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VOLUNTEERS: THE POWER OF COMMUNITY MEDIATION

Becky L. Jacobs*

"We make a living by what we get, but we make a life by what we give."

—Winston Churchill¹

This Article is based upon my presentation at the Conference on Conflict Resolution and the Economic Crisis convened at the UNLV Boyd School of Law's Saltman Center for Conflict Resolution. The conference was a meaningful opportunity for academics, practitioners, policymakers, and students to engage in a very lively exchange about the possible contributions of our profession/avocation to the management of the current economic predicament.

The discussion in which I participated continued an earlier panel's conversation on cost effective dispute resolution. One of the presentations from that earlier panel focused on community mediation and its sustainability. This topic is closely related to my contribution concerning the use of volunteer mediators to reduce costs for community mediation centers (CMCs) and to offer the communities they serve effective and cost effective mediation or facilitation services.

For those unfamiliar with the movement, the term "community mediation" is a bit misleading. Not only do CMCs respond to community and neighborhood disputes, many of them also accept family, custody and divorce referrals; school and juvenile matters; victim/offender mediations; hospital collections; inter-group conflicts, such as those within religious congregations or business and non-profit entities; and environmental and land use issues. Additionally, the National Association for Community Mediation (NAFCM) reports that most centers receive a majority of their referrals from court clerks, judges, prosecutors, or the police.² Some courts have established diversion or specialized programs that direct cases to CMC or other volunteer mediators,³ and

* Associate Professor of Law, University of Tennessee College of Law. Email: jacobs@utk.edu. The author would like to thank Jean Sternlight, Saltman Professor & Director of the Saltman Center for Conflict Resolution, and all of the organizers of this conference for the opportunity to participate in this stimulating event.

¹ Robert C. Maxwell, *YOUR ROAD MAP FOR SUCCESS* 16 (2002) (quote attributed to Winston Churchill).

² *Overview of Community Mediation*, NAT'L ASS'N FOR COMMUNITY MEDIATION, <http://web.archive.org/web/20080517120702/http://www.nafcm.org/pg5.cfm> (accessed by searching for <http://www.nafcm.org/pg5.cfm> using the Internet Archive Wayback Machine) (last visited Feb. 16, 2011). The NAFCM website provides the public with information about CMCs, and it is an invaluable resource for its member organizations. *See generally Purpose*, NAT'L ASS'N FOR COMMUNITY MEDIATION, <http://www.nafcm.org/about/purpose> (last visited Feb. 16, 2011).

³ One example is the Knox County Tennessee General Sessions Court, which has partnered with the Knox County CMC for at least a decade. The Court's official website describes its

some legislatures have enacted innovative mediation legislation, some of which involve the use of volunteers. Speaker Barbara Buckley described one such program at this conference, the innovative foreclosure mediation program supervised by the Nevada Supreme Court.⁴

While the above illustrates just some of the activities of CMCs, it does not describe the organizations themselves. According to NAFCM, community mediation centers are characterized by, and/or committed to:

- (1) the use of trained community volunteers as the primary providers of mediation services; volunteers are not required to have academic or professional credentials;
- (2) a private non-profit or public agency, or program thereof, with a governing/advisory board;
- (3) mediators, staff and governing/advisory board are representative of the diversity of the community served;
- (4) providing direct access of mediation to the public through self referral and striving to reduce barriers to service including physical, linguistic, cultural, programmatic and economic;
- (5) providing service to clients regardless of their ability to pay;
- (6) initiating, facilitating and educating for collaborative community relationships to effect positive systemic change;
- (7) engaging in public awareness and educational activities about the values and practices of mediation;
- (8) providing a forum for dispute resolution at the early stages of the conflict; and
- (9) providing an alternative to the judicial system at any stage of the conflict.⁵

As can be seen, the use of trained community volunteers is the first, and one of the most defining, characteristics of community mediation.

This becomes even more apparent when one considers national statistics regarding CMCs. There are approximately 600 community mediation programs nationwide, and there are more than 25,000 active volunteer community

mediation program. *Court Mediation Program*, KNOX COUNTY TENN., <http://www.knoxcounty.org/gsjudges/mediation.php> (last visited Feb. 16, 2011). Knox County is not alone. To cite just a few examples, the district courts in Maryland also work with Community Mediation Maryland to provide disputants with mediation services. *See Mediation*, DISTRICT CT. OF MD., <http://www.courts.state.md.us/district/forms/general/dc044br.html> (last modified July 2008). The Minnesota Supreme Court tested a family mediation program that utilizes volunteers. *See In Re Pilot Project on Family Law Appellate Mediation in Minnesota Court of Appeals*, No. ADM08-8003 (Minn. Aug. 29, 2008), available at http://www.mncourts.gov/Documents/0/Public/Clerks_Office/Order_Fam_Law_App_Mediation.pdf (order authorizing Family Law Appellate Mediation); *see also* Lauretta D. Towns, *Court of Appeals Testing New Mediation Process*, TWIN CITIES DAILY PLANET (Feb. 8, 2009), <http://www.tcdailyplanet.net/article/2009/02/08/court-appeals-testing-new-mediation-process.html>.

⁴ *See* NEV. REV. STAT. § 107.086 (2009). The Foreclosure Mediation Panels at the conference discussed a number of innovative foreclosure mediation programs, including the first such program in the nation in Ohio. *See generally Foreclosure Mediation Resources*, SUP. CT. OF OHIO & OHIO JUD. SYS., <http://www.supremecourtofohio.gov/JCS/disputeResolution/foreclosure/default.asp> (last updated Oct. 2009). The Foreclosure Mediation Panels also described Florida's program, *see generally* In Re Final Report and Recommendations On Residential Mortgage Foreclosure Cases, No. AOSC09-54 (Fla. Dec. 28, 2009), and the Milwaukee Foreclosure Mediation Program, with which the Marquette University Law School is associated, *see Milwaukee Foreclosure Mediation Program*, MARQ. U. L. SCH., <http://law.marquette.edu/foreclosure/> (last visited Feb. 16, 2011).

⁵ *Overview of Community Mediation*, *supra* note 2 (emphasis added).

mediators.⁶ More than 76,000 individuals have been trained by these community mediation programs.⁷ These programs receive more than 97,500 dispute referrals on an annual basis, and more than 45,500 disputes are mediated annually by community mediators.⁸ Given this data and as was discussed in Justin Corbett and Wendy Hollingshead's presentation, *Budgets, Staffing and Cases, Oh My: The Scary (and Hopeful) State of Community Mediation*,⁹ volunteers have become even more important given the budget issues that CMCs nationwide are experiencing in this economic downturn.

Extrapolating from these statistics, and in a very unscientific manner¹⁰ based upon informal surveys of publicly-available information, I have attempted to quantify the value of CMC volunteers. My first calculation focuses on the value of volunteers to the CMC with which they are associated. If one posits that there are more than 25,000 active volunteer community mediators,¹¹ or approximately 41 volunteers at each of the 600 community mediation programs nationwide,¹² and that the average salary of a CMC staff member is approximately \$32,675,¹³ the salary savings to a local CMC is \$1,339,675 annually if each volunteer were to receive an equivalent salary. This translates to a savings of \$803,805,000 to CMCs as a group. Of course,

⁶ Urška Velikonja, *Making Peace and Making Money: Economic Analysis of the Market for Mediators in Private Practice*, 72 ALB. L. REV. 257, 264 (2009); see also *Overview of Community Mediation*, *supra* note 2.

⁷ *Overview of Community Mediation*, *supra* note 2.

⁸ *Id.*

⁹ Justin Corbett & Wendy Hollingshead, *Budgets, Staffing and Cases, Oh My: The Scary (and Hopeful) State of Community Mediation*, Presentation at the William S. Boyd School of Law Conference on Conflict Resolution and the Economic Crisis (Feb. 13, 2010), available at http://www.law.unlv.edu/ConflictResolutionConference2010_Material.html (follow "Powerpoint Presentation" hyperlink). For a complete program for the conference, see A CONFERENCE ON CONFLICT RESOLUTION AND THE ECONOMIC CRISIS, http://www.law.unlv.edu/pdf/SaltmanCenterConference_Feb2010_program.pdf (last visited Feb. 16, 2011). Justin Corbett was the Executive Director, INDYSPUTE Resolution & Dialogue Center, and Wendy Hollingshead previously served as the Vice Chair of the NAFCM Board of Directors and is the Program Coordinator, Solve-It! Community Mediation Service. Corbett & Hollingshead, *supra*.

¹⁰ It appears that unscientific analyses are becoming a standard operating procedure for me. See, e.g., Becky L. Jacobs, *A Lexical Examination and (Unscientific) Survey of Expanded Clinical Experiences in U.S. Law Schools*, 75 TENN. L. REV. 343 (2008). I vow to undertake "scientific" research at some point in my scholarly endeavors.

