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

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It’s Time to Pay Up, The Justification for Higher Salaries for WNBA Players:
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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. 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. 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. This lack of respect for the women’s game is enforced by the WNBA’s big brother: the NBA. 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.

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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

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\(^7\) 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, 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 Rockers, 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.” Daru, 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. 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.” 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. 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.

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. 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.” 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.”

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. Despite these discrepancies, however, the NBA’s backing of the WNBA left the ABL with little chance of survival. 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. 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. 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. Once the ABL crumbled, several ABL officials blamed

13 Brown, supra note 11, at 31.
14 Walker, Sartore & Macintosh, supra note 8, at 1.
15 Dunn, 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/franci-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 Dunn, 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’.”

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.

The WNBA has since moved toward the traditional ownership structure of individually owned teams with a league office to oversee those teams. 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. Again, even though the league had moved toward independence, there remained a significant advantage by having the backing of the NBA. As a franchise, the NBA is considered “the most successful U.S. sports league overseas in attracting fans and their money.” 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, and even public relations initiatives, “such as diversity programs and the health and wellness platform NBA FIT.”

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.” 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

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21 Id. at 575.
22 Id.
23 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.
24 McCann, supra note 12, at 42-43.
25 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).
26 Id. at 11.
27 McCann, supra note 12, at 42.
28 Id. at 43.
29 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 Richie, and Stern made the public announcement of her hire.” Id. at 576-77.
30 McCann, supra note 12, at 49.
of the NBA, the WNBA is seen as an entity that is simply not profitable.\textsuperscript{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.\textsuperscript{34} In fact, new leagues struggle in the early years and many result in failure, be it women’s or men’s leagues.\textsuperscript{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.\textsuperscript{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.\textsuperscript{37} That figure rose in the 2017 season when the league averaged 7,716 fans per game.\textsuperscript{38} Also, at the 21-year mark, the NBA had ten teams in its league, whereas the WNBA has twelve.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.


\textsuperscript{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 Cwiek, How the WNBA Recovered from its Worst Ever Season, SB NATION (2017), https://www.sbnation.com/wnba-preview-2017/strong-2016 (thrust past the twentieth season is a landmark for women’s sports in America).

\textsuperscript{35} Berri, supra note 34.

\textsuperscript{36} Sandomir, supra note 32.

\textsuperscript{37} Berri, Think the WNBA is in Trouble? Let’s Talk Some NBA History, supra note 34.


\textsuperscript{39} Bogage, supra note 38.

\textsuperscript{40} Berri, Think the WNBA is in Trouble? Let’s Talk Some NBA History, Huffington Post, supra note 34.

\textsuperscript{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

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42 Id.
43 Id. Relegation 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.
Fast forward to the end of the 2017 season, the WNBA surpassed 24 million views on all of its social media platforms. 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.

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.” 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. 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.”

In fact, the market seems so promising that some think expansion is a viable next step for the league. 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.” 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. Especially considering the numerous talented teams in the women’s college basketball, there is a significant lack of teams where that talent reigns.

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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 *Id.*

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.\(^5^9\) 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.\(^6^0\) The commitment to success is also evident in the hiring of Bill Laimbeer, one of the WNBA’s most accomplished coaches.\(^6^1\) 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.\(^6^2\) 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.\(^6^3\) As a result, many top WNBA players spend their off-season playing overseas to earn a decent salary.\(^6^4\) 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.\(^6^5\)

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

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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/?reset=1&resetUserState=true&resetUserState=true. The San Antonio Stars were the team that was in Texas and were then renamed and relocated.


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.


65 Id. at 31.
revenue,” which equates to about $11 million split between every player.\textsuperscript{66} “In contrast, the NBA’s split with its players is 50-50,”\textsuperscript{67} taken from the $3 billion in the league’s revenue.\textsuperscript{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.\textsuperscript{69} That season, Taurasi was paid the league maximum salary of $107,500.\textsuperscript{70} Compare that to Dione 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.\textsuperscript{71} Another example, the 2016 NBA MVP Stephen Curry made $11.4 million during the 2016 season.\textsuperscript{72} Meanwhile, the 2016 WNBA MVP Nneka Ogwumike earned only $95,000,\textsuperscript{73} making her one of the highest paid WNBA players that season.\textsuperscript{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.\textsuperscript{74} The Minnesota Lynx, Fowles’ team for the past three seasons, also finished with the best record in the WNBA for the 2017 season.\textsuperscript{75} Fowles earned a whopping $109,000.\textsuperscript{76} On the other hand, NBA veteran Leandro Barbosa “is scheduled to earn $500,000 from the Phoenix Suns” for the 2017-18 season.\textsuperscript{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.\textsuperscript{78} Yet he will be paid almost five times the salary of the four-time WNBA All-Star and 2017 WNBA MVP.\textsuperscript{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

\textsuperscript{66} Bogase, supra note 38.

\textsuperscript{67} Berri, Think the WNBA is in Trouble? Let’s Talk Some NBA History, Huffington Post, supra note 34.

