

Mediator Burnout

LYDIA NUSSBAUM*

- I. INTRODUCTION
- II. MEDIATOR, GUARDIAN OF MEDIATION QUALITY
 - A. *Informal Norms*
 - B. *Formal Rules*
- III. MEDIATOR SUSCEPTIBILITY TO BURNOUT
 - A. *What Is Burnout*
 - B. *Why Burnout Happens*
 - 1. *DEMANDS OF EMOTION WORK AND ROLE CONFLICT*
 - 2. *LACK OF JOB RESOURCES*
- IV. CONSEQUENCES OF BURNOUT FOR MEDIATORS AND THE MEDIATION PROCESS
 - A. *Cognitive Deficits and Poor Emotional Regulation*
 - 1. *TASK SWITCHING*
 - 2. *WORKING MEMORY AND ATTENTION*
 - 3. *EMOTIONAL SELF-CONTROL*
 - B. *Potential Impact of Burnout on Mediation Quality*
 - 1. *COMMUNICATION AND INFORMATION GATHERING*
 - 2. *OPTION GENERATING AND NEGOTIATION*
 - 3. *MEETING ETHICAL STANDARDS OF PRACTICE*

* Associate Professor of Law and Associate Director of the Saltman Center for Conflict Resolution, William S. Boyd School of Law, University of Nevada, Las Vegas. I sincerely thank Jean Sternlight, Sharon Press, Rob Rubinson, Art Hinshaw, Lena Rieke, and the members of the 2017 AALS Dispute Resolution Section Works-in-Progress Conference; all errors are my own. I am grateful to the Boyd School of Law for supporting my research and to the library faculty at the Weiner-Rogers Law Library for their invaluable assistance.

- V. THINKING MORE BROADLY ABOUT HOW TO DELIVER A QUALITY MEDIATION PROCESS: INTERVENTIONS TO ADDRESS WORKPLACE STRESSORS
 - A. *Value Conflicts*
 - B. *Role Conflicts*
 - C. *Work Overload*
 - D. *Lack of Supervisory and Peer Support*

- VI. CONCLUSION

ABSTRACT

Being a mediator is hard work. Mediators must make meaningful connections with individuals without over-stepping bounds of impartiality, manage emotions without becoming emotionally invested, and empower decisionmaking without undermining self-determination. Decades of research into occupational stress, also known as "burnout," indicates that mediators not only are susceptible to burnout, but also that the symptoms of burnout undermine fundamental principles of quality mediation. For example, a burned-out mediator may exhibit narrow and uncreative thinking, diminished capacity to regulate emotions, compromised decisionmaking, and deficits in attention and memory.

The prospect of mediator burnout not only threatens the quality of mediation, but it also highlights shortcomings in the regulatory framework designed to provide mediation quality control. Despite considerable discussion about how to ensure mediators deliver quality service, the focus has been on molding newly minted mediators rather than those already practicing. And minimal attention is paid to the organizational structures in which mediators work. This Article argues that the mediation community should use burnout research to target external stressors imposed by mediation workplaces. Understanding how workplace demands and resource shortages negatively affect mediators can inform new policies that protect good mediators from burning out and, in so doing, better enable the delivery of quality mediation.

I. INTRODUCTION

Burnout. We all know the term and likely use it to describe ourselves when we feel tired, uninspired, emotionally withdrawn, overworked, and under strain. “Burnout” is, in fact, a defined, diagnosable form of chronic occupational stress and a widespread workplace problem.¹ People at risk of workplace burnout report compassion fatigue, negative or cynical attitudes, depersonalization or dehumanization of their clients, and feelings of professional inefficacy.² The consequences of burnout are serious. For example, physicians who suffer from burnout make more mistakes in medical treatment and engage in ineffective, depersonalized care of their patients.³ Burned-out nurses doubt their patients’ complaints of pain.⁴ And burnout among teachers results in lower student achievement and higher costs for schools.⁵

Mediators can also suffer from burnout, with serious consequences for the quality of the mediation process. Although empirical research into mediator burnout is only just beginning,⁶ extensive research of burnout in analogous professions suggests that mediators regularly encounter key stressors associated with burnout: work that requires high levels of emotional control, professional role and value conflicts, and inadequate social support from supervisory and peer relationships.⁷ The cognitive impairments associated with burnout involve skills central to a mediator’s work. For example, a burned-out mediator may

¹ Wilmar B. Schaufeli et al., *Burnout: 35 Years of Research and Practice*, 14 CAREER DEV. INT’L 204, 211 (2003) (discussing the emergence, globalization, and eventual medicalization of burnout); Jena McGregor, *The Three Types of Job Burnout*, WASH. POST (Mar. 10, 2014), https://www.washingtonpost.com/news/on-leadership/wp/2014/03/10/the-three-types-of-job-burnout/?utm_term=.6e4985145ecc (citing a recent Gallup poll that found disengaged workers outnumber engaged workers by two-to-one).

² Christina Maslach et al., *Maslach Burnout Inventory—Human Services Survey (MBI-HSS)*, in MBI MANUAL 191, 192 (Christina Maslach et al. eds., 3d ed. 1996).

³ Perri Klass, *Taking Care of the Physician*, N.Y. TIMES (Nov. 13, 2017), <https://www.nytimes.com/2017/11/13/well/family/taking-care-of-the-physician.html>.

⁴ Nikita P. Rodrigues et al., *Burnout in Nurses Working with Youth with Chronic Pain: A Mixed-Methods Analysis*, 43 J. PEDIATRIC PSYCHOL. 369, 372 (2017).

⁵ Mark T. Greenberg et al., *Teacher Stress and Health: Effects on Teachers, Students, and Schools*, PENNSYLVANIA STATE UNIVERSITY, Sept. 2016, at 5–6, https://www.rwjf.org/content/dam/farm/reports/issue_briefs/2016/rwjf430428 (estimating the cost of teacher turnover to be more than \$7 billion each year).

⁶ Caroline Harmon-Darrow & Yanfeng Xu, *Retaining Volunteer Mediators: Comparing Predictors of Burnout*, 35 CONFLICT RESOL. Q. 367, 368–69 (2018) (examining burnout among volunteer community mediators as it relates to volunteer retention).

⁷ *Infra*, Part II.

MEDIATOR BURNOUT

exhibit narrow and uncreative thinking, a diminished capacity to regulate emotions, poor decisionmaking, and deficits in attention and memory, all of which can compromise mediation quality.⁸ Recognizing burnout before it negatively impacts job performance proves difficult and even the most dedicated and highly trained mediator could be unaware of her burnout-related behavior.⁹

In an American legal system that relies heavily upon alternative dispute resolution (ADR) processes such as mediation for access to justice, the prospect of mediator burnout raises a serious concern. This concern is particularly acute in certain settings, such as those where mediators work alone and routinely mediate with unrepresented or high conflict litigants. Inexperienced or unsophisticated parties may not be able to recognize a burned-out mediator and take appropriate steps to protect themselves from a poorly conducted mediation. Thus, burnout can result in undesirable mediation practices that go unchecked and lead to unjust outcomes for disputants.

Mediator burnout not only threatens the quality of mediation and imperils mediation participants, but also highlights shortcomings in the regulatory framework establishing mediation quality controls. The existing regulatory approach to ensuring mediation quality, albeit limited, places responsibility for a quality mediation process on mediators' shoulders. As the thinking goes, without a quality mediator, there cannot be a quality process.¹⁰ Accordingly, the mediation community uses both informal and formal means to establish parameters of what makes a good mediator—promoting essential mediator skills, regulating training and credentialing of mediators, and requiring mediators to abide by ethical standards.¹¹ While required skills training and formal ethical standards can mold people's behavior into accepted norms of mediation practice, they do not protect good mediators from succumbing to the chronic stressors that lead to burnout.

The institutionalization of mediation into public and private spheres means that mediation is incorporated into a multiplicity of diverse settings, all of which bring to bear their own pressures and expectations on mediators. Some of these pressures and expectations directly contradict the fundamental norms undergirding a quality mediation process. Indeed, the current regulatory approach may, in and of itself, function as a stressor that puts mediators at risk for burnout.

This Article argues, therefore, that the existing regulatory framework should better account for the external, workplace stressors that place mediators

⁸ *Infra*, Part III.

⁹ *Id.*

¹⁰ SARAH RUDOLPH COLE ET AL., *MEDIATION: LAW, POLICY, PRACTICE* § 11:3 (2016) (noting that, for decades, the mediation community has held to the conviction that “a key component of a good mediation is a quality mediator”).

¹¹ *Infra*, Part I.

at risk for burnout and threaten the quality of mediation delivered. Additionally, more research into the prevalence and manifestations of mediator burnout, whether for private mediators or high-volume court-connected mediators, should inform this new regulatory activity. Understanding how workplace demands and resource shortages negatively affect mediators can spur new policies designed to protect mediators from burning out and, in so doing, better enable the delivery of quality mediation.

To make this argument, this Article proceeds in four parts. Part I demonstrates that regulating the behavior of the mediator serves as the primary vehicle for safeguarding a quality mediation process. Part II discusses why workplace burnout develops and argues that mediators are susceptible to burnout given the nature of their work and their work environments. Part III then examines the consequences of burnout by synthesizing existing research on how burnout negatively impacts individuals' job performance and then extrapolating these research findings to the mediation setting. And, finally, Part IV proposes steps for reducing external stressors and increasing job resources in order to mitigate the risk of mediator burnout.

II. MEDIATOR, GUARDIAN OF MEDIATION QUALITY

Mediators are entrusted by disputants as well as our society's institutions to deliver a quality mediation process. Whether parties have voluntarily agreed to mediate or have been ordered to participate in a mediation, mediators are given the power to intervene in people's private conflicts, sometimes supervising resolutions that seriously impact people's legal rights and liabilities. Mediators perform their role under a protective blanket of confidentiality, with little oversight over what they say or do. In a way that is perhaps unique to other vocations, mediators take on great responsibility with little external accountability.¹²

Establishing accountability proves difficult, in part, because of the wide variety of contexts in which mediators work. Mediators may work in the public setting, as salaried mediators for in-house programs at courts¹³ or administrative

¹² Art Hinshaw, *Regulating Mediators*, 21 HARV. NEGOT. L. REV. 163, 186 (2016) (noting the lack of occupational regulation for mediators and the difficulty with suing mediators for malpractice); Michael L. Moffitt, *The Four Ways to Assure Mediator Quality (And Why None of Them Work)*, 24 OHIO ST. J. ON DISP. RESOL. 191, 204–14 (2009) (explaining why efforts to assure quality professional services work for many professions but not for mediators).

¹³ See, e.g., *Mediation in Family Law Cases*, BALTIMORE COUNTY GOVERNMENT (2016), <https://www.baltimorecountymd.gov/Agencies/circuit/mediation/mediation.html>.

agencies.¹⁴ Not all courts and administrative agencies have their own mediation centers or in-house staff, however, and instead outsource their mediation needs to a roster or panel of contract mediators who mediate on occasion, either as volunteers or for a fixed fee per case.¹⁵ Another public context in which mediators work is at non-profit neighborhood justice centers or community mediation centers, which provide free mediation services to local people and businesses, either directly or through partnerships with public institutions such as courts, schools, prisons, and other state agencies.¹⁶ These community-based mediation centers often rely upon a combination of salaried staff mediators and volunteer mediators.

Mediators also work within the private sphere. Some mediators have their own, free-standing small or solo practices, while others work for large regional or international mediation firms.¹⁷ Disputants might engage these private mediators directly or can select and hire private mediators off a roster maintained by a private organization such as the American Arbitration Association (AAA) or International Chamber of Commerce (ICC).¹⁸ Private corporations also rely on mediators to manage employee and consumer complaints. Similar to public institutions, private corporations may have their own in-house staff mediator, often in conjunction with the human resources department, or may maintain a roster of individual mediators to whom disputes are referred.¹⁹

Perhaps because mediators practice their vocation in such a

¹⁴ See, e.g., *Mediation*, U.S. HEALTH AND HUMAN RESOURCES (2016), <https://www.hhs.gov/about/agencies/dab/adr-services/mediation/index.html>.

¹⁵ See, e.g., *Multi Door Dispute Resolution Division*, DISTRICT OF COLUMBIA COURTS (2018), <https://www.dccourts.gov/superior-court/multi-door-dispute-resolution-division>.

¹⁶ See, e.g., *Tales from CCR Mediators*, CENTER FOR CONFLICT RESOLUTION (2018), <https://www.ccrchicago.org/>. For more on community mediation, see Timothy Hedeem, *The Evolution and Evaluation of Community Mediation: Limited Research Suggests Unlimited Progress*, 22 CONFLICT RESOL. Q. 101 (2004) (summarizing the successes and ongoing challenges of the community mediation movement); Lorig Charkoudian & Michal Bilick, *State of Knowledge: Community Mediation at a Crossroads*, 32 CONFLICT RESOL. Q. 233 (2015) (responding to Hedeem and updating his assessment ten years later).

¹⁷ See, e.g., JUDICATE WEST, <https://www.judicategwest.com/> (last visited Sept. 12, 2018); JAMS, <https://www.jamsadr.com/> (last visited Sept. 12, 2018).

¹⁸ AAA MEDIATION.ORG, <https://www.aaamediation.org> (last visited Sept. 12, 2018); INTERNATIONAL CHAMBER OF COMMERCE, <https://iccwbo.org/> (last visited Sept. 12, 2018). Unlike the AAA, which has a searchable directory, the ICC mediators can be appointed by the ICC depending on the language of the disputants' contract.

¹⁹ See, e.g., *Guide for Resolving Employee Disagreements—North America*, JOHNSON & JOHNSON (2017), https://www.jnj.com/_document?id=00000159-6a16-d7d5-abdd-ea37dd2c0000; *About REDRESS*, UNITED STATES POSTAL SERVICE (2018), <https://about.usps.com/what-we-are-doing/redress/about.htm>.

decentralized manner and in such a wide variety of contexts, the primary means by which the quality of mediation is safeguarded is by regulating the mediator.²⁰ While many acknowledge the variety of organizational systems in which mediators practice,²¹ these workplace settings are rarely targeted by regulations.²² Instead, the mediation community—those who practice mediation professionally and who promote the institutionalization of mediation—has long held to the conviction that a quality mediator will ensure a quality mediation process.²³

But what, then, assures a quality mediator? Both informal, soft-power forces and formal, hard-power regulations attempt to assure mediator quality by establishing a shared understanding of the general behaviors, skills, and qualifications associated with a good mediator.

A. *Informal Norms*

One method for assuring quality mediation is by identifying and promulgating behavioral norms for mediators. Mediation literature, such as training or skills manuals, written profiles of “expert” mediators, and storytelling about “good” and “bad” mediation offer ways in which these norms

²⁰ Michael Moffitt proposes a useful matrix for organizing mechanisms for occupational regulation. Such mechanisms can be public or private and can be activated at the front-end (entry to the profession) or the back-end (removal from the profession). Moffitt, *supra* note 12, at 203. Public/front-end steps include state licensure requirements to practice; public/back-end steps include government revocation of a professional license because of misconduct; private/front-end steps include consumers choosing to hire professionals based on reputation; and private/back-end steps include dissatisfied consumers filing complaints. *Id.*

²¹ Sarah Rudolph Cole, *Mediator Certification: Has the Time Come?*, 11 DISP. RESOL. MAG. 7, 7–10 (2005).

²² COLE ET AL., *supra* note 10, at § 11:1. There have been efforts to set standards for mediation provider organizations—whether public entities like courts and administrative agencies or private entities like mediation firms. However, most of these guidelines focus on how to ensure competence and quality of mediators through training and qualifications with only limited guidelines on external support structures that can assure program quality. For a summary of these regulatory efforts, see Sharon Press, *Ethics for Provider Organizations*, in DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 155–77 (Phyllis Bernard & Bryant Garth eds., 2002).

