



**EDNY ADR Department  
Columbia Law School  
Ethics Colloquium**

*Mediation in the Age of Burnout*

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# Welcome and Introductions

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# Goals for this Workshop

- Understand how the effects of burnout may intersect with mediators' ethical obligations
- Explore ways burnout may surface in mediation
- Develop skills to address burnout



A wide-angle photograph of the Columbia University campus, featuring several large, classical-style buildings with red brick and white columns, set against a clear sky. A green lawn and a paved walkway are visible in the foreground.

# Disclaimer

In this training we will be discussing timely, yet sensitive issues. We invite you to help us create a safe space where all participants treat each other with respect and feel encouraged to share freely.



# Exercise

# Exercise

Discuss which words or phrases come to mind when you think of burnout.



What is Burnout?

# Definitions of Burnout

- “Burnout is a syndrome resulting from chronic workplace stress that has not been successfully managed or alleviated.”
- “It is characterized by three dimensions:
  1. Feelings of energy depletion or exhaustion;
  2. Increased mental distance from one’s job, or feelings of negativism or cynicism related to one’s job; and
  3. Reduced professional efficacy.”





# Types of Burnout

- **OVERLOAD BURNOUT**

- Example: Working harder and harder → becoming frantic
- Sign: Risking your health and personal life to feel successful

- **UNDER-CHALLENGED BURNOUT**

- Example: Underappreciated, bored, lack of growth
- Sign: Distancing yourself, becoming cynical, avoiding job

- **NEGLECT BURNOUT**

- Example: Feeling helpless or inadequate at work
- Sign: Imposter syndrome, feeling incompetent



# Symptoms of Burnout

- **EXHAUSTION**

- Drained, unable emotionally to deal with problems around you
- Can result in physical pain or getting sick often

- **ALIENATION FROM ACTIVITIES**

- Cynicism or frustration toward work
- Distancing yourself, becoming numb

- **REDUCED PERFORMANCE**

- Harder to concentrate, handle responsibilities, or be creative



# 5 Stages of Burnout



# Burnout & Trauma

## 2019 Observational Study

Psychology Today

- Sample: 100 Head Start teachers suffering from high levels of:
  - Burnout
  - Compassion Fatigue
  - Vicarious Trauma
- Approach:
  - Compared teacher's trauma history to quality of life scale
- Preliminary Findings:
  - As employee's trauma history increased, so did their levels of burnout, compassion fatigue, and vicarious trauma.



# Intersectionality of Burnout

# Intersectionality of Burnout

- Burnout can play out in different ways for everyone involved in a mediation, based on their unique circumstances
- The intersections of various factors can exacerbate burnout for parties, both individually and collectively:
  - Race
  - Sexual orientation
  - Gender
  - Environmental issues



# Intersectionality of Burnout: Parties

- Case Studies
  - Racial Justice Activist Burnout for Women of Color
    - For WOC activists, well-being and self-care are often neglected and can make them more susceptible to burnout (Danquah et al., 2021)
  - Racial/Ethnic Differences in Burnout
    - Incidents like racial discrimination, lack of cultural representation, and stereotyping were associated with greater distress and depression scores (Lawrence et al., 2021)



# Ethical Considerations for Mediators

# Ethical Standards for Mediators

- ABA Model Rules of Professional Conduct
  - Rule 1.12
  - Rule 2.4
- ABA/AAA Model Standards of Conduct for Mediators
- Standards of Conduct for NYS Community Dispute Resolution Center Mediators



# Ethical Standards for Mediators

## ABA/AAA Model Standards of Conduct for Mediators

- Safeguard parties' self-determination (Std. I)
- Remain impartial (Std. II)
- Uphold competence (Std. IV)
- Ensure integrity of the process (Std. VI)



# Manifestations in the Mediation Room

## Potential Mediator Bias: The Issue of Implicit Bias

- “Unconsciously held attitudes and stereotypes can affect our interaction with others and may predict behavior.”\*
  - Often people do not have conscious and intentional control over social perceptions and judgments that motivate their actions.