¹¹ See Velikonja, *supra* note 6, at 264.

¹² Cf. *id.*

¹³ I used conservative estimates here so as not to artificially inflate savings, which estimates were based upon data collected from several websites. *Community Mediation, Inc Salary*, INDEED, <http://www.indeed.com/salary/Community-Mediation%252C-Inc.html> (last updated Feb. 16, 2011) (\$34,000 average salary); *Arbitrators Mediators and Conciliators Career Overview*, ELEARNPOTAL.COM, <http://www.elearnportal.com/careers/legal/arbitrators-mediators-and-conciliators> (last visited Feb. 16, 2011) (lowest figure = \$28,000); *Salary Snapshot for Arbitrator/Mediator/Conciliator Jobs*, PAYSACLE, http://www.payscale.com/research/US/Job=Arbitrator_%2F_Mediator_%2F_Conciliator/Salary (last updated Feb. 16, 2010) (lowest figure = \$38,700); *Non-Profit Organizations*, NAT'L CENTER FOR ST. COURTS, [http://www.ncsconline.org/d_kis/jobdeda/Archives/AJobs_Non-profit\(18\).htm](http://www.ncsconline.org/d_kis/jobdeda/Archives/AJobs_Non-profit(18).htm) (last modified Aug. 16, 2007) (lowest figure for a professional position = \$30,000).

this scenario, a non-profit CMC with a staff of over 40 employees,¹⁴ is highly unlikely, but even a fraction of these figures is a substantial number.

My next query ventures to estimate the cost savings to individuals whose matters are being mediated by CMC volunteers. This calculation is based upon several data points:¹⁵ (1) there are more than 45,500 disputes mediated by community mediators annually,¹⁶ (2) the average length of a CMC mediation is 2 hours,¹⁷ and (3) the average hourly rate of a private mediator is \$150.00.¹⁸ This data yielded a total cost savings of \$300 (solo mediator)—\$600 (co-mediation model) per mediation, with a total savings of \$13,650,000—\$27,300,000 annually.

My final quantification considers possible cost savings to volunteers attributable to their association with a CMC. More than 76,000 individuals have been trained by community mediation programs.¹⁹ Accordingly, if an average 40-hour general civil mediation training course is roughly \$1100 for non-CMC volunteers,²⁰ and if the average cost to CMC volunteers for their

¹⁴ The average CMC has a staff of 1.5. See *Overview of Community Mediation*, *supra* note 2.

¹⁵ I arrived at these data points by means of a random sampling of relevant literature and websites, all of which I cite herein.

¹⁶ *Overview of Community Mediation*, *supra* note 2.

¹⁷ See MICH. SUPREME COURT, ANNUAL REPORT 2008: COMMUNITY DISPUTE RESOLUTION PROGRAM 2 (2008), available at <http://courts.michigan.gov/scao/resources/publications/reports/CDRPAAnnualReport2008.pdf> (1.6 hours); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 651 (2002) (most mediations are completed within 31 minutes and 3 hours); *How Does Mediation Work?*, ALBUQUERQUE, <http://www.cabq.gov/legal/adr/how> (last visited Feb. 16, 2011) (2 hours); *Landlord-Tenant Mediation Program*, ST. CT. FULTON COUNTY GA., http://www.georgiacourts.org/courts/fulton/landlord_tenant.html (last visited Feb. 16, 2011) (1 hour); *Mediation*, CA. COURTS SELF-HELP CENTER, <http://www.courtinfo.ca.gov/selfhelp/smallclaims/mediation.htm#howlong> (last modified Jan. 4, 2010) (30 minutes-2 hours). The actual average was 2.146 hours. Consistent with my unscientific methodology, I rounded down.

¹⁸ As the majority of the published rates to which I referred pertained to attorney mediators, I based my calculation upon the non-attorney rate of \$150 so as not to exaggerate the results. See *Civil Mediation Fees and Policies*, MEDIATION GROUP, <http://www.themediationgroup.org/fees.php#civilfees> (last visited Feb. 16, 2011) (lowest hourly rate = \$150); *Find a Lawyer or Mediator*, DISP. RESOL. INST., INC., <http://dri-inc.org/findalawyer.html> (last visited Feb. 16, 2011) (lowest hourly rate = \$100); *Hourly Rate Snapshot for Arbitrator/Mediator/Conciliator Jobs*, PAYSACLE, http://www.payscale.com/research/US/Job=Arbitrator_%2f_Mediator_%2f_Conciliator/Hourly_Rate (last updated Feb. 16, 2011) (graph indicates an hourly rate of between \$13.38 and \$137.50); *Mediation*, INTERACTION CONSULTANTS, <http://www.yoursocialworker.com/Mediation.htm> (last visited Feb. 16, 2011) (lowest quoted rate = \$150); *Nevada Mediation & Arbitration Panel*, ADR SERVICES, INC., [http://www.adr-services.org/pdf/JAMP%20\(Vegas\)%20fees%208.07.pdf](http://www.adr-services.org/pdf/JAMP%20(Vegas)%20fees%208.07.pdf) (last visited Feb. 16, 2011) (lowest quoted rate = \$350).

¹⁹ *Overview of Community Mediation*, *supra* note 2.

²⁰ The random websites from which I collected information are as follows: *40 Hr General Civil Mediator Training SCAO Approved*, WAYNE MEDIATION CENTER, <http://www.mediation-wayne.org/SCAOFlyer.aspx> (last visited Feb. 16, 2011) (\$995); *Basic Mediation Skills*, JUST. CENTER ATLANTA, http://www.justicecenter.org/JCA-Docs/Mediation%20Courses_4_.pdf (last visited Feb. 16, 2011) (\$1390); *Costs and Logistics*, MEDIATION MATTERS, http://www.mediationmatters.com/costs_and_logistics.php (last visited Feb. 16, 2011) (\$1245); *Mediation Dynamics 40-hour Mediation Training*, MEDIATION DYNAMICS, <http://www.md>

training is \$400,²¹ training cost savings to volunteer mediators would be \$700 per volunteer. The total savings to all CMC-trained mediators thus would be \$53,200,000.

“Act as if what you do makes a difference. It does.”

—William James²²

In addition to the rather stunning potential cost saving figures, there also are less quantifiable benefits that CMC volunteers provide to CMCs and to the communities they serve. There also are perquisites that volunteers receive from their CMC affiliations.

First, commentators have suggested that CMCs and their volunteers are invaluable resources to the communities to which they offer their services.²³ For example, the courts in which CMC volunteers serve receive substantial qualitative and quantitative benefits.²⁴ Qualitatively, the volume of mediations conducted by CMC volunteers alleviates case volume and court congestion, increasing the efficiency of case processing at the court and allowing judges to focus on cases on the regular docket.²⁵ Volunteers can improve the quality of justice, an improvement that represents a community investment in the concept of “justice.” Access to mediation and other forms of ADR at little or no cost to litigants also has an institutional value for courts as participants in these alternative processes may have a more positive impression of the justice system than had these options been unavailable.²⁶

Further, successfully concluded volunteer mediations also can improve compliance and collection efforts. Data indicates that compliance rates are

oppr.net/ (last visited Feb. 16, 2011) (\$720); *Mediator Training*, MEDIATION OFFICES STEVEN ROSENBERG, <http://www.rosenbergmediation.com/pg15.cfm> (last visited Feb. 16, 2011) (\$1295); *Training*, FOREVER YOUNG, <http://fyamediation.com/training> (last visited Feb. 16, 2011) (\$975); *TSC Rule 31 Mediator Training Course Descriptions*, CONSENSUS, <http://dontlitigate.com/Forms/02%20CCMMS-Course%20Description-40%20Hour%20TSC%20R31%20GC%20Mediator.pdf> (last visited Feb. 16, 2011) (\$1100).

²¹ My research on the cost of training to center volunteers or potential volunteers costs took me to a number of random websites, including: *Community Mediation 40-hour Course*, OUR FAM., <http://www.ourfamilyservices.org/programs/documents/fall09trainingbrochure.pdf> (last visited Feb. 16, 2011) (\$400); *Conflict Resolution & Mediation Skills*, SEEDS, http://www.seedsrc.org/documents/flyerMediation_Training_April2010_Final.pdf (last visited Feb. 16, 2011) (\$400); *Mediator Certification Program*, VA. CONFLICT RESOL. CENTER, <http://www.vaconflictresolution.org/PROGRAMSANDSERVICES/MediatorCertification-Program/tabid/92/Default.aspx> (last visited Feb. 16, 2011) (\$395).

²² *William James Quotes*, THINKEXIST.COM, http://thinkexist.com/quotation/act_as_if_what_you_do_makes_a_difference-it_does/15219.html (last visited Feb. 16, 2011).

