports negotiations as opposed to other disputes is the amount of parties who have a stake in the outcome. *Id.* at 193–94. First, “you have the two parties, the union and team owners, then you have the commissioner representing the league as a third party. And then, behind the scenes, you have a fourth party, the agents who are representing the individual players, and they have a voice that is being heard in the process. And then there are the interests of the fans.” *Id.*

¹⁴⁵ *Id.* at 193.

¹⁴⁶ See Peter B. Kupelian & Brian R. Salliotte, *The Use of Mediation for Resolving Salary Disputes in Sports*, 2 T.M. COOLEY J. PRAC. & CLINICAL L. 383, 390-391 (1999). (Arguing mediation is especially suitable to sports dispute because of the unique interests of sports disputes in comparison to business or interpersonal disputes).

¹⁴⁷ *Mediation and the NBA Labor Talks—Breakthrough Communication with Results Everyone Can Live With*, MEDIATION.COM (Nov. 26, 2012), <https://www.mediation.com/articles/mediation-and-the-nba-labor-talksbreakthrough-communication-with-results-everyone-can-live-with.aspx>.

¹⁴⁸ Neil Goodrum, *Mediation in Sports Disputes: Lessons from the UK*, LAWINSPO (July 4, 2013).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

of resolution, as opposed to the last resort.¹⁵² Proof of this first comes from the NFL's use of mediation in its 2011 labor dispute, which consisted of three separate mediation sessions.¹⁵³

The first of the three mediations occurred only two weeks before the expiration of the NFL's CBA.¹⁵⁴ Even though both the team and owners voluntarily submitted to mediation, and employed the Federal Mediation and Conciliation Services ("FMCS") to act as the mediator,¹⁵⁵ the result after sixteen days of meeting was a lock out by the owners.¹⁵⁶ In retaliation to the lock out imposed by the owners, the players, unable to play football, brought a class action suit against the league in *Brady v. National Football League* to challenge the lockout on antitrust grounds.¹⁵⁷ At the same time, several retired players filed a similar suit against the NFL, "arguing that the lockout could harm their retirement benefits, which are subsidized by the NFL."¹⁵⁸ The two suits were ultimately consolidated,¹⁵⁹ and despite the failure of the first mediation, the owners and players surprisingly agreed to a second mediation.¹⁶⁰ Like the first attempt, however, the second court-ordered mediation proved unsuccessful.¹⁶¹ After this set of failed talks, the district court enjoined the lockout, and the owners appealed the ruling to the Eighth Circuit Court of Appeals;¹⁶² the Eighth Circuit issued a temporary stay of the

¹⁵² Issac, *supra*, note 7.

¹⁵³ Bucher, *supra*, note 127, at 213.

¹⁵⁴ *Id.* at 214.

¹⁵⁵ ESPN.com, *NFL, NFLPA Agree to Enter Mediation*, ESPN NFL (Feb. 18, 2011) <http://www.espn.co.uk/nfl/news/story?id=6132690>.

¹⁵⁶ Bucher, *supra*, note 127, at 214. "In a lockout, league owners try to financially pressure the players in order to obtain the upper hand in labor negotiations since the players would be prevented from collecting payments under their contracts." Michael Finkelstein, *Competitive Bargaining Delays 2011-2012 NBA Season*, MEDIATE.COM (Apr. 2012), <https://www.mediate.com/articles/FinkelsteinM2.cfm>.

¹⁵⁷ Bucher, *supra*, note 127, at 214; *see generally*, Complaint, *Brady v. NFL*, No. 11-CV-639 (D. Minn. Mar. 11, 2011).

¹⁵⁸ Bucher, *supra*, note 127, at 214; *see*, Complaint, *Brady v. NFL*, No. 11-CV-639, ¶¶ 57, 63 (D. Minn. Mar. 11, 2011).

¹⁵⁹ *See generally*, Order for Reassignment of Related Cases, *Brady v. NFL*, No. 11-CV-639 (D. Minn. Mar. 29, 2011).

¹⁶⁰ Bucher, *supra*, note 127, at 215.