\textsuperscript{68} Bogase, supra note 38.


\textsuperscript{70} Id.

\textsuperscript{71} Id.

\textsuperscript{72} Id.


\textsuperscript{74} Id.

\textsuperscript{75} Berri, Basketball’s Growing Gender Wage Gap, supra note 2.

\textsuperscript{76} Id.

\textsuperscript{77} Id.

\textsuperscript{78} Id.

\textsuperscript{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.
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. See id. 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. Id. However, the expansion of the talent pool can also help speed up the process. See id. In short, “more talent definitely improves the product a sports league offers.” See id. 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. Id. A perfect example of this is Diana Taurasi, who was paid by her team in Russia to sit out the 2015 WNBA season. See id. 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. See id. And if you are as good as Taurasi, you might as well rest for the team that pays you based on your value.

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. See id. The numbers quoted highlighting NCAA viewership and the increase in the WNBA viewership, serves as an adequate response to that argument. See id. However, viewership still does play a significant role in how the league is viewed. See id. It is settled that WNBA viewership is significantly less than that of the NBA. See id. However, the issue is less about viewership as opposed to coverage. See generally, Alexander, supra note 81; see Barri, Basketball’s Gender Wage Gap Is Even Worse Than You Think, supra note 69.


90 Id.
91 Id.
92 Id. 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.”).
93 Id.
94 Id.
95 Id.
96 Id. 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.
97 Id.
98 See generally, Alexander, supra note 81; see Barri, Basketball’s Gender Wage Gap Is Even Worse Than You Think, supra note 69.
99 Id.
100 Id.
101 Id.
102 Id.
the amount of games.\textsuperscript{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.\textsuperscript{103}

Doing some simple math, the men play about 2.5 times more games than the women during the regular season.\textsuperscript{104} Multiplying 2.5 by the WNBA maximum salary for 2017 ($109,000)\textsuperscript{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.\textsuperscript{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.\textsuperscript{107} Multiplying $543,115 by 491 (the number of players on the opening day roster list of the 2017-18 season),\textsuperscript{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.\textsuperscript{109}

Another common argument in favor of the discrepancy is that the NBA generates more revenue and thus those players should be paid more.\textsuperscript{110} But that argument ignores the fact that the viewership is directly dependent on coverage.\textsuperscript{111} If there is more coverage, then there will likely be more viewership.\textsuperscript{112} Thus, if there was more coverage of the WNBA, then there would be more viewership.\textsuperscript{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.\textsuperscript{114}


\textsuperscript{103} Alexander, supra note 81.

\textsuperscript{104} $2 \times 34 = 2.41.$

\textsuperscript{105} Berri, Basketball’s Gender Wage Gap Is Even Worse Than You Think, supra note 69.


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


\textsuperscript{109} 2017 CBA Minimum Annual Salary Scale, supra note 105.

\textsuperscript{110} Berri, Basketball’s Gender Wage Gap Is Even Worse Than You Think, supra note 69.

\textsuperscript{111} Lyndsey D’Arcangelo, supra note 98.

\textsuperscript{112} Id.

\textsuperscript{113} Id.

\textsuperscript{114} Id.
As opposed to other league extensions, which have historically garnered little success,\textsuperscript{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.\textsuperscript{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.\textsuperscript{117} One way in which the league has certainly taken an untraditional route is its commitment to bringing awareness to social and political issues.\textsuperscript{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.”\textsuperscript{119} There is a disparity in revenue, games, TV ratings, and, of course, salary.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{124} Furthermore, “this inequity is not merely an academic matter. Rather, the female player is profoundly disadvantaged in real-world tangible terms.”\textsuperscript{125} Going into more depth about the issues with the age/education policy would

\textsuperscript{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.

\textsuperscript{116} Walker, Sartore & MacIntosh, supra note 8, at 2.

\textsuperscript{117} Id.

\textsuperscript{118} Id.; Edelman & Harrison, supra note 64.

\textsuperscript{119} Edelman & Harrison, supra note 64, at 3.

\textsuperscript{120} Alexander, supra note 81.

\textsuperscript{121} Id.

\textsuperscript{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.

\textsuperscript{123} Id. at 3.

\textsuperscript{124} Id. at 3.

\textsuperscript{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.
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”). 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.” Mediation has also been deemed an “extension of negotiation” where an unbiased mediator helps the parties foster their own solutions. 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.

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. The personal nature of mediation is ideal for the settlement of sports disputes because it can preserve personal and business relationships, and thus “provides the best forum for open communication.” As a recent development in sports, mediation is attractive in that it is both voluntary, yet confidential, taking a great deal of

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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.


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

129 Id.


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.asaascenter.org/Resources/ANowDetail.cfm?ItemNumber=98679 [http://perma.cc/BDH4-BWJP]). A 2011 study found that mediation was the preferred ADR process among 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. Stapanowich & 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.