²³ See, e.g., Clark Freshman, *The Promise and Perils of “Our” Justice: Psychological, Critical and Economic Perspectives on Communities and Prejudices in Mediation*, 6 CARDOZO J. CONFLICT RESOL. 1, 3-4 (2004).

²⁴ See generally DANIEL MCGILLIS, *COMMUNITY MEDIATION PROGRAMS: DEVELOPMENTS AND CHALLENGES* (1997).

²⁵ See *id.* at 61-62.

²⁶ See Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241, 244-45, 250-52, 254-58, 267-71 (2006).

higher for mediated outcomes versus adjudicated claims,²⁷ potentially resulting in fewer appeals.²⁸ As one defendant explained to a researcher,

I did it simply because I said I would. I signed the paper saying that I would do some things and so I felt compelled to do it. I'm a man of my word. I felt strongly enough about it to sign the paper saying that I would do these things, so I did it.²⁹

Courts also benefit quantitatively from the services that volunteer mediators provide.³⁰ Volunteers have been demonstrated to enhance court revenues by providing services at a reduced, or at no, cost.³¹ Resources dedicated to mediation program administration reportedly are significantly lower than those resources exclusively dedicated to operation of the adversarial system.³²

While not focusing specifically on community mediation programs, the following statement by Wayne Brazil, a highly esteemed former jurist and scholar, addresses both the qualitative and quantitative aspects of low cost court-related ADR programs:

It also is significant that between twenty percent and thirty-five percent of civil cases leave the federal system without any action by or direct contact with a judge. Nearly three quarters of the cases have left the federal court system before a judge holds a pretrial conference. Thus, it seems that the only "service" that the vast majority of civil cases get from federal courts is a case management conference or two—perhaps supplemented in some cases by a ruling on a discovery dispute.

Statistics like these, statistics that are attributable at least in some measure to the high cost of formal adjudicatory processes, support my belief that free or low cost ADR programs represent one of the very few means through which courts can provide any

²⁷ See generally Jennie J. Long, *Compliance in Small Claims Court: Exploring the Factors Associated with Defendants' Level of Compliance with Mediated and Adjudicated Outcomes*, 21 CONFLICT RESOL. Q. 139 (2003); see also Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 261 (1981) (data indicates that mediation is more likely to result in compliance as compared to adjudication); Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 578-79 (2008); Douglas A. Van Epps, *The Impact of Mediation on State Courts*, 17 OHIO ST. J. ON DISP. RESOL. 627, 640 (2002) ("Annual surveys conducted by this court regarding compliance rates with mediated agreements indicate that 95% of the agreements are kept by the parties."). But see Wissler, *supra* note 17, at 695 ("[S]tudies found that mediated agreements did not increase compliance or reduce subsequent disputing compared to non-mediation resolutions . . .").

²⁸ Wissler, *supra* note 17, at 695 ("[S]tudies found that mediated agreements . . . did result in fewer filed appeals.").

²⁹ Long, *supra* note 27, at 149. "For defendants experiencing mediation, the consensual nature of the mediation process seemed to invoke feelings of personal responsibility in defendants who felt that their promise to fulfill the terms of their mediated agreement meant their compliance would serve as a reflection of their character, self-worth and personal honor." *Id.* at 150.

³⁰ John A. Goerdt, *How Mediation Is Working in Small Claims Courts: Three Urban Court Experiments Evaluated*, 32 JUDGES' J. 13, 49-50 (1993).

³¹ Susan Oberman, *Style vs. Model: Why Quibble?*, 9 PEPP. DISP. RESOL. L.J. 1, 60 (2008).

³² Douglas A. Van Epps, *Therapeutic Justice Adds to Prescriptions for Problems*, DISP. RESOL. MAG., Spring 2000, at 9, 11 ("Many court and community mediation programs run either on a volunteer basis, with little or no funding, or continually struggle to justify their existence. Even in mediation programs in which mediators are paid by parties, the resources dedicated to mediation program administration pale in comparison to the resources exclusively dedicated to operation of the adversarial system.").

meaningful service to many litigants. In fact, I believe . . . that free or low-cost ADR programs hold more promise than any other procedure or service for making courts useful to the great body of judicially under-served disputants. Court ADR must survive if the judicial branch is to remain relevant to all but the few.³³

Commentators have suggested that CMCs and their volunteers also are invaluable resources to individual mediation clients of CMCs.³⁴ Parties choosing mediation report satisfaction with the mediation process, would choose it again, and would recommend it to others.³⁵ Benefits are numerous; mediations conducted by volunteers can reduce the time and cost of litigation³⁶ or avoid litigation and the courts altogether. Studies suggest that community mediation programs handle cases more quickly than do court systems.³⁷ Further, on a more qualitative level, mediation can enhance access to justice and provide more responsive and effective dispute resolution.³⁸

On a more philosophical level, CMC volunteers also serve and benefit the public and society at large. Local control over conflict resolution mechanisms is self-empowering.³⁹ Not only does the public approve of high settlement rates and welcome opportunities for community training,⁴⁰ but committed volunteers also improve their communities in unquantifiable ways, including instilling and modeling a sense of social justice,⁴¹ self-reliance, and a spirit of

³³ Brazil, *supra* note 26, at 244-45.

³⁴ See Freshman, *supra* note 23, at 4.

³⁵ Goerdt, *supra* note 30, at 48-49; see also OFFICE OF THE EXEC. SEC'Y, SUPREME COURT OF VA., QUALITY AND GROWTH OF COURT-CONNECTED MEDIATION IN VIRGINIA 2-3 (2003), available at http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/resolutions/june2003/quality_and_growth_of_court-connected_mediation_in_virgini.pdf. During my presentation at the conference, I received a thought-provoking question relating to party perceptions of mediation that I wanted to share and explore a bit further. The question is whether the use of volunteers to provide free or no-cost mediations to the public may in some way de-value the cost of mediation in private settings or perhaps, in a more general sense, tarnish the reputation of the process vis-à-vis "you get what you pay for." Scholars have commented on this possible phenomenon, observing that "[c]ritiques of community mediation have labeled it as 'second class' justice," Susan J. Rogers, *Ten Ways to Work More Effectively with Volunteer Mediators*, 7 NEGOT. J. 201, 204-205 (1991), and opining that

[m]any mediators 'keep their day jobs' and work around busy schedules to offer what they believe to be a service that benefits their communities. While not quite 'charity work,' the low fees create a public expectation that mediation should be free or low-cost even when offered privately, in essence, derailing professionalism.

Oberman, *supra* note 31, at 42. An in-depth analysis of this expectation is beyond the scope of this short Article. However, it is an issue that I or some other proponent of community mediation should undertake. Regardless of one's position on community mediation, however, this is a concern that the entire mediation community must address.

³⁶ Brazil, *supra* note 26, at 247, 261, 265.

³⁷ See MCGILLIS, *supra* note 24, at 61.

³⁸ OFFICE OF THE EXEC. SEC'Y, SUPREME COURT OF VA., *supra* note 35, at 6-7.

³⁹ Francis E. McGovern, *Uniform Mediation Act*, in ALI-ABA COURSE OF STUDY: CIVIL PRACTICE AND LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS, July 11-13, 2007, at 2221 (2007); see also Brazil, *supra* note 26, at 247-48.

⁴⁰ See, e.g., Jannarone v. W. T. Co., 168 A.2d 72, 74 (N.J. Super. Ct. App. Div. 1961), cert. denied, 171 A.2d 147 (N.J. 1961) ("[S]ettlement of litigation ranks high in our public policy.").

⁴¹ I received another very intriguing question after my presentation at the conference: "what do you think provides a more qualitative sense of justice to participants, serving on a jury or

volunteerism.⁴² Volunteers also strengthen community capacity and civic commitment, a concrete example of the exercise of democratic responsibilities.⁴³

At the CMC level, volunteers also define, and are tremendous assets to, their centers.⁴⁴ Their service allows CMC staff members to be more productive. In my experience, committed volunteers enhance the reputation and standing of the centers in their communities.

“Everybody can be great because anybody can serve. You don’t have to have a college degree to serve.”

—Martin Luther King, Jr.⁴⁵

Given the above-described benefits, I would argue that CMCs are seriously underutilized and that there could be much greater cost savings to communities if courts, and other entities and institutions, would refer more matters to CMCs. One reason for this underutilization relates, in my opinion, to the perceptions regarding the quality of CMC volunteer mediators.⁴⁶ By “quality,” I am referring to the qualifications or professional backgrounds of CMC mediators, many of whom are non-lawyers.⁴⁷ I, personally, have no such reservations, but there are those, particularly in the legal community,⁴⁸ who will not retain, or refer matters to, non-lawyer mediators.⁴⁹

mediating?” Interestingly, several of the mediators whom I know have served on juries, some in civil trials and some in criminal. In informal conversations, they complained, almost to a person, that they did not believe they received all of the relevant information at trial. Some of those who served on criminal juries also expressed frustration that they did not get to hear from the defendant. All reported that they were dissatisfied by the options for judgment/outcome. They appeared to prefer more active party participation in the resolution of their own disputes, the very essence of participative and individualized social justice. This is a question to which I hope to return in my research.