²³ COLE ET AL., *supra* note 10, at § 11; MODEL STANDARDS OF CONDUCT FOR MEDIATORS § VI (2005), available at https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf (requiring mediators to ensure the quality of the mediation process).

are developed and disseminated.²⁴ These materials introduce new initiates to the accepted practices of the mediation world. And, presumably, identifying and disseminating these narratives into the mainstream enables “free market” regulation of mediators under the theory that consumers will demand these norms when they engage a mediator or participate in a mediation process.²⁵

The essential mediator behaviors about which most of the field seems to agree, no matter the type, style, or context of mediation, fall into two primary categories. One category emphasizes how mediators build trust and rapport by using patience and tact, listening carefully, demonstrating empathy and

²⁴ See, e.g., SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, REPORT OF THE COMMISSION ON QUALIFICATIONS 17–19 (1989), https://cdn.ymaws.com/acrnet.org/resource/resmgr/docs/SPIDR_1989_Qualifications_Re.pdf (listing skills necessary for competent performance as a neutral mediator); DEBORAH M. KOLB ET AL., WHEN TALK WORKS: PROFILES OF MEDIATORS (Deborah M. Kolb & Assocs. eds., 2001); Daniel Bowling & David A. Hoffman, *Bringing Peace Into the Room: The Personal Qualities of the Mediator and Their Impact*, in BRINGING PEACE INTO THE ROOM 13 (Daniel Bowling & David A. Hoffman eds., 2003); ALLAN GOODMAN, BASIC SKILLS FOR THE NEW MEDIATOR (2d ed. 2005); STORIES MEDIATORS TELL (Eric R. Galton & Lela P. Love eds., 2012); VICTORIA PYNCHON & JOE KRAYNAK, SUCCESS AS A MEDIATOR FOR DUMMIES (2012); DOUGLAS N. FRENKEL & JAMES H. STARK, THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT 128 (Vicki Been et al. eds., 2d ed. 2012); JEAN POITRAS & SUSAN RAINES, EXPERT MEDIATORS: OVERCOMING MEDIATION CHALLENGES IN WORKPLACE, FAMILY, AND COMMUNITY CONFLICTS (2013); WILLIAM D. KIMSEY ET AL., MEDIATOR COMMUNICATION COMPETENCIES: PROBLEM SOLVING AND TRANSFORMATIVE PRACTICES (2013); JAMES J. ALFINI ET AL., MEDIATION THEORY AND PRACTICE (3d ed. 2013); and SUSAN NAUSS EXON, ADVANCED GUIDE FOR MEDIATORS (2014). These literary efforts to establish “good” mediation norms are frustrated by examples of “bad” mediation in popular media, such as the notorious “Wedding Crashers” mediation scene, WEDDING CRASHERS (New Line Cinema 2005), the television series “Fairly Legal,” *Fairly Legal* (USA Network 2011), luckily canceled after one season, and “Untying the Knot” on BravoTV, *Untying the Knot* (BravoTV 2013).

²⁵ Moffitt, *supra* note 12, at 207–12. The likelihood that consumers can enforce quality mediation by hiring “good” mediators and demanding “good” mediation practice is questionable. As Moffitt notes, the forces at play in the mediator market rely on proxies, such as mediator reputation, that do not correlate to quality mediation. *Id.* And, the individualized and confidential nature of mediation creates a lack of transparency making it nearly impossible for consumers to make educated decisions about mediators. *Id.* But, that has not stopped some jurisdictions from trying to educate consumers about mediation. For example, the Maryland Judiciary created a “Consumer’s Guide” to mediation in the state identifying the role of the mediator and the basic components of the process. *Consumer’s Guide: Alternative Dispute Resolution (ADR) Services in Maryland*, MARYLAND JUDICIARY: MEDIATION AND CONFLICT RESOLUTION OFFICE (MACRO) (2018), <https://mdcourts.gov/sites/default/files/import/macro/pdfs/consumersguide/consumersguideto adrservices.pdf>.

respect,²⁶ and maintaining a non-judgmental or impartial orientation toward the parties' perspectives.²⁷ These interventions lay the foundation for the mediator's neutral role in relation to the parties and their dispute, and also create a climate conducive to problem-solving and constructive dialogue.²⁸ A second category of behaviors encompasses "substantive interventions": activities like issue identification, agenda setting, and shaping proposals,²⁹ all of which are activities requiring flexibility and adaptability, curious questioning,³⁰ strategic planning,³¹ and organization.³² Together, these two categories comprise widely-accepted norms of what a good mediator does to deliver a quality mediation process. Different segments of the mediation community might emphasize some of these

²⁶ See, e.g., Stephen B. Goldberg, *The Secrets of Successful Mediators*, 21 NEGOT. J. 365 (2005) (identifying rapport building as the key to mediator success); Stephen B. Goldberg & Margaret L. Shaw, *The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three*, 23 NEGOT. J. 393, 398 (2003); Austin Sarat, *Patrick Phear: Family and Divorce Mediation*, in WHEN TALK WORKS: PROFILES OF MEDIATORS 200–01 (Deborah M. Kolb & Assocs. eds., 2001) (explaining that "it's hard work to mediate, to listen to the subtleties and nuances of what people are saying" and not lose patience); Neil H. Katz & Adriana Sosa, *The Emotional Advantage: The Added Value of the Emotionally Intelligent Negotiator*, 33 CONFLICT RESOL. Q. 57 (2015) (evaluating the importance of managing emotions effectively in negotiations).

²⁷ Kenneth Kressel, *Mediation Revisited*, in THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 726, 740 (Morton Deutsch et al. eds., 2d ed. 2006) (noting that neutrality is often invoked as the "sine qua non of rapport building"); POITRAS & RAINES, *supra* note 24, at 81 (describing mediator neutrality as "equidistance," meaning the mediator behaves symmetrically, showing sympathy and asking difficult questions to both parties).

²⁸ Kressel, *supra* note 27, at 726, 738–41 (discussing "reflexive" and "contextual" mediator interventions).

²⁹ *Id.* at 741.

³⁰ See, e.g., Kenneth Kressel, *Francis Butler: Questions that Lead to Answers in Child Custody Mediation*, in WHEN TALK WORKS: PROFILES OF MEDIATORS 45 (Deborah M. Kolb & Assocs. eds., 2001) (describing how mediator Francis Butler used "focused questioning and her continuing flow of substantive ideas" to engineer parties' progress in a divorce mediation).

³¹ See, e.g., Christine B. Harrington, *Howard Bellman: Using "Bundles of Input" to Negotiate an Environmental Dispute*, in WHEN TALK WORKS: PROFILES OF MEDIATORS 133–34, 138–44 (Deborah M. Kolb & Assocs. eds., 2001) (describing how mediator Howard Bellman used a mixture of different strategies to build consensus among distrustful parties, planned negotiations of multiple disputes during "reg-neg" mediation about nuclear waste disposal).

³² These skills enhance the perception of procedural justice and mediator impartiality. FRENKEL & STARK, *supra* note 24, at 128 (citing E. ALLEN LIND & TOM TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1998)); Nancy Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U.L.Q. 787 (2001)).

skills and behaviors more than others or might add other interventions to the list; nevertheless, there appears to be consensus in the mediation literature that these norms constitute a “quality” mediation process and should apply no matter who the mediator is, who the parties are, and what the dispute involves.

Relying on informal norms to assure quality mediation proves problematic. First, these norms largely function as “folk concepts” in that their meaning and purpose are tacitly understood even though their function and mechanics are rarely evaluated objectively.³³ Thus, even if all mediators and disputants could agree, for example, that “curious questioning” denotes a quality mediation, they likely could not identify the elements that comprise this skill or its effective deployment. Second, promulgating such norms informally, through literature and storytelling, offers no accountability because it neither compels mediators to abide by these norms nor guarantees that parties will know to enforce them.³⁴ Informal means of promoting norms are therefore unlikely to result in educated consumers who, under the “free market forces” theory of regulation, will reward quality mediators and punish poor mediators.³⁵ Thus, if a quality mediator assures a quality mediation process, informal means of promoting quality have limited reach.

B. *Formal Rules*

In addition to informal means of establishing mediator quality, there exists a formal, regulatory framework of statutes, rules, and written ethical

³³ Janet Rifkin et al., *Toward a New Discourse for Mediation: A Critique of Neutrality*, 9 MEDIATION Q. 151, 151 (1991) (comparing the mediation norm of neutrality to a folk concept). One notable exception is the recent effort by the Maryland judiciary to study the effect of specific mediator strategies and techniques in court-connected small claims and family mediation programs. *Statewide Evaluation of Court ADR*, MARYLAND COURTS, <https://www.courts.state.md.us/courtoperations/adrprojects> (last visited Oct. 14, 2018).

³⁴ E.g., Hinshaw, *supra* note 12, at 164–69 (telling the haunting tale of Gary J. Karpin, an Arizona man who held himself out as a mediator and, in the process, conned more than 300 people before he was criminally convicted for theft and fraud).

³⁵ Moffitt, *supra* note 12, at 209–12 (explaining why reputational market forces that work in some contexts are unlikely to assure quality in the mediation context). Despite good reasons to doubt the functionality of “free market forces” in mediation, this theory still holds sway and serves as a frequent rebuttal to create formal licensure or certification requirements for mediators. See, e.g., *Meeting the Challenge of Mediator Excellence: Final Report of the Maryland Mediator Quality Assurance Committee*, MARYLAND MEDIATOR QUALITY ASSURANCE COMMITTEE, 3, 28, 32–33 (2004), <https://www.courts.state.md.us/sites/default/files/import/macro/pdfs/reports/meetingthec hallengeofmediatorexcellence2004report.pdf> (attempting to find a balance between a “laissez-faire,” market-based approach to quality assurance and stricter quality control measures).

standards.³⁶ These formal regulations also attempt to safeguard a fair, quality mediation process by focusing on the person of the mediator.³⁷

Take, for example, the Model Standards of Conduct for Mediators (Model Standards). The AAA, the American Bar Association (ABA), and the Association for Conflict Resolution (ACR) together wrote and adopted these Model Standards to instruct all mediators, regardless of practice area, on their fundamental ethical responsibilities.³⁸ The Model Standards' purpose is "to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes."³⁹ Under the Model Standards, mediators must honor parties' self-determination, maintain impartiality and confidentiality, monitor their own competence, and take steps to ensure a quality process.⁴⁰ Mediators in the public sphere may be governed by court rules, regulations, and statutes that either incorporate these Model Standards through explicit reference⁴¹ or generally require mediators to adhere to similar standards of confidentiality, neutrality, and respect for parties' self-

³⁶ Mediation's institutionalization throughout the American legal system and across the private sector has led to growing concerns about how to balance the quality and fairness of a mediation process with access and effectiveness. COLE ET AL., *supra* note 10, at § 2 (discussing difficulty in promoting competing goals of mediation quality, effectiveness, access, and fairness).

³⁷ Press, *supra* note 22, at 155–77.

³⁸ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 23 (outlining mediators' ethical responsibilities for party self-determination, mediator impartiality, prevention of conflicts of interest, mediator competence, confidentiality, quality of the process, advertising and solicitation, fees and other charges, and advancement of the mediation practice). Additional rules also exist for specialized areas of mediation practice. See, e.g., STANDARDS OF PRACTICE FOR PROFESSIONAL FAMILY MEDIATORS (ACAD. PROF. FAM. MEDIATORS 2014), available at <https://apfmnet.org/standards-practice-professional-family-mediators/>; STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES (A.B.A. 2001), https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/attach.authcheckdam.pdf.

³⁹ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 23, at Preamble.

⁴⁰ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 23, at §§ 1–VI. The Standards also regulate mediators' advertising, solicitation, and fee charging practices, and require mediators to engage in activities that advance the practice of mediation. *Id.* at §§ VII–IX.

⁴¹ See, e.g., NEV. CT. R. PRAC. 8TH JUDICIAL DIST. 5.106 (West 2018) (requiring mediators at the Clark County Family Court's Family Mediation Center to adhere to Model Standards of Conduct for Mediators); ILL. 4TH JUDICIAL CIR. CT. R. 11-4 (West 2018) (listing among the duties of a family mediator compliance with the Model Standards of Conduct for Mediators); 12 OKL. ST. ANN. § 1825(c) (West 2018) (requiring mediators who are not certified under the state's Dispute Resolution Act to adhere to the Model Standards of Conduct for Mediators).

determination⁴²—though very few jurisdictions have adopted the Model Standards in this way. Mediators in the private sphere who, for example, want to be listed on the AAA mediator roster are also required to adhere to the Model Standards as well as additional rules and procedures established by the AAA.

Public institutions and private mediation providers further attempt to safeguard quality mediation through formal requirements for mediator training and certification. Private mediation firms will provide training for their own mediators or will require them to complete a specified quantity or type of continuing education credits.⁴³ Similarly, in the public sphere, state legislatures, courts, and administrative agencies require their mediators to satisfy certain training requirements or to have certain qualifications in order to be eligible to mediate cases.⁴⁴ Some jurisdictions go a step further and regulate mediator training, certification, and credentialing programs.⁴⁵ Mediation trainers who want court-approval or the imprimatur of a professional association, such as ACR, have to include specific topics or provide the opportunity for hands-on exercises in their curriculum.⁴⁶

In addition to efforts to formalize “good” mediation practices, a handful of jurisdictions make provisions to address “bad” mediation practices. For

⁴² COLE ET AL., *supra* note 10, at § 11:3. Some states have also adopted the Uniform Mediation Act, which defines confidentiality in the mediation setting and outlines its limitations, while other states have enacted their own laws governing mediation confidentiality. UNIFORM MEDIATION ACT (NAT’L CONF. OF COMMISSIONERS ON UNIFORM ST. LAWS 2003); *see, e.g.*, MARYLAND MEDIATION CONFIDENTIALITY ACT, 17 MD. CODE ANN. § 3-1801 et seq. (West 2018).

⁴³ *See, e.g.*, JAMS Training and Development Philosophy, JAMS, <https://www.jamsadr.com/careers-training/> (last visited Aug. 29, 2018).

⁴⁴ *See, e.g.*, 12 OKL. ST. ANN. § 1803 (West 2018) (requiring the Administrative Director of the Courts to promulgate rules and regulations that include, among other things, mediator qualifications to certify mediator competence).

⁴⁵ *See* Mediation Training Standards and Procedures including Appointments to the Mediation Training Review Board, Fla., Administrative Order No. AOSC17-25 (May 2017), *available at* <http://www.flcourts.org/core/fileparse.php/611/urlt/AOSC17-25.pdf>. Florida has gone further in this direction than any other state. The Supreme Court of Florida adopted mediation training standards and procedures and created a Mediation Training Review Board as the disciplinary body tasked with ensuring that mediation trainers meet course content requirements and use required training methodology to meet learning objectives.

⁴⁶ *See, e.g.*, ASSOCIATION FOR CONFLICT RESOLUTION, MODEL STANDARDS FOR MEDIATION CERTIFICATION PROGRAMS (2011), *available at* <https://cdn.ymaws.com/acrnet.org/resource/resmgr/docs/ModelStandardsCertification.pdf>; *see also* *How to Become a Florida Supreme Court Certified Mediator: Step by Step Guide*, FLORIDA COURTS (2017), *available at* <http://www.flcourts.org/core/fileparse.php/534/urlt/HowtoBecomeaMediatorGuide.pdf>.

example, some courts acknowledge the possibility of mediator negligence claims, though none has found a mediator liable.⁴⁷ Two courts have refused to enforce mediated agreements in cases of mediator error⁴⁸ and one court denied immunity to a mediator in a defamation suit.⁴⁹ Thus, while formal court action theoretically could offer a path for mediation participants to hold mediators accountable and push back on bad mediation practices, in reality this approach has little-to-no effect as a mechanism for mediation quality-assurance.⁵⁰

States also offer formal means of regulating mediator behavior through statutes and court rules, though these, too, have limited practical effect. For example, some states create exceptions to mediators' statutory immunity and confidentiality protections if they act unethically or maliciously.⁵¹ While such

⁴⁷ See, e.g., *Chang's Imports, Inc. v. Srader*, 216 F. Supp. 2d 325 (S.D.N.Y. 2002) (dismissing a claim of mediator negligence because plaintiff could not demonstrate a legal standard for the appropriate standard of care for a mediator); *Bastien v. Kershek*, No. 37-2009-00084767-CU-BC-CTL, 2012 WL 1305922 (Cal. Ct. App. Apr. 17, 2012) (dismissing appeal of a summary judgment decision that dismissed plaintiff's fraud and negligence claims against a mediator on the grounds that the statute of limitations had expired); *Pales v. Carrillo*, No. 1-12-3107, 2013 WL 6576480 (Ill. App. Ct. Dec. 12, 2013) (affirming lower court's dismissal of plaintiff's mediator negligence claim because plaintiff failed to plead a proper cause of action, specifically the elements of mediator duty and breach). See also Michael Moffitt, *Suing Mediators*, 83 B.U.L. REV. 147 (2003) (an expanded discussion of mediator negligence claims and the rarity of such claims succeeding); Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81, 125–30 (2003); COLE ET AL., *supra* note 10, at § 11:13.