¹⁶¹ The players and owners had contradictory opinions of how and where the second mediation should take place. The players desired a court-annexed mediation under the supervision of the district court of Minnesota where the lawsuits were filed, while the owners wanted the mediation to take place under the supervision of George Cohen, the mediator who presided over the first mediation, in Washington, D.C. The players got their wish with court annexed mediation, but after only four days of discussions, the mediation was deemed unsuccessful. Magistrate Judge Arthur Boylan, the serving mediator, ended the mediation and instructed the parties to reconvene a month later. Bucher, *supra* note 111, at 215-16; Associated Press, *NFL Talks Adjourn Until May 16*, ESPN NFL (Apr. 21, 2011), <http://sports.espn.go.com/nfl/news/story?id=6395141>.

¹⁶² *See generally*, *Brady v. NFL*, 77 F. Supp. 2d 992 (D. Minn. 2011); Defendants' Notice of Appeal, *Brady v. NFL*, No. 11-1898 (8th Cir. Apr. 29, 2011).

injunction,¹⁶³ which ultimately resulted in the granting of a permanent stay of the district court's injunction.¹⁶⁴

Despite the court's actions, the parties agreed to engage in a third mediation attempt after the owner's appeal on June 3, 2011.¹⁶⁵ However, both parties engaged in these discussions without their legal counsel, and the media referred to the proceedings as "secret."¹⁶⁶ This attempt was also not without setbacks, as the court-appointed mediator postponed talks while he went on vacation.¹⁶⁷ Yet, even without a mediator, the parties were able to make "significant strides towards settlement."¹⁶⁸ The parties, in an effort to show cooperation, even invited the retired players to also join the discussions.¹⁶⁹ Talks continued until July 25, 2011, when the parties settled the *Brady* lawsuit and agreed to a new CBA, ending the four and a half-month lockout.¹⁷⁰ What started out as a rocky and seemingly impossible situation proved to be capable of amicable settlement through mediation.

Similarly, the NBA also used mediation leading up to the 2011 season in an attempt to agree on a new CBA.¹⁷¹ However, unlike the NFL's discussions, the NBA parties' "hard-lined positional bargaining tactics" resulted in a delay of the 2011-12 season and the cancellation of several games.¹⁷² The NBA's CBA was set to expire at the end of the 2010-11 season, and negotiations to produce a new CBA by the fall of 2010 had already failed.¹⁷³ Months passed without an agreement, and with a lockout seeming imminent, the NBPA filed suit to enjoin the league from enforcing a lockout.¹⁷⁴ The NBPA was unsuccessful, and the lockout officially began once the CBA expired at 12:01 a.m. on July 1, 2011.¹⁷⁵

¹⁶³ See generally, *Brady v. NFL*, 683 F.3d 1004 (8th Cir. 2011).

¹⁶⁴ On May 16, 2011, "the Eighth Circuit granted the owners a permanent stay of the district court's injunction that lifted the lockout." Bucher, *supra* note 111, at 216. Thus, the lockout would remain in place until the owner's appeal on June 3, 2011.

¹⁶⁵ Bucher, *supra*, note 127, at 216.

¹⁶⁶ *Id.* at 217. The talks started without both sides' legal counsel, and almost abruptly ended when counsel was brought back into the process. Counsel was asked to "stand down" after they engaged in a heated exchange with one another. *Id.* at 218.

¹⁶⁷ *Id.* at 218-19. In addition to Boylan's vacation, retired NFL players filed a second class-action complaint against the owners alleging a violation of antitrust laws. The Eighth Circuit then overturned the district court's finding that the lockout was a violation of antitrust law. *Id.* at 218.

¹⁶⁸ *Id.* at 219.

¹⁶⁹ *Id.* at 219. Inviting the retired players into the discussions was a significant move because the addition of new issues could have further derailed the third mediation attempt. *Id.* at 219.

¹⁷⁰ *Id.* at 219.

¹⁷¹ Finkelstein, *supra* note 156.