⁴² See, e.g., Alice M. Thomas, *Re-Envisioning the Charitable Deduction to Legislate Compassion and Civility: Reclaiming Our Collective and Individual Humanity Through Sustained Volunteerism*, 19 KAN. J.L. & PUB. POL’Y 269, 269 (2010); Martha F. Davis, *Access and Justice: The Transformative Potential of Pro Bono Work*, 73 FORDHAM L. REV. 903, 904-05 (2004).

⁴³ See Thomas, *supra* note 42, at 269.

⁴⁴ See, e.g., *supra* text accompanying note 5 (providing an alternative to the judicial system at any state of the conflict).

⁴⁵ *Martin Luther King, Jr. Quotes*, THINKEXIST.COM, http://thinkexist.com/quotation/everybody_can_be_great_because_anybody_can_serve/9180.html (last visited Feb. 16, 2011).

⁴⁶ This also may relate to the perception of the “value” of free or low cost services. See Oberman, *supra* note 31, at 60.

⁴⁷ *Overview of Community Mediation*, *supra* note 2.

⁴⁸ “Lawyers tend to select other lawyers as mediators [and] . . . seek case valuation and reality testing . . .” Nancy A. Welsh, *You’ve Got Your Mother’s Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation*, 17 AM. BANKR. INST. L. REV. 427, 438 (2009). Professor Welsh has commented on this preference in several scholarly works. “Attorneys want mediators who, like judges, have the knowledge and expertise that will permit them to understand the parties’ legal arguments, assess the merits of their cases, and even opine regarding settlement ranges.” Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 590 (2004) [hereinafter Welsh, *Stepping Back*].

⁴⁹ A complete exploration of the “lawyer/non-lawyer” mediator debate is beyond the scope of this short Article. Indeed, an entire tome could be written on the topic. I have personally

Before I expand upon my “underutilization” argument, it might be useful to discuss CMC volunteers more generally. First, considering the value of even an underutilized pool of CMC volunteers,⁵⁰ it is clear that CMCs more than ever need to focus their efforts on their volunteers, both maintaining their current cadre and growing their ranks. This is particularly true given budget constraints and staffing issues as there often are an insufficient number of volunteers to adequately staff CMC programs. Recruiting is particularly challenging in these uncertain economic times when individual volunteers and recruits are experiencing financial pressures in their own lives.⁵¹ As Justin Corbett and Wendy Hollingshead’s presentation materials on the impact of the economic downturn on community mediation revealed, center volunteers reported 30 percent less availability.⁵²

How then can community mediation organizations recruit new volunteers? This query involves a number of preliminary inquiries, including whom should CMCs seek, where would they find them, how do they screen them, and what requirements must individuals satisfy in order to volunteer as mediators for local CMCs?

First, as to the “whom,” what type of individuals do CMCs seek when recruiting volunteer mediators? Volunteers should reflect the diversity of the

witnessed this prejudice, and it is a constant battle for many of my excellent non-lawyer mediator colleagues.

The problem for non-lawyer mediators is that parties who have been referred to mediation for the purpose of settling a lawsuit, are often still expecting a quasi-judicial resolution. Often they are not ready for something that sounds too much like touchy-feely therapy. Divorcing couples might have some experience with couples counseling, and may be more likely to appreciate a more therapeutic approach to mediating the issues in a divorce, but even they may prefer a more hard-headed, business-like consideration of the costs and risks of trial vs. settlement, when it comes to the task of making a business-like decision about settling their legal claims against each other. Business people and insurance companies are likely to have even more hesitation about submitting to a process that delves into any issues beyond the straightforward assessment of the value of a lawsuit. As a practical matter, non-lawyers also seem to have more trouble getting accepted for some court-annexed mediation programs, and getting lawyers to refer cases to them.

Joe Markowitz, *Are Non-Lawyers the Best Mediators*, MEDIATION’S PLACE (Jan. 4, 2010, 12:58 PM), <http://www.mediate-la.com/2010/01/are-non-lawyers-best-mediators.html>. This post is an excellent summary of the situation. We lawyers jealously guard our profession, and non-lawyer mediators must take care that their conduct as mediators does not run afoul of “unlawful practice of law” prohibitions. Matthew Daiker, *No J.D. Required: The Critical Role and Contributions of Non-Lawyer Mediators*, 24 REV. LITIG. 499, 511-16 (2005), available at <http://www.allbusiness.com/legal/mediation/907653-1.html>.

⁵⁰ See Markowitz, *supra* note 49.

⁵¹ See Susan E. Raitt et al., *The Use of Mediation in Small Claims Courts*, 9 OHIO ST. J. ON DISP. RESOL. 55, 87 (1993). However, the size and adequacy of the volunteer pool varies widely from CMC to CMC, and some centers have more volunteers than caseload. Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap*, 73 ST. JOHN’S L. REV. 375, 463-64 (1999); see also Diane Levin, *Too Many Mediators, Not Enough Mediations*, MEDIATION CHANNEL (June 10, 2008), <http://mediationchannel.com/2008/06/10/too-many-mediators-not-enough-mediations-is-it-fair-to-keep-training-mediators-with-career-prospects-so-grim/>.

⁵² See Corbett & Hollingshead, *supra* note 9. Interestingly, however, Justin and Wendy also conclude that “[p]ositive impacts [of the downturn] can be found in increased demand for services and stable or increased volunteer availability.” *Id.*

communities and clients that they serve.⁵³ A pool of homogenous mediators may negatively affect the efficacy of, or at least the appearance thereof, a CMC given the tremendous diversity of potential clients.⁵⁴ Ideally, CMCs should consider age, gender, income, ethnicity, literacy, education, employment, religious affiliation, spoken languages, and disability status when recruiting volunteers.⁵⁵ However, in reality, volunteer pools often are not so comprised. Research indicates that mediation centers generally rely on volunteers who, on average, are white, female, middle class, older, and well-educated.⁵⁶ This can be problematic; when volunteers are not representative of the populations in which they mediate, there are potential consequences for the appearance of fairness and effectiveness of their mediations.⁵⁷

In one respect, CMC volunteers are quite diverse, professionally and educationally. There are lawyers, of course, but not all CMC volunteers are attorneys.⁵⁸ There also is a variety of professional backgrounds among volunteers, including clergy, business people, psychologists, and educators.⁵⁹ This professional diversity enhances volunteer diversity more generally: "evaluating volunteers based on their educational degrees may reduce the racial, ethnic, and economic diversity of mediators."⁶⁰

However, as I previously asserted, the use of non-lawyer mediators also implicates my concern about the underutilization of CMC volunteers. There are those who strongly believe that mediators from different professions and backgrounds contribute to the strength of the field of mediation and that a mediator's process expertise is what makes him or her effective.⁶¹

Many others, however, particularly those in the legal profession, contend that non-lawyer mediators are severely limited in their ability to successfully mediate disputes because they cannot accurately assess the strengths and weaknesses of each party's case.⁶² Even if they were able to make legal assessments, they are forbidden from doing so in many states by unauthorized practice of law concerns.⁶³ Some have even urged that only lawyers be permit-

⁵³ NAT'L ASS'N FOR CMTY. MEDIATION, NAFCM SELF-ASSESSMENT MANUAL 106 (2006), available at <http://nafcm-mg.crinfor.org/> (follow "Module 3" hyperlink).

⁵⁴ See, e.g., Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 930 (1997).

⁵⁵ See, e.g., GA. SUP. CT. A.D.R. R. 13, available at <http://www.godr.org/files/CURRENT%20ADR%20RULES%20COMPLETE%201-19-2010.pdf>.

⁵⁶ SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* § 12:9 (2d ed. 2009); Rogers, *supra* note 35, at 201.

⁵⁷ COLE, *supra* note 56, § 12:9.

⁵⁸ *Id.*, see also *Overview of Community Mediation*, *supra* note 2.

⁵⁹ James R. Antes & Kristine Paranca, *The Promise of Mediation for South Dakota*, 84 S.D. L. REV. 669, 677-78 (2008); see also, e.g., Linda Mealey-Lohmann & Eduardo Wolle, *Pockets of Innovation in Minnesota's Alternative Dispute Resolution Journey*, 33 WM. MITCHELL L. REV. 441, 470 (2006).