⁴⁸ See *Yun Zhou v. Hao Zhang*, 2017 WL 659965 (Conn. Super. Ct. Feb. 8, 2017), *amended on reh'g*, 2017 WL 951173 (Conn. Super. Ct. Feb. 8, 2017) (invalidating a portion of a post-nuptial agreement that was signed in mediation after the mediator misrepresented the confidentiality of written materials prepared during the mediation); *Fetcher v. Ard*, No. 6:08-CV-1078-ORL-19DAB, 2009 WL 2423295, at *1 (M.D. Fla. Aug. 4, 2009) (vacating a default judgment that had relied upon a mediator's inaccurate settlement report). Note that in both of these cases, the mediator is not personally sanctioned; rather, the courts simply undo the legal consequences of the mediated agreements; James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006) (discussing courts continuing to enforce mediated agreements despite claims of mediator misconduct, bias, duress, undue influence.); COLE ET AL., *supra* note 10, at §§ 7:10–7:13.

⁴⁹ *White v. Holton*, No. 927915E, 1993 WL 818800, at *1 (Mass. Super. Ct. Oct. 4, 1993) (rejecting defendant's claims that, as a mediator, she was entitled to quasi-judicial immunity). Given the circumstances in this case, however, it is questionable whether the defendant was in fact a mediator.

⁵⁰ Moffitt, *Suing Mediators*, *supra* note 47, at 149–82; Moffitt, *supra* note 12, at 212–14.

⁵¹ See e.g., IOWA CODE ANN. § 679C.115 (West 2018); MICH. COMP. LAWS ANN. § 691.1557a (West 2018). Both statutes contain the same language granting mediators

MEDIATOR BURNOUT

statutes make it possible for consumers to bring claims against mediators, the claiming burden rests on the consumer and it remains uncertain whether a claim would extract a meaningful remedy.⁵² Another formal approach to regulating mediators uses grievance procedures to remove or de-certify mediators who egregiously violate mediation norms.⁵³ For example, state judiciaries have established consumer grievance and mediator removal procedures for mediators on court rosters.⁵⁴

Taken all together, these informal and formal means of promoting quality mediation focus on molding individual mediator behavior to the norms of “good” mediation practice. The onus lies on mediators to self-monitor and to maintain ethical behavior and for parties to recognize and call out bad mediator behavior.

However, as this Article demonstrates, there are additional avenues for safeguarding mediation quality besides the hope and expectation that mediators will abide by norms of good practice. Mediators do not work in a vacuum; to the contrary, they work in a variety of contexts and are exposed to workplace stressors that, over time, can cause even highly skilled and ethical mediators to burn-out. Currently, a mediator’s work environment is not adequately considered by the regulatory framework designed to ensure that disputants receive the quality mediation process they deserve. A better understanding of these stressors and how burnout affects mediators’ job performance may open new doors for protecting mediators and ensuring a fair, effective, and quality mediation process.

immunity from liability unless they act in bad faith or “with malicious purpose or in a manner exhibiting wanton and willful disregard of the rights, safety, or property.” For a critique of mediator immunity statutes and case law; see Scott H. Hughes, *Mediator Immunity: The Misguided and Inequitable Shifting of Risk*, 83 OR. L. REV. 107 (2004). See also COLE ET AL., *supra* note 10, at §§ 11:10–11:12 (describing limitations on scope of statutory and common law provisions for mediator immunity).

⁵² Moffitt, *Suing Mediators*, *supra* note 47.

⁵³ COLE ET AL., *supra* note 10, at § 11:9 (outlining programs for monitoring and continuing accountability of court-connected mediators).

⁵⁴ See, e.g., *Mediator Complaint Review Process*, NEW JERSEY COURTS, available at <https://njcourts.gov/courts/assets/civil/medcomplaintrevprocess.pdf?cacheID=zRCZnes> (last visited Aug. 29, 2018); see also Office of the Executive Secretary of the Supreme Court of Virginia, *Procedures for Complaints Against Certified Mediators, Mediation Trainers, and Mediator Mentors*, VIRGINIA’S JUDICIAL SYSTEM (2011), available at <http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/home.html>.

Florida is especially well-known for establishing not only mediator ethical standards but also a grievance procedure for enforcing those standards. For a discussion of Florida’s approach, see Sharon Press, *Mediator Ethical Breaches: Implications for Public Policy*, 6 Y.B. ARB. & MEDIATION 107 (2014) (explaining the history and policy rationale for Florida’s mediator ethical standards and grievance process).

III. MEDIATOR SUSCEPTIBILITY TO BURNOUT

The fields of workplace psychology and organizational management offer important insights that can promote quality control measures for mediation. Fifty years of research into workplace burnout, a form of occupational stress, demonstrates a complex relationship between people and their workplaces. Specifically, burnout correlates with specific kinds of work as well as certain workplace stressors.⁵⁵ There is substantial reason to think that the nature of mediators' work makes them susceptible to burnout and this prospect is cause for serious concern.

A. *What Is Burnout*

The metaphor of "burnout" emerged in the 1970s to describe occupational stress among human services professionals. In 1974, a consulting psychiatrist at a free drug clinic in New York's East Village applied the term "burnout," which at that time colloquially referred to the consequence of chronic drug abuse, to the behavior he observed among the clinic's volunteers who, over time, had become emotionally exhausted, de-motivated, and less committed to their work.⁵⁶ Also in the mid-70s, another researcher, Dr. Christina Maslach, independently discovered that human services practitioners in California used the term "burnout" to describe their exhaustion as well as negative perceptions of their clients and their professional selves.⁵⁷ Based on her interviews and field observations, Maslach created a survey instrument to assess what she identified as the three core components of burnout: emotional exhaustion, depersonalization, and reduced professional efficacy.⁵⁸

⁵⁵ Although researchers have identified many antecedents and consequences of burnout, this Part III focuses only on findings that are most relevant to mediators.

⁵⁶ Herbert J. Freudenberger, *Staff Burn-Out*, 30 J. SOC. ISSUES 159 (1974) (describing the feelings of burnout experienced among people working in therapeutic communities); Schaufeli et al., *supra* note 1, at 205 (explaining different origins of the metaphor of burnout).

⁵⁷ Schaufeli et al., *supra* note 1, at 205–06.

⁵⁸ Maslach et. al., *supra* note 2. In addition to Maslach's original Burnout Inventory, which focused on human services professionals, she and other colleagues also developed a General Survey instrument to use in any profession, including those that did not have demanding social interactions. Both of these surveys have been used in hundreds of studies and are validated survey instruments. See William B. Schaufeli et al., *The MBI General Survey*, in *MASLACH BURNOUT INVENTORY MANUAL* (Christina Maslach et al., eds., 3d ed. 1996). Although it is the most popular, Maslach's survey is not the only survey instrument used to assess burnout. Other researchers have developed translations in other languages and reworked questions to include both positively and negatively phrased items or to

Today, these three distinct yet interconnected components remain the defining characteristics of occupational burnout.⁵⁹ The first component, emotional exhaustion, comprises the core dimension of burnout. Individuals with burnout feel overextended and emotionally drained by their work.⁶⁰ With the depletion of their emotional resources, burned out workers may feel they can no longer commit emotionally and psychologically to their clients at the same levels they had in the past.⁶¹ This “compassion fatigue” generates a sense of personal limitation, or inability to maintain a desired standard of care and responsibility for clients, in turn resulting in tension, stress, and feelings of professional frustration.⁶²

The second component of burnout is cynicism toward, and negative detachment from, either clients served or the work itself.⁶³ Burned-out workers demonstrate their cynicism and detachment by treating clients “as objects rather

explore alternative characteristics. See e.g., Tage S. Kristensen et al., *The Copenhagen Burnout Inventory: A New Tool for the Assessment of Burnout*, 19 WORK & STRESS 192 (2005) (presenting the Copenhagen Burnout Inventory); Evangelia Demerouti et al., *The Convergent Validity of Two Burnout Instruments: A Multitrait–MultiMethod Analysis*, 19 EUR. J. PSYCH. ASSESSMENT 12 (2003); (comparing the Oldenburg Burnout Inventory and the Maslach Burnout Inventory–General Survey); AYALA MALACH PINES ET AL., BURNOUT FROM TEDIUM TO PERSONAL GROWTH (1981) (discussing the Burnout Tedium Measure); Arie Shirom & Samuel Melamed, *A Comparison of the Construct Validity of Two Burnout Measures in Two Groups of Professionals*, 13 INT’L J. STRESS MGMT. 176 (2006) (comparing the Maslach General Survey and the Shirom–Melamed Burnout Measure); see Veerle Brenninkmeijer & Nico W. Van Yperen, *How to Conduct Research on Burnout: Advantages and Disadvantages of Unidimensional Approach to Burnout*, 60 OCCUPATIONAL & ENVTL. MED. 16 (2003) (discussing how to conduct research in burnout).

⁵⁹ See Cynthia L. Cordes & Thomas W. Dougherty, *A Review and an Integration of Research on Job Burnout*, 18 ACAD. MGMT. REV. 621, 624–25 (1993) (noting that studies attempting to isolate each component of burnout used problematic design). Researchers have developed a number of different models to explain how three components of burnout interact amongst themselves—e.g., whether one (e.g., emotional exhaustion) serves as a precursor for the two others—and also whether each of the three components can be isolated and directly traced back to specific situational or individual causes. See Toon W. Taris et al., *Are There Causal Relationships Between the Dimensions of the Maslach Burnout Inventory? A Review and Two Longitudinal Tests*, 19 WORK & STRESS 238, 242 (reviewing studies of the Maslach Burnout Inventory and whether certain components of burnout trigger others).

⁶⁰ Arnold B. Bakker & Patricia L. Costa, *Chronic Job Burnout and Daily Functioning: A Theoretical Analysis*, 1 BURNOUT RESEARCH 112, 113 (2014).

⁶¹ Christina Maslach & Susan E. Jackson, *The Measurement of Experienced Burnout*, 2 J. OCCUPATIONAL BEHAV. 99, 99 (1981).

⁶² Cordes & Dougherty, *supra* note 59, at 623.

⁶³ *Id.*

than people” and by using “derogatory or abstract language (e.g. the ‘kidney’ in room 212)” to create emotional distance from clients and compartmentalize their professional and personal lives.⁶⁴ This “callous or even dehumanized perception of others can lead staff to view their clients as somehow deserving of their troubles.”⁶⁵

The third component of burnout is a perceived lack of personal accomplishment and professional efficacy. Individuals with burnout report feeling less competent and successful at work⁶⁶ and also tend to evaluate themselves and their job performance negatively.⁶⁷ When put together, these three elements of burnout constitute a stress response that results in the “deterioration or depletion of emotional and cognitive resources over time.”⁶⁸

Burnout was initially identified, and remains most prevalent, among human services professions.⁶⁹ These professions not only center on helping people⁷⁰ and are, by definition, “people-oriented”⁷¹—such as social workers, teachers, criminal justice professionals, and mental health and healthcare providers—but also impose emotional demands on workers.⁷² Although early occupational burnout research began with human services professionals, it has

⁶⁴ *Id.*

⁶⁵ Maslach & Jackson, *supra* note 61, at 99 (citing WILLIAM RYAN, *BLAMING THE VICTIM* (1971)).

⁶⁶ *Id.*

⁶⁷ Cordes & Dougherty, *supra* note 59, at 623–24.

⁶⁸ Arie Shirom, *Job-Related Burnout*, in *HANDBOOK OF OCCUPATIONAL HEALTH PSYCHOLOGY* 245–65 (J.C. Quick & L.E. Tetrick eds., 2003); Michael P. Leiter & Christina Maslach, *Areas of Worklife: A Structured Approach to Organizational Predictors and Job Burnout*, in 3 *RESEARCH IN OCCUPATIONAL STRESS AND WELL BEING: EMOTIONAL AND PHYSIOLOGICAL PROCESSES AND POSITIVE INTERVENTION STRATEGIES* 91 (Pamela Perrewé et al. eds., 2003) (describing “burnout” as an inherent mismatch between a worker and her workplace).

⁶⁹ WILMAR SCHAUFELI & DIRK ENZMANN, *THE BURNOUT COMPANION TO STUDY & PRACTICE* 9 (1998) (noting the dramatically higher reports of burnout among human services professionals like psychologists and psychotherapists).

⁷⁰ Cordes & Dougherty, *supra* note 59, at 628.

⁷¹ Michael P. Leiter & Christina Maslach, *Burnout and Health*, in *HANDBOOK OF HEALTH PSYCHOLOGY* 415 (A. Baum, T. Revenson & J. Singer eds., 2000) (“The therapeutic relationships that such providers develop with their service recipients can be quite stressful because they demand an ongoing and intense level of personal, emotional contact. Within such occupations, the norms are clear, if not always stated explicitly: to be selfless and put others’ needs first, to work long hours and do whatever it takes to help a client or patient or student, to go the extra mile and give one’s all.”)

⁷² Maslach & Jackson, *supra* note 61, at 99; Céleste M. Brotheridge & Alicia A. Grandey, *Emotional Labor and Burnout: Comparing Two Perspectives of “People Work”*, 60 *J. VOCATIONAL BEHAV.* 17, 19–20 (2002).

since been generalized across many workplaces⁷³ and is considered a medical syndrome in some parts of the world.⁷⁴

B. *Why Burnout Happens*

Based on empirical studies examining burnout, researchers have identified a collection of situational and individual factors associated with burnout. Situational factors relate to the structure of the workplace environment itself whereas individual factors include the innate characteristics that might make a particular worker more or less susceptible to burnout, such as personality⁷⁵ or cognitive ability or socio-economic status.⁷⁶ Because this Article focuses on stressors that can be targets for policy interventions, this Section only discusses research into the workplace contributors to burnout.

A prominent theory explaining the external or environmental dimension

⁷³ See Evangelia Demerouti et al., *The Job Demands-Resources Model of Burnout*, 86 J. APPLIED PSYCH. 499, 499 (2001) (citations omitted) (explaining the expansion of burnout research beyond client-based professions to include the service industry and autonomous work (e.g., computer programming) that does not require regular face-to-face or voice-to-voice interaction with clients).