\*Carol Izumi, Implicit Bias and the Illusion of Mediator Neutrality,  
34 Wash. U. J. L. & POL'y 71 (2010).

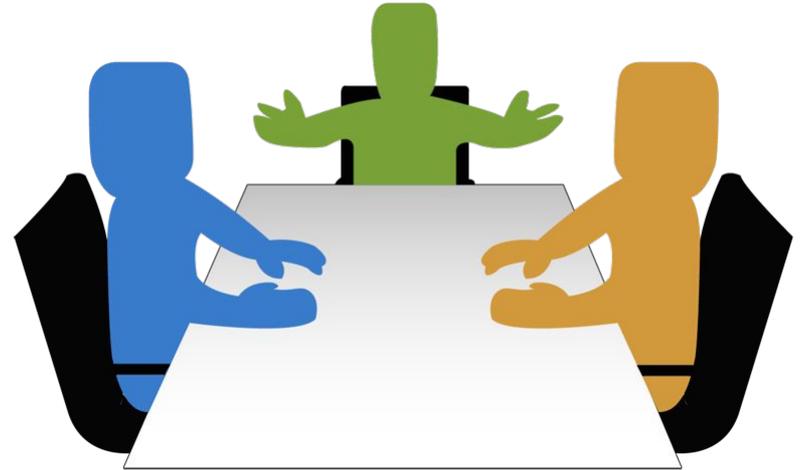
\*Shankar Vedantam, See No Bias, Wash. Po. (2005)



# Impartiality

## Neutrality v. Impartiality

- Neutrality
  - “A duty to refrain from supporting one party against another and imposing an opinion on the parties.”\*
- Impartiality
  - “Freedom from favoritism, bias or prejudice.”\*
  - A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.



\*Mercédeh Azeredo da Silveira, “Impartiality v. Substantive Neutrality: Is the Mediator Authorized to Provide Legal Advice?,” (2007).

\**ABA Model Standards of Conduct for Mediators*

# Cultural Competence in Distress

- Being aware of cultural social status and gender conventions
- Acquiring culturally-sensitive vocabulary
- Acknowledging limitations and differences
- Providing culturally/linguistically competent services
- Monitoring access to services

<http://tucollaborative.org/wp-content/uploads/2017/01/Cultural-Competence-in-Mental-Health.pdf>

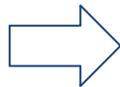
<https://www.healthcaretoolbox.org/culturally-sensitive-trauma-informed-care>

<https://www.nasponline.org/resources-and-publications/resources-and-podcasts/diversity-and-social-justice/cultural-competence/culturally-competent-crisis->



# Quality of Process

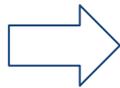
Difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation



Explore the circumstances and potential accommodations that could be made.

Domestic abuse or violence among the parties

Participant conduct jeopardizes conducting a mediation



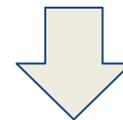
Take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation



# Recognizing Mediator's Burnout



Impaired attention, working memory,  
cognitive flexibility, self-control



Acknowledgement

Withdrawal

Request for appropriate assistance



# Burnout in Mediators

# Burnout for Mediators

- Managing ethics and navigating complex ethical issues can itself can be a source of burnout for mediators (Bischoff et al., 1999; Lagasse, 2019)
- Being a mediator demands emotional labor, which places mediators at risk for burnout (Nussbaum, 2019)
  - Role conflict
    - Receiving contradictory messages about what is expected, with no authority to choose one role or value system over another (i.e. honoring mediation standards while also facing pressure to produce results)
  - Role ambiguity
    - A lack of direction in work or inadequate information on how to accomplish work goals (i.e. a mediator who wants to help parties reach a resolution, but feels like she lacks legal or subject area expertise)



# Burnout for Mediators

- The inconsistency of conflicting demands, rather than the volume or type of work can lead to emotional exhaustion in mediators (Nussbaum, 2019)
- Occupational stress from burnout can lead to impairments in cognitive functioning, which impacts:
  - Cognitive flexibility
  - Attention and working memory
  - Regulation of emotional responses
- Failure to manage the negative consequences that stem from burnout can not only diminish the integrity of the process, but also in some instances lead to misconduct (Nussbaum, 2019; Simionato et al., 2019)



# Burnout in Parties

# Self-Determination

Standard I, Model Standards of Conduct for Mediators:

“Self-determination is the act of coming to a **voluntary, uncoerced** decision in which each party makes **free and informed choices** as to process and outcome.”