¹⁷² *Id.*

¹⁷³ *Id.* "Both sides were adamantly opposed to backing down from their proposed revenue sharing schemes, and the NBA Players' Association President Billy Hunter warned that a lockout was highly likely for the following season." *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

After a few more months of stagnation coupled with threats, filing suits, and NLRB complaints,¹⁷⁶ the NBA and the NBPA agreed to enter into mediation, appointing mediator George Cohen, the same mediator used in the NFL labor dispute.¹⁷⁷ The most important issue to discuss concerned the division of the league's revenue.¹⁷⁸ Under the 2005-2011 CBA agreement, the players received 57% of basketball-related income ("BRI"), but due to the economic recession, several teams in smaller markets asked the league for loans to stay afloat.¹⁷⁹ As a result, the league wanted to increase its share of BRI in order to establish a stronger financial foundation for the future.¹⁸⁰

The league revenue issue proved to be very black and white for both sides. The parties were unable to agree by the self-imposed October 28th deadline, resulting in the cancellation of games through November.¹⁸¹ Ultimately though, the pressures associated with a cancelled season were strong enough to resurrect the seemingly stagnant negotiations.¹⁸² The realization that an agreement was necessary to save the season permeated throughout the rest of the talks and the players and owners were able to reach an agreement that gave the NBA its current 50/50 BRI split, but also allowed for an "opt-out" option after the sixth year of the new CBA agreement.¹⁸³

The final agreement did not arise until after a 149-day lockout, "which reduced the regular season to 66 games and cost the owners, players, and surrounding communities millions of dollars."¹⁸⁴ Without the usage of

¹⁷⁶ Issac, *supra* note 7, at 180.

¹⁷⁷ Finkelstein, *supra* note 156. Cohen is a federal mediator with a strong sports pedigree, serving as outside counsel to professional baseball, basketball and hockey players unions. Cohen also mediated a dispute concerning the Major League Soccer players' union to help both sides reach a settlement before the strike deadline. His skills as a private mediator have extended outside of the sports arena, evidenced by President Obama's appointment in 2009 as the director of the Federal Mediation and Conciliation Service, which helps end major disputes that pose a significant threat to the economy. Steven Greenhouse, *Mediator in N.B.A. Talks Has Strong Sports Pedigree*, N.Y. TIMES (Oct. 19, 2011), <https://www.nytimes.com/2011/10/20/sports/basketball/george-cohen-nba-mediator-has-experience-for-role.html>.

¹⁷⁸ Finkelstein, *supra* note 156.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* The NBPA offered a scheme where they would come down on their BRI to 53% and the owners would get 47%. The NBA wanted a 50/50 BRI split, claiming that the extra 3% was needed to break even "on revenue given the league's financial commitments in support its small market teams." The NBPA was concerned that such a reduction would set a dangerous precedent for future CBA negotiations. "The potential money involved added up to \$1 billion over the course of the ten-year agreement." *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* In addition to legal maneuvers in court by both sides, pressures came from the realities that "players were still not collecting payments under their contracts[,] league finances were being further frustrated with lost revenue from cancelled games[,] and the Occupy Wall Street movement contextualized fan frustrations against wealthy owners in a public relations battle." There was also significant risk that the league would lose fan support, who relied and pointed to the successful NFL mediation as a model for the NBA to "amicably resolve its dispute." *Id.*

¹⁸³ *Id.*

¹⁸⁴ Isaac, *supra* note 7, at 180.

mediation, however, it is likely that there would have been further financial and relational damage.

The 2012–2013 NHL lockout also served as another indication that mediation in professional sports should be employed more often.¹⁸⁵ A lockout was declared by NHL Commissioner Gary Bettman after the expiration of the CBA agreement in 2012 after no agreement for a new CBA could be reached.¹⁸⁶ By January the entire season was on the brink of cancellation leaving both experts and fans with a loss of confidence in the system as a whole.¹⁸⁷ While the cancellation of the season would not be unprecedented for the league,¹⁸⁸ a cancellation would further jeopardize the already dwindling fan base, threatening the classification of professional hockey as a major American sport.¹⁸⁹ After the final round of negotiations broke down, federal government officials offered to help resolve the dispute, and attempted to reach a new CBA with less than a week to save the season from cancellation¹⁹⁰

The owners and players agreed to mediation; Scot L. Beckenbaugh, from the FMCS, agreed to mediate the dispute.¹⁹¹ Beckenbaugh spent the first twelve hours of the mediation “shuttling back and forth between the league offices in Manhattan and a nearby players’ union hotel suite.”¹⁹² The shuttling back and forth proved to be beneficial, and Beckenbaugh was able to get the representatives from both sides “to meet face-to-face at the union’s hotel suite.”¹⁹³ Sixteen hours later, a deal was formed and the NHL season was saved.¹⁹⁴

The various CBA conflicts in the NFL, NBA, and NHL show that the use of “mediation can help foster working relationships and prevent some of the bitter negotiations that frequently lead to litigation.”¹⁹⁵ Particularly, the appointing of a professional and effective mediator is the best way to keep the parties on task and enforce communication between them, even when it seems certain that an agreement cannot be reached.¹⁹⁶ Also, considering the negative role that the media played in those lockouts, the use of a professional mediator

¹⁸⁵ Grabowski, *supra* note 131, at 189.