⁷⁴ See Renzo Bianchi et al., *Is It Time to Consider the "Burnout Syndrome" A Distinct Illness?*, 3 FRONT. PUB. HEALTH 1 (2015). Burnout has been added to the International Classification of Diseases and in several European countries is a diagnosed medical syndrome. See SCHAUFELI & ENZMANN, *supra* note 69, at 39–40, 86–89; Ivanka Savic, *Structural Changes of the Brain in Relation to Occupational Stress*, 25 CEREBRAL CORTEX 1554, 1554 (2015) (noting that only a fraction of burnout individuals are helped by anti-depressants). Burnout's medical diagnosis is distinct from depression. While burnout and depression may share some common associated symptoms, burnout is specific to the work context whereas depression exists in all aspects of a person's life. *Id.*

⁷⁵ Gene Alarcon et al., *Relationships Between Personality Variables and Burnout: A Meta-Analysis*, 23 WORK & STRESS 244, 257 (2009). Alarcon examined the correlations between certain personality traits (e.g., hardiness, extraversion, conscientiousness, agreeableness) and each of the burnout dimensions, which include emotional exhaustion, depersonalization, and personal accomplishment. *Id.* Some personality types seem more susceptible to burnout than others, suggesting that burnout is more likely when there is a misfit between personality and job demands. *Id.* at 259–60. Because personality and burnout have important associations, burnout interventions that target changing work environment may not benefit all employees the same way and certain personality types may need different kinds of workplace support to help them manage burnout. *Id.*

⁷⁶ Jari J. Hakanen et al., *A 35-Year Follow-Up Study on Burnout Among Finnish Employees*, 16 J. OCCUPATIONAL HEALTH PSYCH. 345 (2011) (conducting a three-wave 35-year prospective study and finding that childhood socio-economic status and cognitive ability were positively associated with educational level, which in turn was related to working conditions in early adulthood, which in turn was associated with mid-career job burnout).

of workplace burnout asserts that burnout develops slowly, over time, beginning with an imbalance of high job demands⁷⁷ and low job resources.⁷⁸ Job demands are any thing that has to be done at work,⁷⁹ such as hours clocked, caseload managed, or reports written, as well as intangible aspects of the job, such as intensity of client interactions or the severity of their problems.⁸⁰ In addition to volume and type of work, the organizational setting in which people work also creates job demands.⁸¹ Resources, on the other hand, can be any aspect of the job that makes it doable or helps a worker remain engaged, such as monetary, social, or intrinsic rewards.⁸² Thus, just as workplace structure can serve as an obstacle to meeting job demands, it can also operate as a resource for the worker.

Job demands are not always a bad thing; but, they can become stressors, the antecedents to burnout, when meeting these demands exacts a high cost on a worker and there are insufficient resources available to meet those demands over time.⁸³ This imbalance of demands and resources leads to the development of negative attitudes and behaviors by creating a two-part negative spiral.⁸⁴ First,

⁷⁷ Demerouti et. al., *supra* note 73, at 501 (“Job demands refer to those physical, social, or organizational aspects of the job that require sustained physical or mental effort and are therefore associated with certain physiological and psychological costs (e.g., exhaustion).”); *see also* Salla Toppinen-Tanner et al., *The Process of Burnout in White- and Blue-Collar Jobs: Eight-Year Prospective Study of Exhaustion*, 23 J. ORGANIZATIONAL BEHAV. 555, 564–67 (2002) (comparing the connections between job demands and job resources on the three components of burnout for blue-collar and white-collar workers); Gene M. Alarcon, *A Meta-Analysis of Burnout with Job Demands, Resources, and Attitudes*, 79 J. VOCATIONAL BEHAV. 549, 550 (2011).

⁷⁸ Demerouti et al., *supra* note 73, at 501 (“Job resources refer to those physical, psychological, social, or organizational aspects of the job that may do any of the following: (a) be functional in achieving work goals; (b) reduce job demands at the associated physiological and psychological costs; (c) stimulate personal growth and development.”)

⁷⁹ Wilmar B. Schaufeli & Arnold B. Bakker, *Job Demands, Job Resources, and Their Relationship with Burnout and Engagement: A Multi-Sample Study*, 25 J. ORGANIZATIONAL BEHAV. 293, 296 (2004) (“Demands are the ‘things that have to be done.’”).

⁸⁰ SCHAUFELI & ENZMANN, *supra* note 69, at 83.

⁸¹ Raija Kalimo, *Knowledge Jobs—How to Manage Without Burnout?*, 25 SCAND. J. WORK ENVIRON. HEALTH 605, 606 (1999) (explaining factors beyond heavy work load that contribute to burnout).

⁸² Schaufeli & Bakker, *supra* note 79, at 296; Leiter & Maslach, *supra* note 68, at 95–100.

⁸³ Schaufeli & Bakker, *supra* note 79, at 296.

⁸⁴ Bakker & Costa, *supra* note 60, at 113. A consequence of burnout, therefore, is self-undermining behavior. Specifically, research suggests that high work demands are closely associated with emotional exhaustion while scarce work resources correlate with cynicism and depersonalization. Demerouti et al., *supra* note 73, at 508; *cf.* Arnold B. Bakker et al., *Using the Job Demands-Resources Model to Predict Burnout and Performance*, 43 HUM.

the imbalance progressively depletes a person's energy, diminishing the personal resources they can draw upon and requiring more and more energy to meet existing work demands.⁸⁵ Second, as individuals begin to experience burnout—feeling exhausted, cynical, and ineffective and disengaging from their work—they are less likely to reach out and take advantage of the job resources that could alleviate their job demands.⁸⁶

Although researchers have identified a multitude of job demands⁸⁷ and resources relating to burnout, those most salient to mediators are 1) the job demands of emotional labor and role or values conflicts and 2) the job resources of autonomy and supportive work relationships.

1. DEMANDS OF EMOTION WORK AND ROLE CONFLICT

Researchers find that jobs requiring “emotion work” strongly correlate with burnout.⁸⁸ “Emotion work” involves live, personal contact with clients or

RESOURCE MGMT. 83 (2004) (confirming that high job demands and low job resources correlated with burnout components but finding that high job resources did not necessarily mitigate work demands).

⁸⁵ Bakker & Costa, *supra* note 60, at 115. One group of researchers argues that “employees at risk for burnout create more job demands over time” because employees “with higher levels of daily exhaustion will make more mistakes, which then need to be corrected again, adding to the already high job demands.” *Id.*

⁸⁶ In one longitudinal study, researchers found that efforts to gain emotional distance from demanding and threatening patients only ended up evoking the very same demanding and threatening patient behaviors the workers had been trying to avoid. Arnold B. Bakker et al., *Patient Demands, Lack of Reciprocity, and Burnout: A Five-Year Longitudinal Study Among General Practitioners*, 21 J. ORGANIZATIONAL BEHAV. 425, 438 (2000).

⁸⁷ For example, job demands are categorized into *physical demands* (including indoor climate and air quality, temperature, illumination and other rays, noise and vibrations, and office design); *task demands* (including occupational category, routine jobs, job future ambiguity, interactive organizational demands, and work overload); *role demands* (including role conflicts, role ambiguity, and work-home demands); and *interpersonal demands* (including status incongruity, social density, abrasive personalities, leadership style, team pressures, and diversity). JAMES CAMPBELL QUICK ET AL., PREVENTIVE STRESS MANAGEMENT IN ORGANIZATIONS 22 (1997).

⁸⁸ Christina Maslach et al., *Job Burnout*, 52 ANN. REV. PSYCHOL. 397, 408 (2001) (discussing research into emotion work, or those jobs requiring emotional regulation on the job, which suggests that emotion work contributes to burnout over and above traditional job stressors); Brotheridge & Grandey, *supra* note 72, at 17 (studying the nature or quality of emotional labor experiences and how they relate to burnout); Arnold B. Bakker & Ellen Heuven, *Emotional Dissonance, Burnout, and In-Role Performance Among Nurses and Police Officers*, 13 INT’L J. STRESS MGMT. 423, 425 (2006) (noting that empirical research demonstrates that job-related stressors correlate more strongly with burnout than client-related stressors); Gérard Näring et al., *Beyond Demand-Control: Emotional Labour and*

the public and requires workers to control their emotions and feelings.⁸⁹ Workers might be required to regulate their emotional expressions and control their automatic or natural emotional response in order to comply with organizational or professional rules, to induce certain behaviors in their clients, or both.⁹⁰

Mediation unquestionably entails emotion work. The mediator's job is to help parties who are in conflict, a situation that inevitably exposes the mediator to a broad range of emotions—anger, dismay, denial, guilt, fear, sympathy, and many others. Even a dispute that appears impersonal in nature contains human elements to which a mediator must be attuned.⁹¹ Mediators must take care to monitor how they themselves react to parties in order to maintain their impartiality and protect parties' self-determination.⁹² Mediators must therefore be aware of, and constantly regulating, their outward expressions to parties.

Mediators' emotional work also goes into developing rapport, or a trusting and empathic connection, so parties not only trust the mediator but the

Symptoms of Burnout in Teachers, 20 WORK & STRESS 303 (2006).

⁸⁹ Bakker & Heuven, *supra* note 88, at 423, 425–26; Dieter Zapf, *Emotion Work and Psychological Well-Being: A Review of the Literature and Some Conceptual Considerations*, 12 HUM. RESOURCE MGMT. REV. 237, 239 (2002).

⁹⁰ Dieter Zapf et al., *Emotion Work and Job Stressors and their Effects on Burnout*, 16 PSYCHOL. & HEALTH 527, 529 (2001) (providing examples of implicit and explicit organizational rules to display certain emotions when engaging with clients); Zapf, *supra* note 89, at 239; Klaus-Helmut Schmidt et al., *Self-Control Demands, Cognitive Control Deficits, and Burnout*, 21 WORK & STRESS 142, 143 (2007) (“Self-control involves overriding or inhibiting automatic, habitual, or spontaneous action tendencies, urges, emotions, or desires that would otherwise interfere with planned, purposeful behaviour.”); see also ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* (3d ed., 2012) (conducting a case study of flight attendants and coining the term “emotional labor” to describe when employees are paid for their emotional expression); Alicia A. Grandey, *Emotion Regulation in the Workplace: A New Way to Conceptualize Emotional Labor*, 5 J. OCCUPATIONAL HEALTH PSYCH. 95, 96–97 (2000) (synthesizing three earlier conceptualizations of “emotional labor” and concluding that, although each takes a slightly different perspective, they all “assume that emotions are being managed at work in order to meet the display rules stated by the organization and suggest either individual or organizational outcomes of emotional labor”).

⁹¹ Leonard L. Riskin, *Annual Saltman Lecture: Further Beyond Reason: Emotions, the Core Concerns, and Mindfulness in Negotiation*, 10 NEV. L.J. 289 (2010) (discussing the role of emotion in negotiations); Tricia S. Jones & Andrea Bodtker, *Mediating with Heart in Mind: Addressing Emotion in Mediation Practice*, 17 NEGOT. J. 217, 219–21 (2001) (arguing that conflict is defined by emotion and therefore central to mediators' work).

⁹² MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 23, at § I.

process itself.⁹³ For example, mediators will deliberately model calm and respectful modes of communication, positive thinking, or empathy in the hope that parties will mirror these behaviors themselves and buy-in to the mediation process.⁹⁴ For tactical reasons, a mediator might exhibit different behaviors to engender reactions from parties.⁹⁵ For example, a mediator might offer a gesture of sympathy to one party in the hope that it will lead the other party to make a similar acknowledgement. Or, in caucus, a mediator might adopt a stern or “tough love” tone of voice with the aim of helping a party concentrate on moving forward rather than rehashing past grievances.

Such emotion work naturally results in emotional dissonance, or a conflict between emotions genuinely felt and those emotions required by the job.⁹⁶ An employee might feel a certain way but must suppress that feeling or surface other feelings in order to perform in his professional role.⁹⁷ The suppression or surfacing of emotions takes energy and, over time, can lead to

⁹³ Goldberg, *supra* note 26, at 366–69 (surveying practicing mediators, more than 75% of whom said that developing rapport with parties was the key element in successful mediation); Ilan Bronstein et al., *Rapport in Negotiation: The Contribution of the Verbal Channel*, 56 J. CONFLICT RESOL. 1089, 1090 (2012) (defining rapport, identifying it as essential to the quality of relationships, and central to influencing outcomes of negotiations).

⁹⁴ Goldberg & Shaw, *supra* note 26, at 399–403 (surveying mediation participants, the majority of whom said that successful mediators were friendly, empathic, likeable, neutral, trustworthy, patient, calm, and deliberate).

⁹⁵ Deborah M. Kolb, *To Be a Mediator: Expressive Tactics in Mediation*, 41 J. SOC. ISSUES 11 (1985) (using the dramaturgical metaphor of theater to consider how mediators’ professional expressions are designed to foster particular responses in parties).

⁹⁶ J. Andrew Morris & Daniel C. Feldman, *Managing Emotions in the Workplace*, 9 J. MANAGERIAL ISSUES 257, 259 (1997) (explaining the theory of emotional dissonance); Bakker & Heuven, *supra* note 88, at 426, 434–35 (“Emotional dissonance refers to the structural discrepancy between felt emotions on the one hand and the emotional display that is required and appropriate in the working context on the other...the discrepancy between authentic and displayed emotions as part of the job.”). In addition to emotional dissonance, other kinds of emotion work include requirements to display positive and negative emotions, to sense the emotions of another, to influence social interactions. See Zapf et al., *supra* note 90, at 529.

⁹⁷ These two emotional labor strategies are referred to as “surface acting,” meaning that the individual must fake or suppress emotion, and “deep acting,” meaning the individual must engage in a cognitive process to change his feelings into appropriate emotions. Benjamin R. van Gelderen et al., *Emotional Labor Among Police Officers: A Diary Study Relating Strain, Emotional Labor, and Service Performance*, 28 INT’L J. HUM. RESOURCE MGMT. 852, 853 (2016). See also Jessica R. Mesmer-Magnus et al., *Moving Emotional Labor Beyond Surface and Deep Acting: A Discordance-Congruence Perspective*, 2 ORGANIZATIONAL PSYCHOL. REV. 6 (2012).

exhaustion and detachment—core components of burnout.⁹⁸ Additionally, emotion work not only contributes to burnout, but also burned-out workers have to put more effort into emotional regulation than their unaffected colleagues, in turn leading to greater levels of exhaustion and energy depletion.⁹⁹ Thus, being a mediator demands emotional labor, which, under imbalanced work conditions, can become a job stressor that places mediators at risk for burnout.

The nature of mediators' work exposes them to a second set of organizational job stressors associated with burnout: "role conflict" and "role ambiguity." Role conflict operates as a stressor when individuals receive contradictory messages about what is expected of them at work and then lack authority to choose one role or value system over another.¹⁰⁰ For example, a correctional officer might be told to prioritize rehabilitation by serving in an educational role but also to maintain order and guard inmates strictly by serving in a disciplinary role—two roles which are difficult to merge in practice.¹⁰¹ Research on burnout in social workers identifies role conflict as a stressor because built into the social work profession itself are inherent tensions between social work's vocational ideals ("advocacy, social justice, client self-determination, and empowerment") and performance expectations to produce results.¹⁰²

One can imagine mediators similarly caught between the nature of their

⁹⁸ Empirical research into the regulation of emotions in the workplace supports the hypothesis that suppressing authentic feelings and emotions has a detrimental impact on health and well-being. One study of police officers and nurses found that they continually experienced emotional dissonance as a result of the emotional demands of their jobs, in turn causing them to become emotionally exhausted, detached, and cynical toward the recipients of their services. Bakker & Heuven, *supra* note 88.

⁹⁹ *Id.* at 435. Conservation of resources theory—Hobfoll—suggests that individuals with fewer resources are more vulnerable to losing resources in the future. *Id.* at 425. Research further suggests that, although one might assume that the main source of burnout among police officers and nurses would be the long-term, emotionally charged engagement with clients or patients, that assumption does not necessarily bear out. *Id.* Rather, research findings suggest that it is stress related to the structure or organization of the job, not the nature of client interactions, that correlates most strongly with burnout. *Id.*

¹⁰⁰ Cordes & Dougherty, *supra* note 59, at 630 ("Role conflict occurs as a result of incongruity or incompatibility of expectations communicated to a role incumbent by his or her role senders."); Alarcon, *supra* note 77, at 550 ("Role conflict occurs when an individual experiences conflicting demands at work."); QUICK ET AL., *supra* note 87, at 32 (discussing different kinds of role conflict—intrasender, intersender, person-role, interrole, and role overload).

¹⁰¹ SCHAUFELI & ENZMANN, *supra* note 69, at 82.