⁶⁰ King, *supra* note 51, at 465.

⁶¹ See GA. SUP. CT. A.D.R. R. 13, available at <http://www.godr.org/files/CURRENT%20ADR%20RULES%20COMPLETE%201-19-2010.pdf>.

⁶² See, e.g., Welsh, *Stepping Back*, *supra* note 48, at 590.

⁶³ Daiker, *supra* note 49, at 512; see also Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers, and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 238-39 (2002); David A. Hoffman & Natasha A.

ted to be certified or licensed as mediators, and a number of states allow only lawyers to be included on lists of court-approved mediators.⁶⁴

Setting aside the debate regarding lawyer/non-lawyer mediators,⁶⁵ mediator diversity is both desirable and necessary.⁶⁶ However, successful volunteer mediators are homogenous in some respects; they all share a passion and a natural aptitude for the mediation process. Data indicates that mediator effectiveness is based not only on training but also on personal experiences and characteristics.⁶⁷ “[A]n individual’s preexisting conflict management style appears to be more determinative of mediator effectiveness than training or prior mediation experience.”⁶⁸ Volunteer mediators with collaborative conflict management styles appear to be more successful mediators “than those with competitive conflict management styles.”⁶⁹

A second preliminary query that must be considered as CMCs recruit is where to locate these diverse and naturally talented individuals. One source for search suggestions is the Community Mediation Center Quality Assurance Self-Assessment Manual published by NAFCM.⁷⁰ The advice in the Manual indicates that CMCs must cast their nets widely to bring in a good catch.⁷¹ For example, referrals from current staff and volunteers are a very good source of recruits.⁷² Also, articles or notices in print media, including local alternative news sources, may attract potential mediators, as may announcements in local radio and cable television, particularly local access, NPR, or college stations.⁷³ CMCs also have found success by posting notices at places of worship, community centers, food co-ops, college campuses,⁷⁴ and, as with the University of Tennessee’s program, law schools. Targeting presentations to bar associations,

Affolder, *Mediation and UPL: Do Mediators Have a Well-Founded Fear of Prosecution?*, DISP. RESOL. MAG., Winter 2000, at 20, 20.

⁶⁴ Stephanie A. Henning, Note, *A Framework for Developing Mediator Certification Programs*, 4 HARV. NEGOT. L. REV. 189, 201-10 (1999); see also Daiker, *supra* note 49, at 511-16.

⁶⁵ This is a debate that I cannot adequately address or resolve here, but it has been my experience that it is process skills, conflict resolution styles, and the expectations of the parties that determine the efficacy of any individual mediation. Accordingly, it is my strong conviction that non-lawyer mediators with these skills who are working with informed parties are just as effective as a lawyer-mediator in virtually any mediation setting, regardless of the subject matter or content. This is covered in more detail *infra*. In this time of budget cuts and resource constraints, the cost savings of using skilled volunteers, regardless of professional background, should warrant a reconsideration of any preconceived notions that lawyer mediators are required, preferable, or more effective.

⁶⁶ See GA. SUP. CT. A.D.R. R. 5 & app. B, available at <http://www.godr.org/files/CURRENT%20ADR%20RULES%20COMPLETE%201-19-2010.pdf>.

⁶⁷ King, *supra* note 51, at 465; cf. Antes & Paranca, *supra* note 59, at 377-78.

⁶⁸ Henning, *supra* note 64, at 217 (citing Margaret Shaw, *Selection, Training, and Qualification of Neutrals*, in THE NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH 153, 161 (Susan Keilitz ed. 1993)).

⁶⁹ Henning, *supra* note 64, at 217.

⁷⁰ NAT’L ASS’N FOR CMTY. MEDIATION, *supra* note 53, at 106-27.

⁷¹ See *id.* at 106.

⁷² *Id.* at 108.

⁷³ *Id.*

⁷⁴ *Id.*

civic organizations, and other non-profits also may attract enthusiastic and qualified volunteers.⁷⁵

When centers do identify a potential volunteer, how then do they screen for suitability and acclivity so that they attract diverse and naturally talented individuals? Most CMCs engage in some form of screening process, ranging from a very simple written application to an elaborate application and interview process.⁷⁶ Some centers provide their applicant volunteers with written information regarding volunteer service or hold informal or formal information sessions.⁷⁷ Most also conduct interviews, and these can take many forms, including written or oral interviews with a single interviewer or a series of, or panels of, interviewers.⁷⁸ Some centers also conduct personal and professional reference and background checks.⁷⁹

Each CMC has its own criteria for selecting its volunteers, based upon its values, programs, and goals.⁸⁰ Not every applicant will be an attractive or suitable candidate, nor will each be a successful mediator, and centers must have some process for making that determination and for gently rejecting those applicants who do not satisfy their criteria.⁸¹ A variety of issues or circumstances may exclude an applicant, including those individuals whose other interests and activities, including work, philanthropy, hobbies, and travel, preclude them from making the necessary time commitment.⁸²

“There is only one thing worse than training your volunteers and having them leave—and that’s not training them, and having them stay.”

—Unknown⁸³

Recruitment is only the first step in establishing and maintaining an adequate pool of qualified volunteer mediators. Once CMCs have identified potentially attractive volunteers, they may be reluctant to scare them away by imposing onerous training, apprenticeship, or mentoring requirements. As far

⁷⁵ In my experience, the Knox County CMC has utilized this strategy effectively. *Cf. id.* at 107; Virginia Marcantel, *EM-Power Squared for Mediation: Theory Collides with Practice in Developing an Elder Mediation Project*, BIFOCAL, Spring 2002, at 6, 7-8, available at <http://www.abanet.org/aging/publications/bifocal/spring02.pdf>.

⁷⁶ NAT’L ASS’N FOR CMTY. MEDIATION, *supra* note 53, at 108.

⁷⁷ *Id.* at 108.

⁷⁸ *Id.* at 108. The Knox County CMC, on which Board I serve, engages in various of these processes.

⁷⁹ See, e.g., *Volunteer Opportunities*, CAROLINA DISP. SETTLEMENT SERVICES, <http://www.notrials.com/volunteer.html> (last visited Feb. 16, 2011); *Volunteer Mediator Application*, OAKLAND MEDIATION CENTER, http://www.mediation-omc.org/pdfs/Volunteer_Mediator_Application2.pdf (last updated Sept. 2009); *Mediation and the Mediator*, COMMUNITY MEDIATION SERVICES, <http://www.aclink.org/mediation/main1/about.asp> (last visited Feb. 16, 2011).

⁸⁰ NAT’L ASS’N FOR CMTY. MEDIATION, *supra* note 53, at 106.

⁸¹ Like any organization that employs or manages people, CMCs should take care with the information and data with which it is entrusted regarding its applicants and volunteers. Data collection not only is subject to legal requirements, but it also implicates one of the fundamental attributes of the mediation process, confidentiality. See *id.* at 109-10.

⁸² See, e.g., Marcantel, *supra* note 75, at 8.

⁸³ *Quotes for Volunteering*, ENERGIZE INC, www.energizeinc.com/reflect/quote1v.html (last visited Feb. 16, 2011).

as I can ascertain, no state in the United States currently requires that a mediator be certified or licensed to practice privately.⁸⁴ However, courts often do impose minimum requirements on mediators who seek court referrals, and some states have established requirements for certain types of mediation, such as child custody or visitation cases.⁸⁵ Further, even if there are no state mandates, most CMCs require some initial training,⁸⁶ and, in my experience, volunteers view no or low cost training as one of the perquisites associated with volunteering.

Based on an informal online survey of centers, the numbers of hours of training required of new volunteers vary widely, from twenty-two to fifty hours.⁸⁷ While there does not appear to be a package curriculum required by CMCs for volunteer training, most do offer the "standard" mediation training content, including conflict, negotiation, and communication theory; styles of mediation; the mediation process; confidentiality obligations, local resources, cultural and personal characteristic influences, multi-party mediation, ethical and legal issues and requirements; and general and specific skills training and role-plays.⁸⁸ If CMCs provide services that take place in unusual forums or that involve specialized or complicated subject matter, for example, foreclosure or divorce, content-specific training is important. CMCs often provide this sort of advanced training for their volunteers,⁸⁹ a mutually beneficial arrangement. Regardless of content, NAFCM best practices urge CMCs to tailor their training methodologies to address the diversity of learning styles of its volunteers and to offer honest and accurate direct feedback and self-assessment opportunities.⁹⁰

⁸⁴ *State Requirements for Mediators*, MEDIATION TRAINING INST. INT'L, <http://www.mediationworks.com/medcert3/staterequirements.htm> (last visited Feb. 16, 2011); Joelle Ryssemus Sullivan, *How to Become a Certified Mediator*, eHow, http://www.ehow.com/how_5101081_become-certified-mediator.html (last visited Feb. 16, 2011).