¹⁸⁶ *Id.* at 190.

¹⁸⁷ *Id.* at 190.

¹⁸⁸ NHL officials “canceled the 2004–05 season due to a similar [CBA] dispute, from which ‘the NHL never really recovered.’” *Id.* at 190.

¹⁸⁹ *Id.* at 190.

¹⁹⁰ *Id.* at 191.

¹⁹¹ *Id.*

¹⁹² *Id.* During mediation, experienced mediators avoid creating further tensions between parties “through the use of ‘private caucuses,’ in which the mediator talks with each party confidentially, away from the other side. Usually, these caucuses will go back and forth, a process known as ‘shuttle diplomacy,’ until the separated parties can reach an agreement.” *Id.* at 200.

¹⁹³ *Id.* at 191.

¹⁹⁴ *Id.* at 192.

¹⁹⁵ Isaac, *supra* note 7, at 188.

¹⁹⁶ *Id.*

adds “a layer of confidentiality that helps keep all of the intricate details about the negotiations outside of the public and media’s grasp (save for the ‘anonymous’ leaks that will inevitably occur on occasion).”¹⁹⁷

V. APPLYING MEDIATION TO ISSUES CONCERNING THE WNBA

Mediation between the WNBA and NBA executives would provide a forum for the WNBA executives to voice their grievances regarding the apparent discrepancy in player salaries and overall revenue.¹⁹⁸ Being that the NBA has had decades to reach its own level of success, there has to be more it can do to help speed up the process for the WNBA.¹⁹⁹ There is more wisdom and guidance that can be given by the NBA; more importantly, the possibility of restructuring the relationship so that the WNBA’s success equates to the NBA’s success.²⁰⁰ Mediation is a win-win situation, leaving both sides with viable options for success in the future, and allowing the preservation of the parties’ longstanding relationship.²⁰¹ By choosing to engage in the mediation process, the WNBA and NBA would be sharing control of the process with each other as opposed to being subject to the control of a third party.²⁰² Thus, symbolizing the beginning of a more mutually beneficial relationship.

To reach a successful and meaningful consensus between the two parties, the following elements are necessary: an experienced and mutually agreed upon mediator; a concrete understanding of that mediator’s role in the process; an absence of media coverage and participation, which in turn ensures confidentiality;²⁰³ a willingness of both parties to engage in fruitful and meaningful discussion (probably including face-to-face dialogue);²⁰⁴ and a focus on the interests of the parties, as opposed to the rights of the parties.²⁰⁵ In order to ensure that issues and interests are addressed adequately, “[t]he

¹⁹⁷ *Id.* at 188. “A professional sport league’s inability to gauge the reaction of its supporting public can lead to a spiraling negative effect and must be reversed as early as possible to stop irreparable harm and loss of public interest and confidence.” Kupelian & Salliotte, *supra* note 146, at 390.

¹⁹⁸ See Louisa Dickinson, *When Mediation is the Right Approach to Resolving Workplace Conflict*, WORKLOGIC (Dec. 7, 2016), <http://www.worklogic.com.au/workplace-mediations/mediation-right-approach-resolving-workplace-conflict/> (concluding that “participants have a voice and a safe forum to vent” in a mediation).

¹⁹⁹ The NBA has historically exercised a great deal of control over the WNBA, in that it “founded the WNBA as a subsidiary . . . has long funded the WNBA, [and] instituted the WNBA’s age eligibility rule.” Duru, *supra* note 3, at 562.

²⁰⁰ See Sandomir, *supra*, note 32.

²⁰¹ Grabowski, *supra* note 131, at 195.

²⁰² See *id.* at 195.

²⁰³ See *id.* at 194.