¹⁰² Chris Lloyd et al., *Social Work, Stress and Burnout*, 11 J. MENTAL HEALTH 255, 257 (2002) ("[C]onfusion about roles and tasks within social work itself and with how to demonstrate effectiveness.").

work and expected outcomes.¹⁰³ Consider, for example, a mediator in a court-connected context tasked with settling a lawsuit, or perhaps a mediator hired by a Human Resources Officer to mediate a workplace dispute, wrestling with incompatible messages about their role: how to honor mediation standards of party self-determination while also demonstrating their professional effectiveness by resolving the dispute.¹⁰⁴ The expectation to produce results sets up a clear conflict between the mediator's professional values of protecting fairness and promoting efficiency.¹⁰⁵

In fact, we know that external pressures to produce results exist for mediators working in both the public and private sectors.¹⁰⁶ For example, courts

¹⁰³ Although there is no empirical research, the problem of values and role conflicts for mediators has been a hotly contested topic in the mediation community for decades. See, e.g., Sydney E. Bernard et al., *The Neutral Mediator: Value Dilemmas in Divorce Mediation*, 4 MEDIATION Q. 61 (1984) (discussing the values conflicts of acting as a neutral, facilitative third party and protecting just and fair settlements); Kenneth Kressel et al., *The Settlement-Oriented vs. the Problem-Solving Style in Custody Mediation*, 50 J. SOC. ISSUES 67 (1994) (studying the conflicting roles of settlement-oriented as opposed to problem-solving mediators); Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871 (1997) (discussing the "heated debate" over whether the mediator's role is evaluative or facilitative); Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U.L. REV. 985 (1997) (explaining that the debate over mediators' orientation toward the process and the parties goes to the heart of professional identity of mediators).

¹⁰⁴ Role conflict lies at the heart of ongoing debates about the mediator's role and the extent to which mediators should be settlement-oriented, particularly with the institutionalization of court-connected mediation. See Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 263-64 (1989) (noting that transformative mediators focus on improving the quality of communication between the parties in dispute and less on how to arrive at settlement); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 27-28 (1996) (characterizing evaluative mediators' role as analyzing strengths and weaknesses of their legal positions and predicting outcomes of court or other processes); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U.L. REV. 937, 946-48 (1997); James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, from an Evaluative Lawyer Mediator*, 38 S. TEX. L. REV. 769, 796 (2000); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003).

¹⁰⁵ COLE ET AL., *supra* note 10, at § 2:6 (discussing the problem of defining mediation efficiency solely in terms of high settlement rates and the conflict between values of efficiency and fairness in mediation).

¹⁰⁶ Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV. 371, 378 (2009) (describing how court-connected mediators have to make difficult decisions about how to conduct the

and administrative agencies track mediation settlement rates, sometimes calling them “success rates,”¹⁰⁷ and use procedural rules to prod parties and mediators toward settlement.¹⁰⁸ Indeed, courts prefer cases to settle and permit mediators’ use of implicitly coercive techniques, such as aggressively evaluating the case, intensely pressuring a party to settle, and arguing for a particular settlement outcome.¹⁰⁹ Private mediators, on the other hand, may experience considerable economic pressure to produce settlement results, particularly those mediators trying to get a new practice off the ground and attract more business. Although there currently is no empirical research on whether and how role conflict manifests in mediators, there is clearly potential for role conflict in the mediation context. The conflict between upholding mediation values while also delivering expected settlement outcomes can, in turn, function as a job stressor that places a mediator at risk for burnout.

In contrast to role conflict, role ambiguity refers to a lack of direction in work or inadequate information on how to accomplish work goals.¹¹⁰ For example, a nurse might be expected by her patients or her employer to offer healing and comfort, but she might lack the requisite medical knowledge or authority to meet those expectations.¹¹¹ One can imagine how role ambiguity

mediation process, including becoming “increasingly directive, making recommendations, predicting court outcomes and pressuring parties into agreement,” because they feel compelled to “do whatever it takes” under institutional pressure for parties to reach settlements).

¹⁰⁷ See, e.g., *Questions and Answers About Mediation*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/mediation/qanda.cfm> (last visited Oct. 14, 2018) (saying “yes,” mediation works and that in fiscal year 2008 the program “achieved a 72.1% settlement rate.”); *Alternative Dispute Resolution at the Department of Justice*, U.S. DEPARTMENT OF JUSTICE (June 6, 2018), <https://www.justice.gov/olp/alternative-dispute-resolution-department-justice> (noting “success rates” as percentages of resolved cases and quantifying savings in dollars saved, days of attorney and staff saved, and months of litigation avoided).

¹⁰⁸ COLE ET AL., *supra* note 10, at § 9:1 et seq. (detailing methods by which courts compel party participation in mediation).

¹⁰⁹ Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 66 (2001).

¹¹⁰ QUICK ET AL., *supra* note 87, at 33 (“Role ambiguity results when there is inadequate, unclear, or confusing information about expected role behaviors; unclear or confusing information about what behaviors may enable the incumbent to fulfill the role expectations; or uncertainly about the consequences of certain role behaviors” (citing Mary Van Sell et al., *Role Conflict and Role Ambiguity: Integration of the Literature and Directions for Future Research*, 34 HUM. REL. 43 (1981)).); Cordes & Dougherty, *supra* note 59, at 630; Maslach et. al., *supra* note 88, at 407.

¹¹¹ SCHAUFELI & ENZMANN, *supra* note 69, at 82.

MEDIATOR BURNOUT

can become a stressor for a mediator who, when faced with a particularly combative participant, feels like she lacks sufficient skills to diffuse the situation and keep conversation productive. Or, consider the stress experienced by a mediator who very much wants to be helpful to participants but feels she cannot do so adequately because she lacks legal or subject area expertise. Even if these mediators abide by their ethical duties, remaining impartial and respecting party self-determination, the tension between their desire to help and the strictures of their professional role still cause them to experience the stress of role ambiguity.

Both role conflict and role ambiguity have been found to correlate most strongly with the emotional exhaustion and detachment elements of burnout.¹¹² The theory is that job stressors like role conflict and role ambiguity drain workers' energy and emotional resources.¹¹³ The root of emotional exhaustion is not the volume or type of work but rather inconsistency between those demands and the individual's ability to exercise control over job performance, in accordance with their values.¹¹⁴ As one study of social workers concluded, it is the sense of "failure to live up to unrealistic, or conflicting, expectations fostered by various professional roles" that becomes a source of stress and disappointment.¹¹⁵ When workers feel exhausted and can no longer sufficiently

¹¹² Raymond T. Lee & Blake E. Ashforth, *A Meta-Analytic Examination of the Correlates of the Three Dimensions of Job Burnout*, 81 J. APPLIED PSYCHOL. 123, 126, 128–130 (1996) (explaining study finding strong correlations between job demands like role conflict and role ambiguity with emotional exhaustion and depersonalization); Cordes & Dougherty, *supra* note 59, at 630–31 (discussing studies of teachers, human services professionals, nurses, and public service lawyers and noting that role conflict and role ambiguity are most strongly associated with emotional exhaustion and depersonalization and only somewhat associated with decreased personal accomplishment). See also Susan E. Jackson et al., *Toward an Understanding of the Burnout Phenomenon*, 71 J. APPLIED PSYCHOL. 630, 636–637 (1986) (describing results of a longitudinal study of burnout among elementary and secondary school teachers that found role conflict was most strongly associated with emotional exhaustion); José M. Peiró et al., *Does Role Stress Predict Burnout over Time Among Health Care Professionals?*, 16 PSYCHOL. & HEALTH 511, 521 (2001) (studying the relationship between role stressors and components of burnout among healthcare workers and finding strong correlations between role conflict, exhaustion, and depersonalization, strong correlations between role ambiguity and exhaustion, but weaker connections between role ambiguity and depersonalization).

¹¹³ Bakker et al., *supra* note 84, at 86–88 (positing a connection between job demands, exhaustion, and poor in-role performance).

¹¹⁴ Leiter & Maslach, *supra* note 68, at 96–97 ("[A] worker's preferred role is out of sync with important qualities of the job.").

¹¹⁵ Myung-Yong Um & Dianne F. Harrison, *Role Stressors, Burnout, Mediators, and Job Satisfaction: A Stress-Strain-Outcome Model and an Empirical Test*, 22 SOC. WORK RES. 100, 112 (1998). The authors also noted that, because social work services are usually provided in the context of an organization or institution (i.e. few if any freelancers), the design of the organization (individuals' roles, power structures, and rules) has a significant

handle these stressors, they may adopt defensive strategies of withdrawing from their work through cynicism and depersonalization.¹¹⁶

But, even more profoundly, when workers experience value conflicts at work, it can disrupt their entire relationship to their occupation and rattle their sense of self-worth and self-respect. Doing meaningful work, contributing to an organizational mission, and being part of something bigger than yourself are powerful motivators that go beyond the tangible, utilitarian rewards of financial compensation.¹¹⁷ Workers who encounter a gap or tension between vocational values, organizational values, and even personal values may feel like they have to make trade-offs or that they are compromising the “work they want to do” for the “work they have to do.”¹¹⁸ This dynamic can be extremely distressing and, unsurprisingly, correlates with all three dimensions of burnout.

2. LACK OF JOB RESOURCES

Researchers also find that a lack of job resources is associated with higher levels of burnout, especially the depersonalization or cynicism dimension of burnout.¹¹⁹ Job resources might be intrinsic to an individual, such as a person’s pride in a job well-done or ability to manage workflow well, but they can also be external.¹²⁰ External job resources relevant to mediators include control or participation in workplace decisionmaking as well as recognition and social support from supervisors and colleagues.¹²¹

effect on job stress and burnout. *Id.* at 101.

¹¹⁶ Lee & Ashforth, *supra* note 112, at 130; Karen M. Gutierrez, *Critical Care Nurses’ Perceptions of and Responses to Moral Distress*, 24 DIMENSIONS OF CRITICAL CARE NURSING 229, 236, 237–38 (2005) (finding that nurses who felt moral distress on the job withdrew from their work, avoided job tasks, and reduced their interactions with patients); Stewart Collins, *Statutory Social Workers: Stress, Job Satisfaction, Coping, Social Support and Individual Differences*, 38 BRITISH J. SOC. WORK 1173, 1178 (2007) (discussing dysfunctional means of coping with job stressors, such as behavioral disengagement and avoidance); *cf.* Leiter & Maslach, *supra* note 68 at 97 (noting that, in some work settings, role ambiguity can be beneficial because it provides individuals with freedom to pursue their own values).

¹¹⁷ Leiter & Maslach, *supra* note 68, at 99–100.

¹¹⁸ *Id.*

¹¹⁹ Bakker & Costa, *supra* note 60, at 113 (citing Demerouti et al., *supra* note 73).

¹²⁰ Leiter & Maslach, *supra* note 68, at 97 (discussing intrinsic and extrinsic rewards).

¹²¹ Raymond T. Lee & Blake E. Ashforth, *A Longitudinal Study of Burnout Among Supervisors and Managers: Comparisons Between the Leiter and Maslach (1988) and Golembiewski et al. (1986) Models*, 54 ORGANIZATIONAL BEHAV. AND HUM. DECISION PROCESSES 369, 390 (1993) (discussing how autonomy and social support in the work place relate to stress and burnout). Support might also come from family and non-work

First, research suggests that employees who engage in “job crafting,” meaning they “independently modify aspects of their jobs to improve the fit between the characteristics of the job and their own needs, abilities and preferences,” increase their levels of work engagement and reduce the risk of burnout.¹²² This phenomenon seems to be true across professions. One study of burnout in different occupations found direct correlations between the amount of job control workers reported—the extent to which they could influence their work environment by choosing how to handle tasks or what methods to apply to a situation—and their levels of burnout.¹²³

Mediators’ ability to exercise autonomy and control, and therefore stave off potential burnout, varies considerably given the wide variety of workplace environments in which mediators operate. For example, a salaried staff mediator at a court-connected mediation center may exercise little-to-no control over her hours or which cases she mediates and how many. A contract mediator for either a public institution or private corporation may, similarly, have no choice over which cases he mediates, but he may have the flexibility to set his own schedule and determine the frequency of his mediation work. In contrast, a mediator with her own private practice has far greater power to engage in job crafting. She can select the cases she works on, set her schedule, determine the nature and the length of client interactions, and design her case management practices.¹²⁴ Such wide variability in job crafting and autonomy across mediator workplaces means that some mediators may be able to protect against burnout better than others or, conversely, that those mediators who are unable to draw upon these resources are more vulnerable to burnout than others.

Second, an individual’s workplace community or social context can also serve as a resource that protects against burnout. Research demonstrates that social support in the workplace, whether from supervisors or coworkers, creates a sense of shared values, promotes equity, and is associated with greater

peer groups. *Id.* Additionally, monetary reward can operate as a resource because workers view compensation as an indication of their value. Leiter & Maslach, *supra* note 68, at 97. Poor compensation surely impacts mediators and contributes to their risk of burnout.

¹²² Maria Tims et al., *Impact of Job Crafting on Job Demands, Job Resources, and Well-Being*, 18 J. OCCUPATIONAL HEALTH PSYCHOL. 230, 230; Evangelia Demerouti & Arnold B. Bakker, *Job Crafting*, in AN INTRODUCTION TO CONTEMPORARY WORK PSYCHOLOGY 414–33 (2014); Jonathon R.B. Halbesleben & Wm. Matthew Bowler, *Emotional Exhaustion and Job Performance: The Mediating Role of Motivation*, 92 J. APPLIED PSYCHOL. 93, 95 (2007) (finding that autonomous motivation may protect people against burnout).

¹²³ Toon W. Taris et al., *Job Control and Burnout Across Occupations*, 97 PSYCHOL. REP. 955, 955, 960 (2005).

¹²⁴ Here again, social work provides an interesting corollary to public mediation work environments. *See, e.g.*, Lloyd, *supra* note 102, at 257.

workplace engagement.¹²⁵ Workers with more supervisor support may have greater ability to exercise job control, and those with more co-worker support report higher feelings of accomplishment and efficacy, along with lower job demands and lower levels of emotional exhaustion.¹²⁶ Relatedly, restructuring and downsizing of the workplace, both of which erode social support in the workplace, are found to contribute to burnout.¹²⁷ Thus, workplace environments where individuals work in isolation from one another or lack opportunities to work as a team cannot access the supportive community resource that protects against burnout.¹²⁸

For mediators, the opportunity to access job resources, such as supportive collegial relationships with supervisors, also depends on the nature of the mediation workplace. For example, mediators working for courts or administrative agencies are likely overseen by an administrator who determines case assignments and sets protocols for case management. But that administrator may not be a mediator or, even if she does have mediation expertise, may not be in a position to provide constructive support and evaluation. Private sector mediators, whether at a mediation firm or in-house at a corporation, may not have a supervisor at all.

With respect to building supportive peer relationships, that opportunity also varies based on workplace setting. Mediators whose workplace utilizes a co-mediation model may have more opportunities to work as a team and develop supportive professional relationships than those mediators who mediate alone. In contrast to mediators who work in a group practice setting, solo-practitioners mediate in isolation and do not have opportunities to be observed by, and receive feedback from, peers.¹²⁹ Setting aside variations in the mediation workplace, the confidential nature of mediation itself can be an obstacle to the kind of supervisor and peer support resources that seem to protect individuals from burnout by helping them remain positively engaged in their work.

Taken all together, research demonstrates that burnout happens when a person's job demands are excessive or are not effectively counterbalanced by

¹²⁵ Leiter & Maslach, *supra* note 68, at 98 (referencing studies that show the incompatibility of "a lively, attentive, responsive community" with burnout).

¹²⁶ Yvonne Rafferty et al., *The Association Between Job Skill Discretion, Decision Authority and Burnout*, 15 WORK & STRESS 73, 80–81 (2001) (describing results of a study of 304 human service workers); Leiter & Maslach, *supra* note 68, at 98.

¹²⁷ Wilmar B. Schaufeli & Ester R. Greenglass, *Introduction to Special Issue on Burnout and Health*, 16 PSYCHOL. & HEALTH 501, 503–04 (2001) (describing how job loss and job insecurity undermine individuals' relationships to their work and result in anger, cynicism and hostility).

¹²⁸ Leiter & Maslach, *supra* note 68, at 91, 98.

¹²⁹ Sarat, *supra* note 26, at 191, 200 (explaining that the life of a solo-practicing mediator is "lonely and difficult").

reciprocal workplace resources. This imbalance or mismatch has an individual element, as different people have different personalities and intrinsic abilities to cope with workplace stressors, but it also is created by the nature of a person's work or the structure of the workplace environment. Researchers have found a number of organizational risk factors to be predictive of burnout. For example, jobs and workplaces that demand emotion work, create role or values conflicts, and that lack resources like control, autonomy, and supportive community, are stressful places to work.