⁸⁵ *State Requirements for Mediators*, *supra* note 84; Sullivan, *supra* note 84; *see also* Dairker, *supra* note 49, at 505-06; Henning, *supra* note 64, at 202, 210.

⁸⁶ NAT'L ASS'N FOR CMTY. MEDIATION, *supra* note 53, at 11-13.

⁸⁷ *Community and Family Mediator Training*, CONTINUING STUD., <http://intraweb.stockton.edu/eyos/page.cfm?siteID=107&pageID=22> (last visited Feb. 16, 2011) (22 hours); *How to Become a Mediator*, COMMUNITY MEDIATION CENTER, <http://www.conflictrushers.org/certificationoptions.cfm?linkname-Become%20a%20Mediator> (last visited Feb. 16, 2011) (24 hours); Heather Lowery, *Maryland Mediation Center Offering Free Training for Residents*, HERALD-MAIL.COM (June 4, 2010), http://articles.herald-mail.com/2010-06-04/news/25201730_1_mediation-center-volunteer-mediator-new-mediators (50 hours); *Training*, LANCASTER MEDIATION CENTER, <http://sites.google.com/site/lancastermediation/training> (last visited Feb. 16, 2011) (40 hours).

⁸⁸ *See, e.g.*, Diane J. Levin, *What to Look for in a Basic Mediation Training*, MEDIATE.COM (Mar. 2005), <http://www.mediate.com/articles/levinD1.cfm>; *see also* TENN. SUP. CT. R. 31(17)(c)(1), *available at* http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/TNRulesOfCourt/06SUPCT25_end.htm#31; *Standards and Requirements for Mediators and Mediation Trainers*, in COMMUNITY DISPUTE RESOLUTION CENTERS PROGRAM MANUAL 8, 10-11 (2007), *available at* http://www.nycourts.gov/ip/adr/info_for_Programs.shtml (follow "Chapter 7 [Training Guidelines]" hyperlink).

⁸⁹ NAT'L ASS'N FOR CMTY. MEDIATION, *supra* note 53, at 120-21; Rogers, *supra* note 35, at 205.

⁹⁰ NAT'L ASS'N FOR CMTY. MEDIATION, *supra* note 53, at 113-14.

Training methodologies and content do require careful consideration, particularly given the budget squeeze many CMCs are feeling. It is important to consider what skills training CMCs require their volunteers to have, both basic and advanced, for example, dealing with impasse, multiple parties, or domestic violence.⁹¹ Centers also should consider whether to make the training mandatory or voluntary for their volunteers, what, if any, prerequisites are required for a mediator to participate in advanced skills training, and whether fees, if any, should be charged.

Formal training courses need not create a significant financial burden, particularly if centers approach them creatively. For example, partnering with local law school clinical programs, such as the one that I direct at the University of Tennessee College of Law, may reduce the costs and time commitment required to produce quality training programs. It also can energize and stimulate the students, the community volunteers, and the trainers to engage in this sort of combined training.⁹²

Training can take many forms, some of which will not impose much or any financial burdens on CMCs. Through the practices of mentoring, co-mediation, and various forms of evaluation, CMCs also have “institutionalized continuous reflective educational development,” a practice in which scholars suggest private professional mediators generally do not participate.⁹³ NAFCM’s Quality Assurance Statement enshrines these values: “NAFCM believes that quality assurance is a process rather than an end and is best supported through organizational self-reflection, careful systems design, collaboration with the community, and continuous improvement.”⁹⁴

Consider mentoring, a practice that pairs an experienced mediator with a newly trained volunteer so that new mediators have an opportunity to observe the actual mediation process and to be counseled by an experienced mediator. For some CMCs, mentoring is a formal part of basic training, and a new volunteer must successfully complete a mentorship or apprenticeship before being considered to have mastered the required basic mediation skills.⁹⁵ Other programs offer, but do not require, mentoring for new volunteers after they have

⁹¹ Cf. *id.* at 110, 118-21.

⁹² For more information on UT’s fantastic clinical program, with which I am honored to be associated, see *Clinical Programs*, U. TENN. KNOXVILLE, <http://www.law.utk.edu/clinic/> (last visited Feb. 16, 2011). I want just to note that, while I now direct UT’s Mediation Clinic, it was created by the much honored Grayfred Gray, a legend in Tennessee and beyond, and it has attracted several other excellent directors during its existence, including Ann Barker and Deb House, both of whom are experienced mediators and excellent educators.

⁹³ John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 657 (2007).

⁹⁴ *NAFCM Quality Assurance Statement*, NAT’L ASS’N FOR COMMUNITY MEDIATION, <http://www.nafcm.org/about/programs/quality> (last visited Feb. 16, 2011).

⁹⁵ This is the case with the Knox County CMC with which I am associated. See also *How to Become an NSCMC Volunteer*, NORTH SHORE COMMUNITY MEDIATION CENTER, <http://www.nsmmediation.org/vol.htm> (last visited Feb. 16, 2011); *Volunteer Opportunities*, CENTER FOR CONFLICT RESOL., <http://www.ccrchicago.org/volunteer.html> (last visited Feb. 16, 2011).

completed their basic training.⁹⁶ Mentoring can benefit both members of the pair, the new volunteer and his or her experienced mentor.

Co-mediation is a mediation model used by many CMCs, and it too can be an effective and inexpensive training mechanism.⁹⁷ It allows mediators to observe, learn from, and support each other's best practices.⁹⁸ "[C]o-mediation allows for a blending of the skills, personalities, perceptions, experiences, and creativity of two mediators."⁹⁹ However, for mentoring programs and co-mediation models to be successful, the selection of pairs must be a deliberate and careful process, and selections must be re-visited periodically.¹⁰⁰ It can be a challenge, but also a continuous learning opportunity, to have frequent changes in the pairing of mentor-mentee and co-mediation teams.¹⁰¹

Mentoring, co-mediation, and advanced or specialized content courses are not only excellent training tools, they also provide CMCs with an opportunity to observe, monitor, and evaluate the performance and conduct of their volunteers. Centers often are ambivalent about and cautious with evaluation.¹⁰² Not only do they seek to nurture their valuable volunteers and to avoid offending them, but they also attempt to preserve the time and training investments that these volunteers represent.¹⁰³

From a regulatory perspective, volunteer mediator quality assurance is, no pun intended, almost exclusively voluntary. Like initial training requirements, state mediator ethical codes or codes of conduct are generally only applicable to court-certified or listed mediators.¹⁰⁴ CMCs may develop their own stan-

⁹⁶ NAT'L ASS'N FOR CMTY. MEDIATION, *supra* note 53, at 117-18.

⁹⁷ *See id.* at 116-17.

⁹⁸ *Id.* at 117. Co-mediation also benefits the parties to the mediation. It provides complementary skills and offers mediation participants the "unique opportunity to observe positively modeled communication skills and teamwork." *Id.* at 116. Participants also get an "additional opportunity to establish rapport with at least one mediator, to experience increased attention and to observe positively modeled communication between the mediators." *Id.*

⁹⁹ *Id.* at 116.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* *See generally* Antes & Paronica, *supra* note 59; Henning, *supra* note 64; John P. McCrory, *Mandated Mediation of Civil Cases in State Courts: A Litigant's Perspective on Program Model Choices*, 14 OHIO ST. J. ON DISP. RESOL. 813 (1999).

¹⁰² *Cf.* Michelle Robinson, *Mediator Certification: Realizing Its Potentials and Coping with Its Limitations*, 1 AM. J. MEDIATION 1, 32 (2007), available at <http://www.americanjournalofmediation.com/pg1.cfm>.

¹⁰³ This is certainly true for the Knox County CMC, with which I am associated.

¹⁰⁴ *See, e.g.,* Suzanne McCorkle, *The Murky World of Mediation Ethics: Neutrality, Impartiality, and Conflict of Interest in State Codes of Conduct*, 23 CONFLICT RESOL. Q. 165, 167-70 tbl.1 (2005) (This table contains citations to state/state court codes of mediator ethics.). A number of states have adopted, in whole or with slight modifications, the Model Standards of Conduct for Mediators. *State Adoptions of ABA Mediator Model Rules*, ABA, <http://www.abanet.org/dispute/docs/StateAdoptionofABAMediatorModelRules.xls> (last visited Feb. 16, 2011). The Model Standards were prepared and approved by each of three entities: the American Arbitration Association (AAA), the American Bar Association (ABA) Section of Dispute Resolution, and the Association for Conflict Resolution. *See* AM. BAR ASS'N, MODEL STANDARDS OF CONDUCT FOR MEDIATORS 2-3 (2005), available at http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf. The Association for Conflict Resolution is an organization created by the merger of three entities: (1) the Academy of Family Mediators, (2) the Con-

dards of conduct, or they may adhere to the Model Standards of Conduct for Mediators¹⁰⁵ or, in some cases or settings, to the Model Standards of Practice for Family and Divorce Mediation.¹⁰⁶ In order to ensure that their volunteers are conforming to their codes and standards of practice, centers often assess or evaluate their volunteers in some form, whether informally with mentor and co-mediator debriefings and feedback, party exit surveys, or self-assessments or with formal evaluation or assessment observations.¹⁰⁷ Evaluation should go some way toward alleviating the concerns of those who question the competency or the efficacy of non-lawyer mediators.