²⁰⁴ When describing the necessities for professional sports mediation in general, Isaac stated that “the parties should aim to ensure that the proper people participate in the mediation, emphasize face-to-face dialogue, try to keep media involvement to an absolute minimum, and keep confidentiality to an absolute maximum.” Isaac, *supra* note 7, at 188.

²⁰⁵ Grabowski, *supra* note 131 at 196.

parties should aim to ensure that the proper people participate in the mediation.”²⁰⁶

Concerning the first requirement, a mutually agreed upon mediator will bring satisfaction to both parties, giving them “an equal stake in how the mediation process is managed.”²⁰⁷ One of the factors that make the situation between the WNBA and NBA unique is that these talks would not be initiated in a hostile environment, as opposed to the use of mediation in the CBA disputes.²⁰⁸ As of now, there is no pressing issue that needs to be potentially adjudicated between the two parties, the usual reason for convening mediation in a sports context. There is simply a situation that can be significantly improved if the leagues are able to work together.²⁰⁹ Thus, it is even more important that both the WNBA and the NBA feel that the interests are *equally* and *adequately* revered. The mutual selection of a mediator assures that both parties’ interests and commitment to the mediation are upheld, and is also a symbol of an overall agreeable tone throughout the course of the mediation.²¹⁰ Finally, the mutual selection of a mediator instills a sense of trust between the parties over the entirety of the mediation process.²¹¹

In regard to mediators specifically, they must have requisite experience in mediating labor disputes, and must have experience within the professional sports industry.²¹² It is highly unlikely that the services of George Cohen would be necessary, as this is not an issue that is exacerbated by a deadline, but a mediator with a strong track record of success is imperative. Also, because both leagues are covered by CBAs, the mediator “must also have a basic understanding of labor laws and the intricacies of labor and management relations,”²¹³ and must be particularly well versed in the specific labor relations history between the two leagues.²¹⁴ In addition to the labor relations, mediators with experience working with professional sports organizations know how to handle different personalities and egos that comprise the legal teams of each entity.²¹⁵

The role of the selected mediator is equally as important as the initial decision to choose the mediator. The mediator must obtain an understanding of the respective views of each party in order to determine how each mediation

²⁰⁶ Isaac, *supra* note 7, at 188.

²⁰⁷ Corapi, *supra* note 133, at 832.

²⁰⁸ Finkelstein, *supra* note 140 (explaining the CBA mediation process).

²⁰⁹ See Sandomir, *supra* note 32 (demonstrating that the WNBA already benefits from the NBA’s national television and sponsorship deals).

²¹⁰ Corapi, *supra* note 133, at 832.

²¹¹ *Id.* at 832. In fact, “the mere infusion of a neutral person into the formula can be all it takes to make a difference in resolving such a dispute.” Kupelian & Salliotte, *supra* note 145, at 393–94.

²¹² Corapi, *supra* note 133, at 832–33.

²¹³ “Lack of knowledge of these types could lead to immediate loss of credibility for the mediator . . . which is the death knell to a successful mediation.” Kupelian & Salliotte, *supra* note 145, at 398.

²¹⁴ Corapi, *supra* note 133, at 833.

²¹⁵ *Id.* at 833.

session should proceed.²¹⁶ While the mediator's purpose is to assist in having the parties come to an agreement, he or she cannot force the WNBA and NBA to come to any type of agreement.²¹⁷ However, gaining an understanding of each party's view of the situation at the outset will allow the mediator to always keep the parties focused on the key issues.²¹⁸ Next, the mediator must determine the mediation schedule to establish a concrete plan should talks become stagnated or get off-track: ensuring the parties' commitment at the outset and throughout.²¹⁹ Finally, the mediator must be able to gauge when it is time to break up the parties into private caucuses, if it appears that a resolution in a joint session will be difficult to achieve.²²⁰ Breaking into private caucuses will allow either side to divulge confidential or sensitive information that otherwise wouldn't have been shared, allowing the mediator to use this information strategically to help the parties come to a resolution.²²¹

Privacy and confidentiality will likely be of the utmost importance to both sides. As noted earlier, there is little public knowledge regarding the accurate financial situation of both leagues, and the league owners have good reason to ensure that such privacy is kept. Private caucuses are particularly beneficial for these reasons.²²² In addition to privacy between the parties, "mediation can provide privacy in the proceedings themselves and in subsequent litigation."²²³ Furthermore, the mediator can listen to the concerns raised by one party and has the responsibility to not divulge any sensitive information without the explicit permission from that party.²²⁴ Also, if the jurisdiction in question has adopted the Uniform Mediation Act, the law adds an extra level

²¹⁶ *Id.* at 834. Also, the WNBA and NBA executives likely have a history in negotiating with one another and there is a possibility that they could bring excess baggage or negative emotion with them to the table. An experienced mediator however is trained to deal with issues, not personalities, and will be able to keep the parties on task. Kupelian & Salliotte, *supra* note 145, at 394.