It should come as no surprise, then, that some mediators feel emotionally exhausted, cynical and angry, and ineffective—the defining dimensions of burnout. Mediating requires intense emotional labor, which becomes a job stressor over time. The role and values conflicts created by the professional standards of conduct and mediators' workplace environments can also act as job stressors. Further, given the diversity of mediation workplaces, not all mediators can access protective job resources such as autonomy or supportive collegial relationships. When these job demands and resources are imbalanced, mediating can become lonely, thankless, and disappointing.

IV. CONSEQUENCES OF BURNOUT FOR MEDIATORS AND THE MEDIATION PROCESS

Burnout can create a variety of problems for individuals and organizations.¹³⁰ Studies show that burnout correlates with high absenteeism, high turnover, and low job performance.¹³¹ Poor job performance is particularly

¹³⁰ Researchers find a higher prevalence of physical and mental ailments among individuals suffering from burnout. See, e.g., Ulla Peterson et al., *Burnout and Physical and Mental Health Among Swedish Healthcare Workers*, 62 J. ADVANCED NURSING 84 (2008) (surveying health indicators and finding that burnout groups reported higher levels of depression, anxiety, sleep disturbance, impaired memory, and neck and back pain than non-burnout groups); Danielle C.L. Mohren et al., *Common Infections and the Role of Burnout in a Dutch Working Population*, 55 J. PSYCHOSOMATIC RES. 201 (2003) (finding an increased incidence of common infections, such as flu and gastroenteritis, among individuals who reported high burnout levels); Samuel Melamed et al., *Burnout and Risk of Type 2 Diabetes: A Prospective Study of Apparently Healthy Employed Persons*, 68 PSYCHOSOMATIC MED. 863 (2006) (being burned-out puts a person at a 1.84 times greater odds of developing type 2 diabetes); Kirsi Ahola et al., *Burnout as a Predictor of All-Cause Mortality Among Industrial Employees: A 10-year Prospective Register-Linkage Study*, 69 J. PSYCHOSOMATIC RES. 51 (2010) (reporting an association between higher burnout scores and higher mortality risk among younger workers (under the age of 45)).

¹³¹ Brian W. Swider & Ryan D. Zimmerman, *Born to Burnout: A Meta-Analytic Path Model of Personality, Job Burnout, and Work Outcomes*, 76 J. VOCATIONAL BEHAV. 487, 487 (2010). Absenteeism and high turnover of personnel inflict harms on organizations as

worrisome when applied to mediators because, as discussed previously in Part I, the quality of the mediation process largely depends on the mediator.¹³² This Part IV begins by exploring the connections between burnout and job performance, particularly through research into cognitive deficits associated with burnout. It then considers how burnout undermines both the skills mediators require to be effective and the core structural components of the mediation process.

A. Cognitive Deficits and Poor Emotional Regulation

Field research on the effect of burnout on workers' objective job performance is limited to only a few occupations,¹³³ but a growing body of clinical research into the effect of workplace stress (and stress in general) on individuals' brains¹³⁴ and cognitive functioning illuminates how burnout may

well as individuals. See, e.g., Tait Shanafelt et al., *The Business Case for Investing in Physician Well-Being*, 177 JAMA INTERN. MED. 1826 (2017) (examining the direct and indirect economic costs of high physician turnover caused by burnout); Salla Toppinen-Tanner et al., *Burnout as a Predictor of Medically Certified Sick-Leave Absences and Their Diagnosed Causes*, 31 BEHAV. MED. 18 (2005) (reporting study results finding that burnout scores predicted employee sick-leave absences).

¹³² See, *supra* Parts I.A and I.B text and accompanying notes.

¹³³ Studies include firefighters, nurses, and physicians, and police officers but not yet mediators. Demonstrating an actual, causal, negative relationship between burnout and job performance through empirical research has been hard to do. Field studies are limited because of the difficulty in isolating objective (i.e., not self-reported) job performance criteria, gathering large enough samples, and executing longitudinal studies that can isolate and capture cause and effect relationships (a person may have been lousy at her job even before she developed burnout). For a meta-analysis of studies examining how burnout relates to both subjective and objective measures of job performance, see Toon W. Taris, *Is There a Relationship Between Burnout and Objective Performance? A Critical Review of 16 Studies*, 20 WORK & STRESS 316, 319–20 (2006); see also, Thomas A. Wright & Russell Cropanzano, *Emotional Exhaustion as a Predictor of Job Performance and Voluntary Turnover*, 83 J. APPLIED PSYCHOL. 486, 491 (1998) (noting limited empirical support showing that emotional exhaustion is related to declining work performance).

¹³⁴ We know that stress causes physiological changes to the brain, including reductions in regional brain tissue volume and cortisol production. Eva Blix et al., *Long-Term Occupational Stress Is Associated with Regional Reductions in Brain Tissue Volumes*, 8 PLoS ONE, June 11, 2013, at 1 (comparing magnetic resonance imaging of cerebral gray and white matter found tissue atrophy in otherwise normal individuals diagnosed with severe work-related stress); Savic, *supra* note 74, at 1554 (finding a thinning of mesial frontal cortex among stressed subjects); Bart G. Oosterholt et al., *Burnout and Cortisol: Evidence for a Lower Cortisol Awakening Response in Both Clinical and Non-Clinical Burnout*, 78 J. PSYCHOSOMATIC RES. 445 (2015) (finding lower levels of cortisol in burnout group than healthy control group).

impact job performance. These studies largely occur in the laboratory where individuals, some of whom are burned-out workers and some of whom are normal individuals exposed to general stress, complete a battery of cognitive tests. These studies do not assess actual, on-the-job performance, but they reveal connections between occupational stress and impairments in cognitive functioning.¹³⁵ The assumption is that such deficits in cognitive function impact job performance in some way. Cognitive functions impaired by burnout include: 1) cognitive flexibility, or the ability to focus on multiple tasks at once and to switch from thinking about one concept to another; 2) attention and working memory, or the ability to take in new information, retain what is relevant, and discard what is irrelevant; and 3) regulation of emotional responses.¹³⁶

¹³⁵ See, e.g., Nicolas Feuerhahn et al., *Emotional Exhaustion and Cognitive Performance in Apparently Healthy Teachers: A Longitudinal Multi-Source Study*, 29 *STRESS & HEALTH* 297, 303–04 (2013) (studying burnout in teachers and finding that, while emotional exhaustion did effect teacher's cognitive ability when tested with neuropsychological tests, emotional exhaustion was not related to self-reported job performance). Interestingly, this research on burned out workers' executive functioning exposes a potential gap between burnout individuals' negative self-perception and their actual cognitive performance. E.g., contrast Lena Öhman et al., *Cognitive Function in Outpatients with Perceived Chronic Stress*, 33 *SCAND. J. WORK ENVIRON. HEALTH* 223, 224 (2007) (finding that burned out individuals' subjective reports of memory problems were reflected in objective, suboptimal performance on memory tests) with Ingibjörg H. Jonsdottir et al., *Cognitive Impairment in Patients with Stress-Related Exhaustion*, 16 *STRESS* 181, 188 (2013) (finding that, despite self-reports of impaired memory, burnout workers performed just as well on memory tests as the control group); Dmitri Van Der Linden et al., *Work Stress and Attentional Difficulties: An Initial Study on Burnout and Cognitive Failures*, 19 *WORK & STRESS* 23, 32 (2005) (finding no objective attentional deficits in burnout individuals who self-reported cognitive difficulties); and Anu E. Castaneda et al., *Cognitive Functioning in Relation to Burnout Symptoms and Social and Occupational Functioning in a Population-Based Sample of Young Adults*, 65 *NORDIC J. PSYCHIATRY* 32 (2011) (finding no association between difficulties in cognitive functioning and self-reported symptoms of burnout in people aged 22–35).

¹³⁶ Candace M. Raio et al., *Cognitive Emotion Regulation Fails the Stress Test*, 110 *PNAS* 15,139, 15,139 (2013); Akira Miyake et al., *The Unity and Diversity of Executive Functions and Their Contributions to Complex "Frontal Lobe" Tasks: A Latent Variable Analysis*, 41 *COGNITIVE PSYCH.* 49, 54–58 (2000) (explaining executive function of task-switching, working memory, and inhibition of automatic responses); Pavlos Deligkaris et al., *Job Burnout and Cognitive Functioning: A Systematic Review*, 28 *WORK & STRESS* 107, 107 (2014) (conducting a systematic review of studies examining the link between cognitive functioning and job burnout); Arno van Dam et al., *Burnout and Impaired Cognitive Performance: Review of Evidence, Underlying Processes and Future Directions*, in *HANDBOOK ON BURNOUT AND SLEEP DEPRIVATION* 113, 123 (Travis N. Winston ed., 2015) (noting that the cause and effect relationship between burnout fatigue and cognitive impairment is unknown); Öhman et al., *supra* note 135, at 224 (reviewing research on work-related chronic stress and its effects on cognitive functioning); Todd F.

1. TASK SWITCHING

Individuals under stress and suffering from burnout display deterioration in one area of cognitive flexibility known as task-switching.¹³⁷ One group of researchers found that individuals exposed to stress were less capable of transitioning between tasks efficiently and without error than individuals in a control group who were not exposed to stress.¹³⁸ Additionally, researchers found that, when compared to healthy controls, burned-out individuals had a disproportionately harder time completing test requirements when their attention was divided between two tasks.¹³⁹ Therefore, if burned-out individuals have to juggle more than one task at a time, they tend to work more inefficiently and to make more mistakes.

2. WORKING MEMORY AND ATTENTION

Researchers also found that workplace burnout impacts the executive functions of working memory¹⁴⁰ and attention.¹⁴¹ Human beings use their working memory to sort through the enormous quantity of sensory information to which they are continually exposed, keeping the information that is relevant

Heatherton & Dylan D. Wagner, *Cognitive Neuroscience of Self-Regulation Failure*, 15 TRENDS COGNITIVE SCI. 132, 136 (2011) (reviewing a range of threats to individuals' self-control, including stress exposure and negative mood).

¹³⁷ Stefan Diestel et al., *Burnout and Impaired Cognitive Functioning: The Role of Executive Control in the Performance of Cognitive Tasks*, 27 WORK & STRESS 164, 166 (2013) (stating "task shifting refers to switching back and forth between multiple tasks, operations or goals"; working memory "requires the controlling and coding of incoming information of relevance . . . appropriately revising items . . . replacing irrelevant information with relevant information"; and "response inhibition involves the ability to deliberately control or suppress prepotent responses and impulses").

¹³⁸ Franziska Plessow et al., *The Stressed Prefrontal Cortex and Goal-Directed Behaviour: Acute Psychosocial Stress Impairs the Flexible implementation of Task Goals*, 216 EXPERIMENTAL BRAIN RES. 397, 397–98, 405 (2012) (explaining that individuals under stress "displayed larger error-related switch costs indicating less efficiency of the cognitive control processes involved").

¹³⁹ Öhman et al., *supra* note 135, at 230 (noting drops in performance in the workplace stress group when their attention was divided at either information encoding or retrieval, but not both).

¹⁴⁰ Bart G. Oosterholt et al., *Burned Out Cognition—Cognitive Functioning of Burnout Patients Before and After a Period with Psychological Treatment*, 38 SCAND. J. WORK ENVIRON. HEALTH 358, 365 (2012) (finding that burnout was associated with deficits in working memory).

¹⁴¹ Van der Linden et al., *supra* note 135, at 28–29, 33; Öhman et al., *supra* note 135, at 230.

and throwing out what is irrelevant.¹⁴² Individuals with burnout, however, have difficulty coding incoming sensory information and sorting between relevant and irrelevant information.¹⁴³

In addition to the erosion of working memory, another cognitive deficit associated with burnout involves the ability to sustain or control attention. One in-depth study of attention found that individuals under stress tend to fixate on one thing and are unable to focus on multiple things at once.¹⁴⁴ Researchers concluded that stressed individuals narrow their attention, allocating their finite attentional resources to perform a single, specific task, but that this fixation cannot be sustained long-term and comes at a cost of reduced cognitive adaptability.¹⁴⁵

These laboratory findings on working memory and attention are consistent with “negative affect theory,” or the theory that burned-out individuals’ negative emotional state compromises their ability to focus on new, global information and engage in creative thinking.¹⁴⁶ Non-stressed people usually follow a global-to-local processing pattern, meaning they first take in big-picture information and then begin incorporating information at increasing levels of detail.¹⁴⁷ However, under stress, this processing pattern changes. The natural human response to stress results in a narrowing of cognitive attention to focus on specific targets.¹⁴⁸ But, with this narrowed attention, individuals under

¹⁴² See Diestel et al., *supra* note 137, at 166 (defining working memory).

¹⁴³ Oosterholt et. al., *supra* note 140, at 365; Agneta Sandström et al., *Impaired Cognitive Performance in Patients with Chronic Burnout Syndrome*, 69 *BIOLOGICAL PSYCHOL.* 271 (2005) (finding that individuals with burnout have decreased working memory and nonverbal memory but no problems with verbal memory).

¹⁴⁴ Franziska Plessow et al., *Inflexibly Focused Under Stress: Acute Psychosocial Stress Increases Shielding of Action Goals at the Expense of Reduced Cognitive Flexibility with Increasing Time Lag to the Stressor*, 23 *J. COGNITIVE NEUROSCIENCE* 3218, 3223–24 (2011) (finding that stressed individuals exhibit “increased goal shielding to reduce interference” of irrelevant stimuli but, gradually over time, these highly focused individuals demonstrated decreased cognitive flexibility).

¹⁴⁵ *Id.*

¹⁴⁶ See, e.g., Barbara L. Fredrickson, *The Role of Positive Emotions in Positive Psychology: The Broaden-and-Build Theory of Positive Emotions*, 56 *AM. PSYCHOLOGIST* 218, 218 (2001) (theorizing that positive emotions “broaden people’s momentary thought-action repertoires, widening the array of the thoughts and actions that come to mind”).

¹⁴⁷ Douglas Derryberry & Don M. Tucker, *Motivating the Focus of Attention*, in *THE HEART’S EYE: EMOTIONAL INFLUENCES IN PERCEPTION AND ATTENTION* 167, 181–82 (Paula M. Niedenthal & Shinobu Kitayama eds., 1994) (proposing that people who experience positive affective behaviors “show an increased preference for variety and accept a broader array of behavioral options” and that “positive affect produces a ‘broad, flexible cognitive organization and ability to integrate diverse material’”).

¹⁴⁸ *Id.* (noting that stressed and anxious people do not follow the global-to-local pattern

stress ignore big-picture sensory information—their working memory does not code global information as relevant because it lies peripheral to the target of their fixed attention—and will instead fill-in those information gaps with pre-existing cognitive biases or schemata.¹⁴⁹ Researchers theorize that stress, in altering the pattern of processing information, reduces creativity and impairs decisionmaking, which in turn can impact job performance.¹⁵⁰

3. EMOTIONAL SELF-CONTROL

Finally, in addition to impairments in task-switching, working memory, and attention, research suggests that workplace burnout is also associated with deficits in cognitive regulation of emotions and self-control. Burned-out individuals exhibit a dysregulation of their emotion- and stress-processing neuronal networks, meaning that these individuals have trouble down-regulating their negative emotions.¹⁵¹ Stressed out individuals have less energy available to regulate their emotions on the job and are more likely to use surface acting (changing outer expressions without changing underlying felt emotions, leading to emotional dissonance, discussed above¹⁵²) rather than deep acting (making a cognitive change to felt emotions, rationalizing and not taking others' behavior personally).¹⁵³ These findings link back to research investigating the relationship between emotional work demanded by a job and the prevalence of burnout.¹⁵⁴ If exerting cognitive self-control over emotional responses is an integral part of someone's work and the exercise of that self-control requires energy and attentional resources, then an individual with burnout exhaustion, who has fewer energy resources available, would have a harder time maintaining cognitive control over his emotions.¹⁵⁵ Such emotional exhaustion and failure in emotional control affects job performance.¹⁵⁶

but instead show “a significant bias to attend to the local features”).