Integrating these informal educational practices into a center's standard operations encourages continual growth and development for mediators and preserves the integrity of the mediation process.¹⁰⁸ Studies suggest that mediators who are regularly exposed to informal feedback gain valuable insight into their strengths and weaknesses and are usually more receptive to more formalized evaluation.¹⁰⁹ However, even these informal training methods require deliberate design. CMCs must consider which skills and qualities of mediators should be evaluated, what form of evaluative training is appropriate for each particular item, and with what frequency it should occur.¹¹⁰

All continuous learning opportunities, both formal and informal, allow volunteers to build skill and to stay abreast of new developments in the field. Training is a symbiotic process, benefiting not only CMCs, but also their volunteers and communities, by strengthening and improving the quality of services.¹¹¹

flict Resolution Education Network, and (3) the Society of Professionals in Dispute Resolution (SPDR). SPDR was actually the third organization involved in the development of the 1994 Standards. The Uniform Mediation Act, drafted by National Conference of Commissioners on Uniform State Laws in collaboration with the ABA Section of Dispute Resolution, serves a slightly different function, which is to establish a privilege of confidentiality for mediators and participants. *See* NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAW, UNIFORM MEDIATION ACT 15-16 (2003), available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf>. It has been enacted in ten states, including the District of Columbia, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, Washington, and it is being introduced in Hawaii, Massachusetts, and New York. *Legislative Fact Sheet—Mediation Act*, UNIFORM L. COMMISSION, <http://uniformlaws.org/LegislativeFactSheet.aspx?title=Mediation%20Act> (last visited Feb. 16, 2011).

¹⁰⁵ AM. BAR ASS'N, *supra* note 104, at 2-3.

¹⁰⁶ The Model Standards of Practice for Family and Divorce Mediation are the creation of the family mediation community and are the result of nearly twenty-year-old effort by this community. "They draw on existing codes of conduct for mediators and take into account issues and problems that have been identified in divorce and family mediation practice." *See Model Standards of Practice for Family and Divorce Mediation*, ASS'N FAM. & CONCILIATION COURTS (Aug. 2000), http://www.afcnet.org/resources/resources_model_mediation.asp (The Model Standards themselves also may be accessed through this link.).

¹⁰⁷ NAT'L ASS'N FOR CMTY. MEDIATION, *supra* note 53, at 122-23; *cf.* Charles Pou, *Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality*, 2004 J. DISP. RESOL. 303, 324.

¹⁰⁸ NAT'L ASS'N FOR CMTY. MEDIATION, *supra* note 53, at 123-24.

¹⁰⁹ *Cf.* Beryl Blaustone, *Teaching Law Students to Self-Critique and to Develop Critical Clinical Self-Awareness in Performance*, 13 CLINICAL L. REV. 143, 159-61 (2006).

¹¹⁰ NAT'L ASS'N FOR CMTY. MEDIATION, *supra* note 53, at 122-23.

¹¹¹ *Id.* at 111; *cf.* Lande, *supra* note 93, at 657-58.

"The purpose of life is not to be happy—but to matter, to be productive, to be useful . . . to have it make some difference that you have lived."

—Leo Rosten¹¹²

My discussion hopefully has demonstrated the value of volunteer mediators to their centers, to the individual parties for whom they mediate, to the communities they serve, and to society at large. However, there is another question that one might ask: why do the volunteers do it? What benefits or satisfaction do they derive from their service, and how can CMCs provide these benefits and cultivate their committed volunteer cadre in this era of tight budgets?

CMC volunteers generally serve with great commitment, enthusiasm, and talent, taking great personal pride and getting satisfaction by helping people resolve their problems.¹¹³ CMCs need do little but continue to refer cases to their volunteers to provide this benefit.¹¹⁴ Volunteers also report an improvement in personal communication and conflict resolution skills.¹¹⁵

Additionally, volunteers value the training they receive from their centers. In other more concrete ways, the economy may actually give CMCs an edge here. One way to provide a real benefit to volunteers is to offer the low or no cost basic and advanced training opportunities discussed in more detail in the previous section.¹¹⁶ Individuals may be unwilling or unable to pay for a basic 40-hour course or for Continuing Mediation Education annual requirements and would welcome the opportunity to participate in education programs offered by CMCs. Therefore, training can be a successful volunteer recruitment and retention tool.

In addition to the personal satisfaction that they derive and the educational programs that are available to them, volunteers also prize the mediation opportunities that their CMCs furnish.¹¹⁷ I have observed that newly minted private mediators often have little opportunity to apply and hone their skills in a structured environment,¹¹⁸ and these opportunities allow volunteers to gain much coveted experience, unlike the steep career trajectory that many professional mediators must confront as they slowly build a reputation for quality over time. If more courts and other institutions and entities would consider partnering with their local CMCs to expand services, even more opportunities could be created.

Two additional benefits are worth mentioning. CMC volunteers do not incur the marketing or advertising expenses that are often a professional necessity for private mediators. Also, mediators who volunteer with CMCs may be granted limited immunity from civil suit when mediating within court-related

¹¹² Leo Rosten, *The Myths by Which We Live*, ROTARIAN, Sept. 1965, at 32, 55.

¹¹³ King, *supra* note 51, at 463-64 (quoting Amy Roquemore, *Volunteers Use Mediation to Keep Fights out of Court*, DALLAS MORNING NEWS, Sept. 14, 1998, at 8A, which discusses a mediation program made up of two hundred volunteers and quotes one volunteer who gets "personal gratification out of helping people discover that they have the ability within themselves to solve their problems.').

¹¹⁴ See, e.g., Rogers, *supra* note 35, at 202, 204.

¹¹⁵ See *id.* at 203.

¹¹⁶ *Id.* at 205.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

programs,¹¹⁹ or they may be covered by their centers' malpractice policies when acting within the "course and scope" of their duties or assignment.¹²⁰ Without such immunity or coverage, they otherwise might feel compelled or be required to purchase malpractice insurance. This can be quite costly and a particularly frustrating expense early in a mediator's career.

"We often take for granted the very things that most deserve our gratitude."

—Cynthia Ozick¹²¹

Surveys of volunteers indicate that most are very content with their CMC service.¹²² However, there are some areas of dissatisfaction to which CMCs should attend in order to keep their volunteer corps happy. The main concern expressed by volunteers was that they were underutilized.¹²³ Centers have found that volunteers are eager to take on the challenge of mediating in new subject areas, such as divorce and family mediation.¹²⁴ Conversely, "[c]lose to a third of all mediators take breaks from servicing their agencies because they are not being used enough. A significant portion of mediators (28 percent) also terminate their service for this reason; very few volunteers ever quit because they have experienced 'burn out.'"¹²⁵

These areas are not always within the control of a CMC. Many referral agencies have low caseloads, a problem further compounded by high failure-to-appear rates for parties to the mediations.¹²⁶ Volunteers also may find it difficult to sustain their commitment to service if they are assigned to a high number of "hopeless" cases or have low settlement rates.¹²⁷

While CMCs cannot fully control their case loads or assignments, there are some steps that they can take to manage volunteer expectations. For exam-

¹¹⁹ Scott H. Hughes, *Mediator Immunity: The Misguided and Inequitable Shifting of Risk*, 83 OR. L. REV. 107, 170-205 (2004) (this article has a comprehensive appendix which surveys the state laws and rules pertaining to mediator immunity).

¹²⁰ Ben Carroll, *Liability in Mediation*, NAFCM PRAC. NOTES, Spring 2000, available at <http://web.archive.org/web/20060929053759/http://www.nafcm.org/docs/Liability+In+Mediation.doc> (accessed by searching for www.nafcm.org/docs/Liability%20In%20Mediation.doc using the Internet Archive Wayback Machine).

¹²¹ *Cynthia Ozick Quotes*, THINKEXIST.COM, http://thinkexist.com/quotes/Cynthia_ozick/ (last visited Feb. 16, 2011).

¹²² See Rogers, *supra* note 35, at 203, 208.

¹²³ "[O]ne-fourth of the mediators polled voiced concern about not being used frequently enough or to their fullest capacity." *Id.* at 203; see also King, *supra* note 51, at 463.