²¹⁷ Corapi, *supra* note 133, at 834.

²¹⁸ *Id.* at 834.

²¹⁹ "[H]aving a previously agreed upon schedule is an effective prophylactic . . . because it is a constant reminder from the outset that both parties are dedicated to seeing the mediation process through to the end and reaching an agreement." *Id.* at 835.

²²⁰ *Id.* at 835.

²²¹ For example, in the NFL CBA mediation, the divulging of sensitive information would likely not be agreed upon by the NFL, especially during a joint session. In his article, Corapi suggested that Cohen engage in the following: "Cohen should urge the NFL's management to produce [the league's financial data that the NFLPA has requested] during its private caucus. Cohen would then have the opportunity to review the data and interpret its meaning. After considering the financial information, Cohen could make an objective recommendation during the next joint session as to how League revenue should be divided in the new CBA. So long as the NFLPA is informed of the fact that Cohen's recommendation is based on the NFL management's full financial disclosure during the private caucus, the NFLPA would have little reason to object to Cohen's proposal and the NFL's management would not have to reveal the contents of its financial data to the NFLPA." *Id.* at 835-36.

²²² Grabowski, *supra* note 131, at 201.

²²³ *Id.* at 201.

²²⁴ *Id.* at 201.

of privacy “which creates a mediation privilege for most mediation communications and prevents their use in subsequent legal proceedings.”²²⁵

The use of the mediation privilege also eliminates the possibility of media scrutiny and involvement throughout the process. In any professional sports dispute, the involvement of the media typically has a negative effect on fan perception, thus resulting in a public relations nightmare.²²⁶ The increased level of privacy will allow the respective leagues to protect their reputation and image²²⁷—allowing the leagues to control the delivery of the message when a mutually beneficial agreement has been reached. Also, in the unusual event that these issues cannot be solved by mediation quickly, the mediation is still particularly valuable because of its ability to keep the talks out of the public eye.²²⁸ The mediation offers hope that a resolution can come much sooner, “with much less public display of greed and pettiness that turns off fans and sponsors.”²²⁹ The commitment to privacy and confidentiality will likely be one of the WNBA’s largest bargaining chips when convincing the NBA to agree to mediate.

While having an experienced and knowledgeable mediator with a commitment to privacy will ensure that the mediation process is run properly, it is ultimately up to the leagues to come to some form of an agreement.²³⁰ This requires the respective leagues to commit to bargain in good faith.²³¹ This not only refers to the mediation process, but to the process of even getting the NBA to the table.²³² As eluded to prior, it is unlikely that the NBA will be of the opinion that there is an issue at the moment, and it is certainly in the best interest of the WNBA to not frame its proposal for mediation in this way. Thus, having the NBA participate in the mediation requires an honest approach coupled with the idea that by participating in the mediation the NBA will be working towards an agreement that will make its league even more profitable and further expand its fan base. Once the NBA is at the table, both leagues must continue to be honest with one another and committed to a resolution for the process to be effective.²³³ Each league must realize that by

²²⁵ *Id.* at 201.

²²⁶ *Id.* at 202-03. “Mediation would offer hope that such disputes could be resolved at an earlier stage with much less public displays of greed and pettiness.” Kupelian & Salliotte, *supra* note 146, at 391.

²²⁷ “Public relations and consumer opinion are important in any business, and pro sports seem especially dependent on it.” Grabowski, *supra* note 131, at 202.

²²⁸ *Id.* at 204.

²²⁹ *Id.* at 204.

²³⁰ Corapi, *supra* note 133, at 834.

²³¹ *Id.* at 836.

²³² “Getting the parties to mediate their dispute is the biggest hurdle, although as a voluntary undertaking ‘neither party has much to lose by entering into such discussions.’” Kupelian & Salliotte, *supra* note 146, at 397.