¹⁴⁹ *Id.* (“[R]estricted attention . . . may lead cognition to become routinized, or fixated on stereotyped themes.”).

¹⁵⁰ *Id.*

¹⁵¹ Armita Golkar et al., *The Influence of Work-Related Chronic Stress on the Regulation of Emotion and on Functional Connectivity in the Brain*, 9 PLoS ONE, Sept. 3, 2014.

¹⁵² See Morris & Feldman, *supra* note 96, at 259; see also Bakker & Heuven, *supra* note 96, at 434–35; Zapf et al., *supra*, note 90, at 529.

¹⁵³ Van Gelderen et al., *supra* note 97 at 854–55, 869.

¹⁵⁴ See *supra*, notes and accompanying text Part II.B.1.

¹⁵⁵ Schmidt et al., *supra* note 90, at 143–44 (2007) (discussing research into “self-control strength” as a limited resource).

¹⁵⁶ Russell Cropanzano et al., *The Relationship of Emotional Exhaustion to Work Attitudes, Job Performance, and Organizational Citizenship Behaviors*, 88 J. APPLIED

Taken together, these studies suggest that key cognitive functions—task-switching, attention and working memory, and emotional regulation—deteriorate in burned-out individuals. Impairments in these functions are associated with forgetfulness, tendency to perseverate, difficulty with problem-solving, poor emotional restraint or inappropriate and inauthentic emotional responses, and poor strategic planning and goal-directed behavior.¹⁵⁷ If we assume that this relationship between cognitive impairment and burnout extends beyond the laboratory and into real-world workplace settings such as the mediation room, then burnout undermines both the skills mediators require to be effective and the core structural components of the mediation process.

B. *Potential Impact of Burnout on Mediation Quality*

Mediators make use of a variety of cognitive functions throughout the mediation process and also at particular stages of a mediation, such as the

PSYCHOL. 160, 166 (2003) (finding hospital employees' level of emotional exhaustion predicted their organizational commitment and job performance ratings given by their supervisors); Halbesleben & Bowler, *supra* note 122, at 95 (studying professional firefighters and finding that emotional exhaustion negatively affected in-role job performance but that this relationship was moderated by individuals' personal motivation to strive for achievement); Tait Shanafelt et al., *supra* note 131, at 1828 (detailing studies showing relationships between burnout and medical errors); Amy Witkoski Stimpfel et al., *The Longer the Shifts for Hospital Nurses, the Higher the Levels of Burnout and Patient Dissatisfaction*, 31 HEALTH AFF. 2501, 2505–06 (2012) (studying nursing shifts and finding that hospitals with longer shifts had higher proportions of burned out nurses than hospitals with shorter shifts and that there was a relationship between nurse shift length and patient satisfaction); Louise H. Hall et al., *Healthcare Staff Wellbeing, Burnout, and Patient Safety: A Systematic Review*, 11 PLoS ONE, July 8, 2016 (reviewing burnout studies and finding that most studies found an association between burnout among healthcare providers (nurses, physicians, pharmacists, hospital staff, paramedics, surgeons, anesthetists, etc.) and poorer patient safety, including more self-reported errors and more objective measures of healthcare provider error); *see also* Michelle P. Salyers et al., *The Relationship Between Professional Burnout and Quality and Safety in Healthcare: A Meta-Analysis*, 32 J. GEN. INTERNAL MED. 475, 478 (2016) (analyzing empirical studies and finding that, of the three burnout components, emotional exhaustion correlated most strongly with quality of healthcare services).

¹⁵⁷ Feuerhahn et al., *supra* note 135, at 298 (explaining cognitive problems associated with burnout); Öhman et al., *supra* note 135, at 230 (suggesting inefficient strategy implementation could explain poor cognitive performance by chronic stress group); Dimitri van der Linden et al., *Mental Fatigue and the Control of Cognitive Processes: Effects on Perseveration and Planning*, 113 ACTA PSYCHOLOGICA 45, 49 (2003) (discussing deficits in problem-solving, specifically flexibility and planning, among individuals with burnout fatigue).

information gathering and the negotiation or option generating stages.¹⁵⁸ It does not take much to imagine how a mediator with compromised communication or organizational skills would yield a poor-quality process, negatively impacting parties and mediation outcomes. This Section considers how deficits in a mediator's cognitive processing could play out in a mediation.

1. COMMUNICATION AND INFORMATION GATHERING

Doug Frenkel and Jim Stark argue that improving the flow of information is “[t]he major factor in producing change through mediation.”¹⁵⁹ Mediators improve parties' communication by paying close attention to perspectives, exposing communication distortions, uncovering unarticulated interests, and adding new dimensions to established information.¹⁶⁰ A mediator must listen not just to the factual content of what parties are saying but also must listen: for parties' underlying needs, interests, and goals; for what they are *not* saying; for potential topics for negotiation; and for misperceptions or false assumptions; and they must do all of this while appearing empathic and nonjudgmental and navigating layers of confidentiality.¹⁶¹

A burned-out mediator with impaired attention and working memory would understandably struggle with this dynamic and multi-faceted stage of the process. He could easily overlook something crucially important or mismanage the exchange of information. A missed opportunity to capture a parties' shared interest or to correct a communication distortion could mean the difference between a breakthrough or a setback. Or, the mediator might fail to notice that one party has been speaking much longer than the other or that he has spent far longer in caucus with one party than the other, which risks eroding parties' trust in the mediator and in the procedural justice of the process itself.

The attentional deficits related to burnout, which include narrowing focus and a bias toward local rather than global information¹⁶² as well as

¹⁵⁸ Jeffrey Kravis, *How Structure Helps Mediation*, 15 ALTERNATIVES HIGH COST LITIG. 110 (1997) (describing stages of mediation as convening, opening, communicating, negotiating, closing). This model was developed by Professor Randy Lowry at Pepperdine and is the basis for its “STAR” model of mediation. *Id.*

¹⁵⁹ FRENKEL & STARK, *supra* note 24, at 128 (emphasis in original); see also, Robert A. Baruch Bush, “What Do We Need a Mediator For?”: Mediation's “Value-Added” for Negotiators, 12 OHIO ST. J. ON DISP. RESOL. 1, 12–15 (1996) (discussing how mediators' “value-added” to negotiations is improvements in information flow and corrections of informational distortion).

¹⁶⁰ FRENKEL & STARK, *supra* note 24, at 138–40.

¹⁶¹ *Id.* at 149–151.

¹⁶² Derryberry & Tucker, *supra* note 147, at 181–82.

diminished creativity in problem-solving,¹⁶³ would make it difficult to be a good mediator. Mediators use reframing to encourage parties to see themselves or their dispute in a more constructive way, and they ask future-oriented or big-picture questions to take participants out of their own, narrow perspective.¹⁶⁴ If a mediator is burned-out, and therefore functioning with a bias toward local rather than global information, her ability to reframe or ask questions that require participants to engage with new or alternative perspectives might be compromised, making it difficult for parties to participate in the kind of creative problem-solving that the mediation process encourages.¹⁶⁵

Another potential danger of focusing on local rather than global information is that it compromises the mediator's ability to maintain a global perspective, to resist the gravitational pull of one disputant's side of the story, and to "consider the opposite," all of which are central to the mediator's neutral role.¹⁶⁶ For example, a mediator with narrowed attention might be so focused on her own narrow perspective or assessment (e.g., "I need to correct this party's overconfident view of his case" or "the only way this case will settle is if she drops her alimony claim") that it interferes with her ability to view the larger context of the dispute (e.g., "where is this overconfidence coming from?" or "what would winning or losing this particular legal claim mean for each of the parties?"). Or, a mediator could become mired in one party's worldview, making it impossible for her to keep an open-mind, engage in perspective-taking, and resist making assessments about which viewpoints or resolution outcomes are legitimate or fair.

Burnout can also impair the ability of working memory to sort through audio and visual stimuli in order to encode the relevant and discard the irrelevant.¹⁶⁷ One can imagine how mediators use their working memories during information gathering: listening to what parties are saying and observing their body language, then coding as relevant or terminating as irrelevant all sorts of information from the parties. If a mediator is burned-out and has an impairment in working memory, then that means she or he may be overwhelmed by information or unable to sort between relevant and irrelevant information.

¹⁶³ Fredrickson, *supra* note 146, at 220–21.

¹⁶⁴ FRENKEL & STARK, *supra* note 24, at 158 (citing SHERRY CORMIER & BILL CORMIER, INTERVIEWING STRATEGIES FOR HELPERS 107–08 (Brooks-Cole Pubin Co. ed., 1998)).

¹⁶⁵ Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgment: Is Mediation Training De-Biasing?*, 21 HARV. NEGOT. L. REV. 1, 26 (2015) (discussing how "consider the opposite" prompts reduce cognitive biases, improves decisionmaking, prompts flexibility and open-mindedness).

¹⁶⁶ *Id.* at 19, 31–32, (discussing mediator's multi-partiality and need for open-mindedness as well as the de-biasing effects of "consider the opposite" perspective-taking).

¹⁶⁷ See Diestel, *supra* note 137, at 166; see also Oosterholt et. al., *supra* note 140, at 365; see also Sandström et. al., *supra* note 143.

For example, if a burned-out mediator misses visual cues that a normal mediator might take as signs of hesitance or lack of understanding or discomfort, failure to code those as relevant could mean those signs go unaddressed, potentially resulting in a party signing an agreement that was coerced or that the party did not fully understand.

2. OPTION GENERATING AND NEGOTIATION

One of the ways in which mediators add value to legal negotiations is by providing structure to negotiations. Particularly for polycentric problems involving multiple issues to be negotiated, a mediator can assist parties with organization—building an agenda of discrete topics needing resolution and then managing the process by which parties conduct their actual bargaining.¹⁶⁸ Sometimes there are multiple layers of negotiation as parties wrangle not only with the substance of their dispute but also how the negotiation process should proceed.¹⁶⁹ The exact skills and techniques a mediator might use depends on the mediator's intuition and sense of timing, meaning that while a mediator is engaged in one strategy she is considering, assessing, and preparing alternative tactics if the parties encounter an obstacle and she needs to change direction.¹⁷⁰ For a mediator to keep track of the different moving parts in a negotiation and to structure discussion efficiently and productively, she surely requires cognitive flexibility.

But, picture a mediator who suffers from burnout and whose cognitive flexibility is impaired. Cognitive flexibility involves the ability to switch between tasks, to work on multiple tasks at once, to plan, and to use strategic thinking. A burned-out mediator who, for example, cannot multi-task by listening to parties' conversation—while also engaging in active listening and while also making a mental map of issues in dispute—will be unable to run an effective and efficient mediation. A burned-out mediator who cannot help parties determine whether discrete items in a negotiation are inherently linked or instead should be considered separate issues, cannot assist parties in packaging feasible negotiation offers. And a burned-out mediator who cannot

¹⁶⁸ For more on the nature of polycentric problems and why they are ill-suited to adjudicative, as opposed to negotiated forms of dispute resolution, see Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 353 (1978).

¹⁶⁹ See, e.g., Harrington, *supra* note 31, at 106, 138 (describing both substantive and procedural topics for negotiation in a negotiated rulemaking mediation).

¹⁷⁰ JEFFREY KRIVIS, *IMPROVISATIONAL NEGOTIATION: A MEDIATOR'S STORIES OF CONFLICT ABOUT LOVE, MONEY, ANGER—AND THE STRATEGIES THAT RESOLVED THEM* 313–22 (2006) (explaining that there are no rules in mediation, just improvisation, and listing skills and techniques, from decision trees to bracketing to bathroom moves, that a mediator might draw upon).

think strategically about which topics to pursue first in mediation or who hammers for options on a dead-end topic instead of parking the conversation and switching to another, more fruitful topic, can erode parties' confidence in the process and lead them to feel discouraged about the possibility of reaching resolution. Even thinking about the structure of the process itself—whether to begin with all the parties in the room, who should speak first, when to use caucus, whether to carry an offer and how to frame it—necessitates planning and strategic thinking. A mediator whose cognitive abilities are compromised simply cannot do a good job of performing these essential components of the mediation process and therefore does a disservice to the parties and undermines their chances of reaching resolution.

3. MEETING ETHICAL STANDARDS OF PRACTICE

A core tenet of mediation is honoring parties' self-determination, made possible by the mediator's role as a neutral, non-judgmental, impartial third party.¹⁷¹ Mediators are supposed to keep their personal opinions from impacting how the disputants make decisions.¹⁷² There is no absolute or objective measure of mediator impartiality; rather, it is the disputants' perception that determines whether a mediator has performed her professional role in an impartial manner.¹⁷³ Thus, mediators must maintain constant vigilance and self-awareness during the mediation process about what they say and how they behave. The decisions they make could signal a lack of impartiality—favoritism, bias, or prejudice¹⁷⁴—to the parties.

Such self-regulation and self-control demands energy and focus; one can picture how a burned-out mediator, experiencing compassion fatigue or cynical detachment, might struggle to keep biases at bay. For example, a burned-out mediator may not engage in thorough information gathering and instead might rely on cynical or faulty heuristics to draw conclusions about the party's

¹⁷¹ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 23, at §§ I, II; *see, e.g.*, KENNETH CLOKE, *MEDIATION: REVENGE AND THE MAGIC OF FORGIVENESS* (1994) (discussing the concept of multi- or omni-partiality).

¹⁷² CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 35–36 (2014) (explaining what impartiality means for mediators); MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 23, at §§ I, II. Whether sharing an opinion about the merits of a case violates impartiality and unfairly impinges on party self-determination lies at the heart of the debate around evaluative mediation practices.

¹⁷³ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 23, at § II.B (“A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.”).

¹⁷⁴ *Id.* at § II.A.

underlying motivations (“just give this lady a chance to say her piece and hear an apology and this case will end” or “dads who say they want more kid time are only paying lip-service—they really just want to pay less child support”). Everyone has cognitive biases and relies on heuristics for decisionmaking—including mediators.¹⁷⁵ But, it is the mediator’s job—perhaps the defining characteristic of what it means to be an ethical mediator—to be aware of these judgments and then to set them aside in a mental lock-box so they do not unfairly influence the mediation process and the participants. A mediator who is too exhausted to control her snap-judgments or who circumvents key portions of the mediation process because of her cynical assumptions cannot deliver an ethical, quality process.

Additionally, as research into occupational stress demonstrates, individuals with burnout have deficits in cognitive self-control and regulation of their emotions. Burned out individuals tend to rely on surface acting, suppressing natural emotional reactions, rather than deep-acting, where they engage in a series of mental calculations to adjust their emotional reaction to one that is professionally appropriate.¹⁷⁶ Individuals who engage in surface acting are viewed as inauthentic whereas individuals who engage in deep-acting are able to empathize.¹⁷⁷ A mediator who is burned out and therefore has diminished capacity to exercise cognitive control over her emotional responses is likely to be viewed as inauthentic and therefore may be unable to engender trust from parties. Further, a mediator with compromised powers of self-control could find himself reacting too personally to one party’s emotional state or acting upon his biases or judgments about the relative merits of the parties’ positions. A mediator with diminished powers of self-control and self-regulation risks creating the impression of judgment and bias, trampling on parties’ self-determination, and undermining a central principle of mediation.

A burned-out mediator likely will deliver an ineffective and unfair process. To protect mediators and, ultimately, mediation participants, existing methods for assuring mediation quality should expand to address the workplace stressors and resources with the greatest potential to affect mediator burnout.

¹⁷⁵ See generally HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich, Dale Griffin, & Daniel Kahneman eds., 2002).

¹⁷⁶ Van Gelderen et al., *supra* note 97.

¹⁷⁷ *Supra* notes and accompanying text in Part II.B.1.