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

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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, among other things.” Id.
138 See id. at 189.
139 Bucher, supra note 127, at 213.
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.\textsuperscript{142}

The NBA, the National Football League ("NFL").\textsuperscript{143} and the National Hockey League ("NHL") have all experienced the benefits of this ADR tactic during their respective lockouts.\textsuperscript{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.\textsuperscript{145} Thus an effective means of resolving them must be tailored to the unique needs presented by the leagues and players.\textsuperscript{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.\textsuperscript{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 . . ."\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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
of resolution, as opposed to the last resort.\footnote{Issac, supra, note 7.} Proof of this first comes from the NFL’s use of mediation in its 2011 labor dispute, which consisted of three separate mediation sessions.\footnote{Id. at 214.} The first of the three mediations occurred only two weeks before the expiration of the NFL’s CBA.\footnote{ESPN.com, NFL, NFLPA Agree to Enter Mediation, ESPN NFL (Feb. 18, 2011) http://www.espn.com/nfl/news/story?id=6132990.} 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,\footnote{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.} the result after sixteen days of meeting was a lock out by the owners.\footnote{Bucher, supra, note 127, at 214; see generally, Complaint, Brady v. NFL, No. 11-CV-639 (D. Minn. Mar. 11, 2011).} In retaliation to the lockout 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.\footnote{Id. at 214.} 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.”\footnote{See generally, Order for Reassignment of Related Cases, Brady v. NFL, No. 11-CV-639 (D. Minn. Mar. 29, 2011).} The two suits were ultimately consolidated,\footnote{Bucher, supra, note 127, at 215.} and despite the failure of the first mediation, the owners and players surprisingly agreed to a second mediation.\footnote{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).} Like the first attempt, however, the second court-ordered mediation proved unsuccessful.\footnote{Bucher, supra, note 127, at 215.} 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;\footnote{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.} the Eighth Circuit issued a temporary stay of the
injunction, which ultimately resulted in the granting of a permanent stay of the district court’s injunction.

Despite the court’s actions, the parties agreed to engage in a third mediation attempt after the owner’s appeal on June 3, 2011. However, both parties engaged in these discussions without their legal counsel, and the media referred to the proceedings as “secret.” This attempt was also not without setbacks, as the court-appointed mediator postponed talks while he went on vacation. Yet, even without a mediator, the parties were able to make “significant strides towards settlement.” The parties, in an effort to show cooperation, even invited the retired players to also join the discussions. 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. 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. 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. 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. Months passed without an agreement, and with a lockout seeming imminent, the NBPA filed suit to enjoin the league from enforcing a lockout. The NBPA was unsuccessful, and the lockout officially began once the CBA expired at 12:01 a.m. on July 1, 2011.

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(classaction 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, the NBA and the NBPA agreed to enter into mediation, appointing mediator George Cohen, the same mediator used in the NFL labor dispute. The most important issue to discuss concerned the division of the league’s revenue. 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. As a result, the league wanted to increase its share of BRI in order to establish a stronger financial foundation for the future.

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 28 deadline, resulting in the cancellation of games through November. Ultimately though, the pressures associated with a cancelled season were strong enough to resurrect the seemingly stagnant negotiations. 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.

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.”

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176 Isaac, 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 cancellation.

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

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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 Louise Dickinson, When Mediation is the Right Approach to Resolving 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 at 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.  

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.” 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. 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. 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. Finally, the mutual selection of a mediator instills a sense of trust between the parties over the entirety of the mediation process.

In regard to mediators specifically, they must have requisite experience in mediating labor disputes, and must have experience within the professional sports industry. 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,” and must be particularly well versed in the specific labor relations history between the two leagues. 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.

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

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206 Isaac, supra note 7, at 188.
207 Corapi, supra note 133, at 832.
208 Finkelman, 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. 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. 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. 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. 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. 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.

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. In addition to privacy between the parties, “mediation can provide privacy in the proceedings themselves and in subsequent litigation.” 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. Also, if the jurisdiction in question has adopted the Uniform Mediation Act, the law adds an extra level

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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 “Having 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.”

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. The increased level of privacy will allow the respective leagues to protect their reputation and image—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.

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.” 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. This requires the respective leagues to commit to bargain in good faith. This not only refers to the mediation process, but to the process of even getting the NBA to the table. 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. Each league must realize that by

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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 display 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{239} Mediation should never be deemed a waste of time.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{243} thus strengthening the dispute resolution tactics of both leagues.

\begin{itemize}
\item \textsuperscript{234} \textsc{Roger Fisher & William Ury, Getting to Yes: Negotiating Agreement Without Giving in 42–43 (Bruce Patton ed., 3d ed. 2011)}.
\item \textsuperscript{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.
\item \textsuperscript{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.
\item \textsuperscript{237} See id. at 212–13.
\item \textsuperscript{238} Id. at 213.
\item \textsuperscript{239} Id. at 211.
\item \textsuperscript{240} Id. at 212.
\item \textsuperscript{241} Id. at 212.
\item \textsuperscript{242} See id. at 212.
\item \textsuperscript{243} Id. at 212.
\end{itemize}
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.