²³³ Corapi, *supra* note 133, at 836.

working together, there is a much greater potential for increased profitability and overall sustainability.

Finally, once the leagues have committed to bargaining in good faith, the focus of the talks needs to be interest centered, as opposed to rights centered.²³⁴ Any prospect of reaching an agreement will be thwarted if the WNBA seeks to present these issues as part of its “right” to operate as a league. Such an abrasive tone will put the wrong taste in the NBA’s mouth and likely eradicate any of the WNBA’s bargaining power.²³⁵ Instead, the focus of the talks should be centered on the interest of expanding the reach of the game of basketball, and how each league plays a role in that expansion.²³⁶ Framed in this way, it becomes less of a blame game situation and more of a creative process in how to pool the strengths of each side into a win-win game plan.

By proactively engaging in mediation before any real dispute arises, the respective leagues will be more likely to continue developing a more positive relationship with one another.²³⁷ Some practitioners argue that mediation operates best in early stages of a potential dispute, “and not [when] used as a last-second Hail Mary pass, as is usually the case.”²³⁸ It must also be noted that engaging in the mediation process will not guarantee a solution to the issues expounded upon in this article; however, going through the process “does increase the probability of reaching a resolution.”²³⁹ Mediation should never be deemed a waste of time.²⁴⁰ By engaging in this process, albeit a properly conducted process, both the WNBA and NBA could identify key issues that later could lead to some kind of resolution, even if no formal agreement is reached initially.²⁴¹ The open and facilitated discussion of pertinent issues could be the start of a better interleague relationship, in which the NBA may be more inclined to make the necessary adjustments to ensure the WNBA’s increased viability.²⁴² Furthermore, the process could also educate parties in the benefits of mediation and be used as a springboard for the resolution of other potential disputes,²⁴³ thus strengthening the dispute resolution tactics of both leagues.

²³⁴ ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 42–43 (Bruce Patton ed., 3d ed. 2011).

²³⁵ “Mediation is likely to fail if the dispute contains high levels of conflict and low commitment to mediate.” Grabowski, *supra* note 131, at 211. This reinforces the idea that the WNBA cannot approach the NBA in a way that ignites any kind of conflict in order to get the NBA’s commitment to engage in the mediation.

²³⁶ ADR presumes, particularly in mediation, “that both parties wish to explore a compromise.” *Id.* at 211. Thus it cannot be taken for granted that the NBA may not be willing to compromise initially.

²³⁷ *See id.* at 212–13.

²³⁸ *Id.* at 213.

²³⁹ *Id.* at 211.

²⁴⁰ *Id.* at 212.

²⁴¹ *Id.* at 212.

²⁴² *See id.* at 212.

²⁴³ *Id.* at 212.

IV. CONCLUSION

Women's basketball, from the elementary level to the pros, is shattering the negative stereotypes that have plagued the rise of female sports and is doing so at an unprecedented rate. It is highly likely that even in the next five years, the strength and excitement of the game will only continue to increase. With that being said, the upward mobility that inspires male basketball players to dream of a career in the NBA does not necessarily permeate the minds of young female players in the same way. And while a professional career playing basketball is not probable, those that do reach the highest level of their sport should be both respected and compensated accordingly—male and female.

The WNBA as a professional sports organization has certainly defied expectations and persevered while other leagues have come and gone. A major reason for this viability is its affiliation with the NBA. As such, the NBA should view the WNBA not as an added burden but as an untapped asset. The market potential is there. The revenue is there. The fan base is there. And while the WNBA certainly has a significant role in the salary discrepancy, particularly the percentage of revenue shared, the WNBA cannot do it alone.

Mediation provides an excellent forum for the NBA and the WNBA to engage in necessary discussions regarding the status of the leagues: how an improved relationship with one another could equate to significant financial gain for both and ultimately get the WNBA players the pay they deserve. Talks would give the WNBA executives a forum to express some of the grievances regarding player salary, thus giving the NBA an opportunity to share some of its wisdom and insight that has allowed it to rise to its current dominance. Ultimately, the decision to engage in such discussions will rest upon the shoulders of the respective executives, but it would be unwise for the NBA to ignore the WNBA's potential to further propel its own success.