V. THINKING MORE BROADLY ABOUT HOW TO DELIVER A QUALITY MEDIATION PROCESS: INTERVENTIONS TO ADDRESS WORKPLACE STRESSORS

The specter of mediator burnout highlights shortcomings in current measures to ensure mediation quality control. As discussed above in Part I, existing efforts to safeguard the mediation process are based upon the assumption that a quality mediator can assure a quality mediation process, thereby collapsing the person of the mediator into the quality of the process itself. Both informal and formal methods for establishing and disseminating mediation norms attempt to mold “good” mediators but pay little attention to the systems in which mediators operate.¹⁷⁸

Promoting quality mediation by focusing primarily on the mediator poses a problem for three key reasons. First, imposing ethical standards on mediators or regulating their training and certification will not prevent a good mediator from burning out and running an ineffective or unfair process. Second, formal regulations fail to account for and protect against the external, workplace stressors that might contribute to mediator burnout and, consequently, erode the quality of the mediation process. And finally, the current approach to mediation quality control may create stressors that place mediators at risk of burnout. By positioning mediators as gatekeepers for the quality of the mediation process without accounting for situational pressures that are incompatible with their other ethical duties, such as maintaining impartiality and honoring party self-determination, the current regulatory framework fails to protect mediators and imperils the quality of the mediation process.

Mediation’s increasing institutionalization and integration into a wide variety of workplaces should be reflected in new quality control measures. The diversity of mediators’ workplace environments should not be a reason to avoid regulating but instead underscores the need to ensure that the public and private institutions relying upon mediators are not imposing work demands that lead to burned-out mediators. There have been some informal efforts to guide ADR provider organizations on best practices, though such guidance has been aspirational only and, for the most part, focuses on selection and training of mediators, avoiding conflicts of interest, and removing “bad apples.”¹⁷⁹ An

¹⁷⁸ COLE ET AL., *supra* note 10, at § 2:4.

¹⁷⁹ See, e.g., NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS (CTR. FOR DISP. SETTLEMENT & INST. OF JUD. ADMIN. 1991) (proposing policies and procedures for courts to ensure equal access to ADR services, informed consent to participate, and evaluation and grievance procedures for removing incompetent mediators, among others); PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS (CTR. FOR PUBL. RESOURCES-GEO. COMMISSION ON ETHICS AND STANDARDS PRAC. 2002) (establishing best

expanded scope of quality control regulations that aim to alleviate workplace stressors and bolster job resources would support good mediators and prevent them from burning out.

It would be premature to propose precise, binding regulatory interventions without more research into the causes and consequences of mediator burnout; however, existing burnout research can at least provide some places to start. For example, burnout research tells us that workplace environments that generate role and values conflicts, that demand an unsustainable workload, or that lack resources such as support from supervisors and colleagues, correlate with emotional exhaustion, cynicism and withdrawal, and feelings of inefficacy, the three components of burnout.¹⁸⁰ Perhaps these areas of work-life present opportunities for new policy interventions.

A. *Value Conflicts*

The problem of value conflicts should be addressed for mediators by targeting workplace pressures to settle cases. Value conflicts arise when individuals lack authority to self-direct and shape their work environment so that it is consistent with their professional and personal values.¹⁸¹ Both public and private mediators can experience conflicts between their responsibilities to honor party self-determination and maintain impartiality, on the one hand, and work performance expectations that equate effectiveness with case settlement, on the other.¹⁸² Such values conflicts can become stressors that contribute to mediator burnout, thereby threatening the quality of a mediation process and enabling harm to mediation participants.¹⁸³

Given that public and private mediators can experience value conflicts, resolving this conflict should be a target of new policy interventions. These interventions should focus not on the person of the mediator, but on the system-wide or workplace context responsible for imposing a pressure to settle that directly conflicts with mediators' ethical standards. Indeed, the Model Standards already instruct mediators to resist institutional pressures to settle cases,¹⁸⁴

practices for public and private ADR provider organizations, including ensuring mediator competence and curbing profit motive). For a helpful comparison of the two sets of standards, see *MEDIATION ETHICS: CASES AND COMMENTARIES* 340–48 (Ellen Waldman ed., 2011).

¹⁸⁰ *Supra* Part II.B.

¹⁸¹ *Supra* Part II.B.1.

¹⁸² *Supra* notes and accompanying text.

¹⁸³ *Supra* Part III.B and accompanying notes.

¹⁸⁴ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 23, at § I.B (“A mediator shall not undermine part self-determination by any party for reasons such as

nevertheless, mediators still experience this pressure and act upon it.¹⁸⁵

In the public mediation setting, there were some early efforts to dissuade courts from relying on settlement rates as proxy for mediator competence,¹⁸⁶ but these efforts were too narrowly focused on determining mediator competence. More expansive regulations should address the systemic settlement pressures mediators face.¹⁸⁷ For example, court administrators who oversee mediation staff or a roster of contract mediators could adopt a policy to define efficiency, not by settlement rates, but by other metrics, such as party perceptions of fairness and satisfaction with the process, which would require a commitment to use appropriate survey instruments to gather party's feedback. Or judges could adopt new court rules that would require all judges to include, in a prove-up of any mediated agreement, questions to assess whether the parties felt pressured to settle by the mediator and reject agreements where parties say "yes."

With respect to private mediation settings, reducing external, economic pressures proves more challenging. This is because, to a certain extent, private mediators are hired to provide a service that many of their customers (and perhaps many private mediators as well) would consider worthwhile only if it produced settlement.¹⁸⁸ To push back on this expectation would require pushing back on the reasons why lawyers and businesses might hire a private mediator at the outset. Nevertheless, just as public institutions should measure mediation outcomes other than settlement, private mediation firms or organizational providers should take steps to promote and advocate for mediation's other benefits. For example, even without resolving a dispute, mediation adds value

higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.").

¹⁸⁵ See, e.g., ABA SECTION OF DISPUTE RESOLUTION, REPORT OF THE TASK FORCE ON RESEARCH ON MEDIATOR TECHNIQUES 14–31 (2017) (discussing empirical findings of mediators' use of pressing or directive actions, recommendations, suggestions, evaluations, and opinions); Welsh, *supra* note 109, at 7–15 (providing illustrative examples of mediator "muscle" techniques, parties' feeling pressure to settle, and a court's lack of concern).

¹⁸⁶ Press, *supra* note 22 at 167 (citing § 11.4 of the National Standards for Court-Connected Mediation Programs as well as a portion of the Qualifying Dispute Resolution Practitioners Guidelines for Court-Connected Programs).

¹⁸⁷ The form and content of such regulations remains an open question. They could take the form of formal rules or statutes, or internal policy, or could be shaped by informal professional norms.

¹⁸⁸ The early rationales for institutionalizing mediation in the 1980s, the "production argument" and the "quality argument," were set up as separate, competing interests but they need not be. Lydia Nussbaum, *Mediation as Regulation: Expanding State Governance over Private Disputes*, 2016 UTAH L. REV. 361, 375–79 (2016).

by creating a time and a place for parties to convene, providing a structure for negotiations, and enabling parties to correct false assumptions and overcome informational barriers in a confidential and non-adversarial setting.¹⁸⁹ Indeed, educating consumers about the value-added of mediation requires going back to the important insights made by mediation proponents when mediation was becoming institutionalized in the 1980s: that mediation should be viewed not as an alternative to adjudication (case resolution), but as an alternative to unassisted negotiation.¹⁹⁰ If private mediation providers were to promote these other dimensions of a quality mediation service, spelling them out in engagement letters or agreements to mediate, then perhaps mediators and consumers would think about beneficial outcomes of mediation other than settlement, thereby reducing settlement as the prime pressure point for mediators.

B. *Role Conflicts*

Role conflict, another workplace stressor that might affect mediators, could also be addressed by new quality control measures. Role conflict occurs when a person receives irreconcilable messages about their work expectations, is told to occupy roles that are inherently incompatible, or is placed in a position that makes it difficult or impossible to fulfill their work responsibilities.¹⁹¹

Mediators likely experience this role stressor in different ways. For example, in the public setting, courts that mandate mediation for all child custody disputes but then fail to utilize adequate domestic violence screening place mediators in conflicting roles of making an assessment about the suitability of mediation for the parties while also serving in the role of an impartial third-party. Or, consider the role conflict created for individuals who mediate in programs that regularly have unrepresented parties.¹⁹² When unrepresented individuals are inadequately prepared for mediation, mediators may find themselves placed into conflicting roles of educating litigants about their legal rights and responsibilities, thereby potentially overstepping their role as a neutral third-party, or withholding that information, thereby allowing parties to make uninformed decisions in mediation that could lead to unjust results.

¹⁸⁹ See generally, Baruch Bush, *supra* note 159 at 1, 5–6, 12–15 (1996).

¹⁹⁰ Craig A. McEwen, Nancy H. Rogers & Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1367–73, 1379 (1995).

¹⁹¹ *Supra*, notes and accompanying text; QUICK ET AL., *supra* note 87 at 32.

¹⁹² Such programs could be mandatory court-connected programs, such as Small Claims mediation, or could be opt-in programs for consumer disputes. See, e.g., *Initiate an Arbitration or Mediation*, FINANCIAL INDUSTRY REGULATORY AUTHORITY, <https://www.finra.org/arbitration-and-mediation/initiate> (last visited Octo. 14, 2018).

Any administrator of a mediation program, whether public or private, could alleviate these role stressors by diverting inappropriate cases away from mediation and by helping unrepresented parties prepare. For example, programs should adopt rules incorporating best practices for case screening. To help unrepresented litigants, programs should develop easily-accessible videos or substantive “know your rights” primers for unrepresented litigants. Although this kind of technical assistance has been proposed in certain agency settings,¹⁹³ it should become more widespread and be made a component of any mediation program, particularly one involving unrepresented litigants.

C. Work Overload

A third work demand that may contribute to mediator burnout is work overload. Again, consider the example of the court- or agency-connected mediation center, which may require its salaried staff mediators to convene or conduct intake on a required number of cases each week or month, or to mediate a certain volume of cases on a weekly or monthly basis. If these quotas are too high and unsustainable, then mediators will likely burnout. Burnout not only risks the integrity of mediation services provided, but it may also result in absenteeism or high-turnover, further burdening those staff mediators who remain. Here, too, is an opportunity for a regulatory intervention focused on the mediator’s workplace environment. A policy of outlawing or restricting the use of quotas for staff mediators could be adopted by the ADR administrator of a particular court program or become a state-wide practice promoted by the state’s administrative office of the courts.

D. Lack of Supervisory and Peer Support

A fourth aspect of the mediator’s workplace environment that could be targeted by regulatory intervention is the lack of job resources like supervisory or peer support. Mediators may have an “apprenticeship” when they first start mediating but once they complete that phase of their training, they are often on their own. Many mediators, both in the public and private realm, work in isolation—they prepare for cases on their own, conduct mediations alone, and manage post-mediation follow-up on their own. These mediators may have limited opportunity to engage with peers to share experiences, exchange ideas about how to address thorny mediation issues, or receive professional coaching about where they are most effective and where they could improve. And, when

¹⁹³ The “Guidelines for Voluntary Mediation Programs Instituted by Agencies Charged with Enforcing Workplace Rights” recommended that agencies provide technical assistance to unrepresented disputants so that they can understand their statutory rights, relevant procedures, and the mediation process. Press, *supra* note 22 at 170.

they do have these opportunities, such as meeting with other professional mediators or attending continuing education programs, their reports about their mediations are filtered through their subjective self-assessments. This lack of objectivity is further compounded by the closed, confidential nature of mediation that makes it difficult for outsiders to drop-in to observe and share feedback with mediators. As Atul Gawande observes, self-regulation does not adequately help professionals perform at their best.¹⁹⁴ Just as professional athletes and musicians receive coaching throughout their careers, other professionals—doctors, lawyers, mediators—should regularly work with an experienced peer mentor who can serve as another pair of eyes and ears in the room, offer constructive feedback, and provide a sounding board for meaningful self-reflection.

One way to counteract mediators' professional isolation and foster teamwork in the mediation profession is to establish a new norm of co-mediation.¹⁹⁵ Having another person with whom to strategize and debrief can enhance the engagement of both mediators and help them grow professionally. Local, state, or national mediator organizations could help facilitate co-mediator matches—perhaps a co-mediation equivalent of online dating mechanisms like eHarmony or Match.com.¹⁹⁶ Although co-mediation may seem prohibitively expensive, perhaps that cost is preferable to the costs of poor quality mediation. At the very least, periodic co-mediation with different mediator colleagues would help mediators connect and learn from one another.¹⁹⁷

Another approach could be to formalize ongoing evaluation, support, and feedback, extending beyond the “apprenticeship” phase of mediation training.¹⁹⁸ For example, Maryland has a purely voluntary program, “The Maryland Program for Mediator Excellence” (MPME), stewarded by the state judiciary’s Mediation and Conflict Resolution Office.¹⁹⁹ Mediators register for

¹⁹⁴ Atul Gawande, *Personal Best*, NEW YORKER (Oct. 3, 2011), <https://www.newyorker.com/magazine/2011/10/03/personal-best> (arguing that professionals need coaches to provide external judgment and guidance on how they can improve their job performance).

¹⁹⁵ Indeed, a co-mediation model is already the norm for many community mediation centers.

¹⁹⁶ With thanks to Professor Rob Rubinson for this creative, techie suggestion.

¹⁹⁷ Lela P. Love & Joseph B. Stulberg, *Practice Guidelines for Co-Mediation: Making Certain That “Two Heads Are Better Than One”*, 13 MEDIATION Q. 179, 187 (1996) (laying out guidelines that can minimize disadvantages and maximize advantages of co-mediation).

¹⁹⁸ There have been numerous efforts to establish experiential training for mediators but this form of training, even if required, does not usually extend beyond an initial apprenticeship or probation period. Press, *supra* note 22 at 166.

¹⁹⁹ *About MPME*, MARYLAND PROGRAM FOR MEDIATOR EXCELLENCE,

free to acquire networking opportunities and join a directory of MPME mediators that can be accessed by the general public. In exchange, as members of MPME, mediators commit themselves to peer evaluation, mentoring, annual continuing skills and ethics trainings, performance-based certification, and participation in an ombuds program for resolving mediator-participant disputes.²⁰⁰ Through MPME, mediators who work in all kinds of settings can connect with one another and serve as support and mentoring resources. More states could establish programs like MPME, perhaps even making membership mandatory for mediators, so evaluation, professional support, networking, and continuing education become new, professional norms.

VI. CONCLUSION

Mediation, compared to other professions, is relatively unfettered by strict rules and regulations. The field has largely resisted encumbering the practice of mediation with oversights and special qualifications for fear that it will squelch innovation and restrict diversity and access. But, in an effort to impose some modicum of quality control, the mediation field has established universal norms of “good” mediation and relies on both informal and formal mechanisms to push mediators to adhere to these norms. This approach, however, focuses primarily on the mediator as the guardian of a quality process and does not sufficiently take into account the various contexts in which mediators do their work.

Research from the fields of workplace management and occupational psychology reveals that individuals who do “people work,” like mediators, are susceptible to burnout. Burnout is a particular form of occupational stress characterized by emotional exhaustion and compassion fatigue, cynicism, and feelings of professional inefficacy. A number of factors contribute to burnout, including an imbalance in workplace demands and resources available to meet those demands. Mediators often do their jobs in workplace environments that produce role and values conflicts and that lack opportunities for job crafting or teamwork—an imbalance that, overtime, can lead to burnout.

A burned-out mediator, even one who is well-trained, competent, and passionate about his work, will struggle to engage fundamental norms of good, quality mediation. Burnout, like many other forms of stress, interferes with people’s ability to regulate emotions and can also impair cognitive functioning. Therefore, burnout imperils essential mediator skills—careful listening, developing rapport, engaging human interests behind positional arguments, responding to and incorporating new information, deploying creative

https://www.mpmeonline.org/MPME/About/About_MPME/ (last visited Oct. 14, 2018).

²⁰⁰ *Id.*

questioning—and core ethical principles such as party self-determination and mediator impartiality. That parties should bear the cost of such poor mediation is unacceptable; therefore, more should be done both to protect mediators against external stressors and to provide resources that will enhance their work.

The potential for workplace burnout to undermine the quality of the mediation process both reveals shortcomings in the current regulatory framework governing mediators and also opens up new avenues for safeguarding—even improving—the practice of mediation. Expanding the scope of mediation regulation to include the mediator workplace, and developing and formalizing new norms for institutions that make use of mediation and mediators, can help protect good mediators and the quality of mediation they provide to everyone.