¹²⁴ Cf. Rogers, *supra* note 35, at 205.

¹²⁵ *Id.* at 204.

¹²⁶ The failure-to-appear rates for disputants has been reported to be as high as 60 percent. *Id.* at 203.

¹²⁷ One author notes:

[A]ssigning a hopeless case to a volunteer mediator may undermine the mediator's commitment to the program. . . . [M]any private attorneys acting as mediators are trying to transition their practices from traditional law practice into ADR. In those instances, the mediator may be hoping to build an impressive pro bono settlement rate to enhance his or her reputation as a private mediator for fee. Those mediators will be unwilling to endure many doomed pro bono assignments before he or she begins to question the value in continuing to participate in the program.

Ignazio J. Ruvolo, *Appellate Mediation—"Settling" the Last Frontier of ADR*, 42 SAN DIEGO L. REV. 177, 217 (2005).

ple, they might ensure that they are democratic with their case assignments,¹²⁸ and they can educate volunteers about the fluctuations in caseload volume, the possibility of underutilization, and high no-show and low settlement rates.¹²⁹

Underutilization is not the only concern that volunteers have expressed. For example, one study noted that nearly one quarter of mediators had complaints about the physical environment in which they mediated.¹³⁰ Volunteers reported being forced to mediate in hallways, in "cramped" or closet-sized rooms, in areas with inadequate heating or cooling, or even in locations where safety may be a concern.¹³¹ Also, items such as white boards or charts or writing implements often are in short supply. Given financial constraints, particularly in the current economy, CMCs may be unable to address these concerns with improved facilities or additional supplies.¹³² However, they may be able to manage their volunteers' expectations with improved communication about these sorts of situations and issues.¹³³

Other concerns raised by volunteers are more easily, and inexpensively, addressed by CMCs. Many volunteers express frustration with a lack of feedback on their performance.¹³⁴ Volunteer mediators report that they need more feedback in order to gain confidence and to improve their skills, but, once past the basic training course, they indicate that they do not receive regular feedback.¹³⁵ CMC best practices involve the provision of regular feedback, a practice that need not be an onerous or expensive burden.¹³⁶ Centers can enlist their volunteers to assist with this exercise, an exercise which is a development and training opportunity that will benefit the evaluated, the evaluators, the centers, and the communities and individuals served by CMCs.¹³⁷

Ironically, volunteers also have expressed disappointment with how their CMCs resolve internal conflict.¹³⁸ Discord between and amongst volunteers, staff, and board members "leads to mistrust and unproductive relationships for the agency and therefore, reduced satisfaction and commitment among volunteer mediators."¹³⁹ Centers should have established mechanisms that model

¹²⁸ One scholar has noted that many CMCs tend to draw from only 15 percent of their entire volunteer pool; the remaining volunteers are rarely called to mediate. "These core mediators are very often retired volunteers who are more available during the daytime hours or are assessed by the director as having the strongest mediation skills." Rogers, *supra* note 35, at 203-04.

¹²⁹ *See id.* at 208. As an aside, I find it troubling that volunteers feel that they are underutilized, particularly in this economic climate. If there are mediators who want to mediate, and if there is a lack of official resources to respond to the number of disputes that need to be resolved, we are missing a real opportunity to create a value-added, Pareto optimal solution. Underutilized CMC volunteers could offer tremendous cost advantages to budget-strapped courts, administrative agencies, other institutions and business entities, and also to individuals. *See supra* notes 30-33 and accompanying text.

¹³⁰ Rogers, *supra* note 35, at 204.

¹³¹ *Id.*

¹³² *See id.* at 204-05.

¹³³ *See id.* at 206.

¹³⁴ *See id.* at 205.

¹³⁵ *Id.*

¹³⁶ *See* NAT'L ASS'N FOR CMTY. MEDIATION, *supra* note 53, at 114-15, 123-25.

¹³⁷ *Id.* at 114, 123-25.

¹³⁸ Rogers, *supra* note 35, at 205-06.

¹³⁹ *Id.* at 206.

positive conflict resolution practices internally to foster improved relations amongst all stakeholders.¹⁴⁰

One final complaint that CMC volunteers have voiced pertains to the services that they are willing to provide.¹⁴¹ Some volunteer mediators prefer only to mediate; they are not interested in developing policy or procedures, serving on the Board of Directors, or performing community education and outreach.¹⁴² Some have expressed dissatisfaction at being asked to perform non-mediation or administrative tasks or to assume leadership roles in the organization.¹⁴³ While this can be problematic for many thinly-staffed CMCs, it is a complaint that must be addressed. This may require targeted recruitment for potential volunteers who have an interest in this type of service.

"Feeling gratitude and not expressing it is like wrapping a present and not giving it."

—William Arthur Ward¹⁴⁴

While volunteers may not list it as a benefit or consciously seek approval, another simple and rewarding way to improve morale and maintain loyalty is to thank and praise volunteers frequently and to recognize their efforts. In all non-profit organizations that rely upon the labor of volunteers, not only CMCs, recognition is essential to demonstrate to volunteers that they are valued and appreciated and to incentivize them to remain engaged and enthusiastic about their service.¹⁴⁵ Just as training is designed to address various learning styles, awards and recognition should be tailored to the characteristics of individual volunteers and should reflect the values of the centers.¹⁴⁶

There are countless ways to recognize the work that volunteer mediators do, many of which are realistic to create and award even with limited budgets or other resource limitations. Centers can publish announcements or articles in local media, in their internal publications and newsletters, or on their websites.¹⁴⁷ They can hold formal or informal events at which volunteers are recognized.¹⁴⁸ Center directors and staff can send personal notes or award certificates of achievement for such milestones as completion of training or apprenticeships, or for completion of a certain number of hours or mediations, or for outreach or education efforts.¹⁴⁹ Annual awards for the highest volume of mediations, for the most requested, or for humorous categories of accomplishments such as the longest or shortest mediation are other common forms of

¹⁴⁰ *Id.* at 205-06, 210.

¹⁴¹ This observation is based upon personal experience.

¹⁴² Rogers, *supra* note 35, at 205-06, 210; *see, e.g.*, Marcantel, *supra* note 75, at 9.

¹⁴³ *See* Marcantel, *supra* note 75, at 9.

¹⁴⁴ *William Arthur Ward Quotes*, THINKEXIST.COM, thinkexist.com/quotes/William_arthur_ward/4.html (last visited Feb. 16, 2011).

¹⁴⁵ *See* NAT'L ASS'N FOR CMTY. MEDIATION, *supra* note 53, at 125; *see also* Rogers, *supra* note 35, at 208-09.

¹⁴⁶ NAT'L ASS'N FOR CMTY. MEDIATION, *supra* note 53, at 126.

¹⁴⁷ *Id.* at 125-26.

¹⁴⁸ *Id.* at 125-27.

¹⁴⁹ *Id.* at 125-26.

recognition.¹⁵⁰ Directors also can be generous with their praise in letters of recommendation for their mediators.¹⁵¹

If CMCs continue to provide the benefits that volunteers value and to appear responsive to volunteer concerns, they will be in a better position to sustain the commitment of their mediators.

"Volunteers don't get paid, not because they're worthless, but because they're priceless."

—Sherry Anderson¹⁵²

Community mediation is powerful, and it derives its power from its priceless volunteers. CMC power can, and should, be harnessed to fuel our economic recovery, and I conclude by urging you to think creatively to find ways to maximize the value of your local CMCs. As we learned from Speaker Buckley, Nevada is leading the way with many creative examples of effective partnerships between state and local agencies with volunteer mediation organizations to provide relief to communities in crisis in these uncertain times.¹⁵³ Professors Schneider and Fleury also educated us as to how law schools, partnering with other local organizations, can successfully respond to the needs of their communities.¹⁵⁴ With their established track-record of service to their communities and to the individuals therein, volunteer CMCs can serve as both a partner in, and a model for, such partnerships.

I leave you with a beautiful and particularly apropos New Zealand Maori Proverb:

Naku te rourou
Nau te rourou
Ka ora ai te iwi
*With your basket and my basket
The people will live*¹⁵⁵

¹⁵⁰ *Id.* at 126.

¹⁵¹ *Id.*

¹⁵² *Quotations: Appreciation for Volunteers*, THE QUOTE GARDEN, www.quotegarden.com/volunteer-apprec.html (last visited Feb. 16, 2011).

¹⁵³ See A. 149, 2009 Leg., 75th Sess. (Nev. 2009).

¹⁵⁴ *Milwaukee Foreclosure Mediation Program*, *supra* note 4.

¹⁵⁵ *Whakatauki*, MAORI PROVERBS, <http://www.maori.cl/Proverbs.htm> (last visited Feb. 16, 2011).