- Assumes that individuals have basic psychological needs for autonomy, competence, and relatedness
- The satisfaction of your needs is linked to emotional exhaustion and vigour, which are the energetic components of burnout



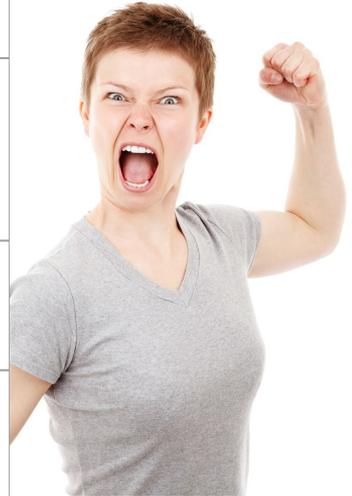
# Burnout in Parties

- “Emotion work”
  - Helping parties in conflict inevitably exposes the mediator to a broad range of emotions
  - Monitor parties’ reactions to protect self-determination
- **Passive forms** of burnout stemming from low-arousal emotions (such as sadness and fatigue)
- **Active forms** driven by high-arousal emotions (such as frustration and distress)





Passive Burnout in Parties	Active Burnout in Parties
Disengagement from the mediation, physically, or mentally	Hyperarousal, agitation, anger and aggression
Feel like a failure at everything they do, leading them to ask, why bother trying only to fail again?	Can easily become incivil and leans towards blaming, may speak up more often
Won't confront or antagonize, may be passive and compliant	Difficulty with focus, concentration, and memory
Avoids eye contact	Explosive reactions like angry outbursts or unprompted crying
“It’s just the way things are,”“why bother?”	Use of insults, spiraling behavior



# Burnout in Parties



- Party may bring it up in joint session or caucus.
- Party might express difficulty with understanding the process or with evaluating available options.
- Often, what a party *doesn't* say, says much in itself
  - Nonverbal behaviors
    - Low tone, audible sighs, and slight head shaking



# Burnout in Parties

- “I can’t think clearly right now.”
- “I can’t figure out what I should do. Can you tell me what I should do?”
- “I need [someone else, a trusted friend or family member] here; I feel too stressed to make a decision.”



# Power Imbalance and Burnout

- Power imbalance is not inherently bad in mediation
- Becomes a problem when a power imbalance affects self-determination
  - Burnout can lead to a power imbalance that directly affects self-determination and can derail a mediation



# Mediator Interventions

If the party is so burned out as to temporarily prevent her comprehension, participation, or exercise of self-determination, the mediator should intervene:

- You control the room, you set the boundaries of the process.
- Not addressing the topic is a choice!



# Chat Question:

In the chat, please tell us what strategies or techniques you would use in a mediation if a party is experiencing burnout?



# Mediator Response to Burnout

# Mediator Response to Burnout

- Create space
  - Establish an open environment
  - Keep in mind current social conditions
- Listen actively
- Ask open questions
  - Would you feel comfortable telling me more...
- Reassess
  - Reschedule if concerned about process



# Mediator Response to Burnout: Create Space

- Safety
  - Ensure Physical and emotional safety
- Agency and control
- Trustworthiness
  - Through clarity, consistency, and interpersonal boundaries



# Mediator Response to Burnout: Create Space

- Verbal Response
  - Party brings up burnout/condition:
    - Thank the party for sharing
    - Assure and remind all parties that this is a safe space where everyone is respectful to one another



# Mediator Response to Burnout: Create Space

- Take longer time to listen to and summarize the party's statements
- Use the party's words as much as possible when summarizing
- Do not pressure, but provide the opportunity to discuss
- If the opposite party reacts dismissively, the mediator might reemphasize respect and set a good example by stroking the party



# Mediator Response to Burnout: Create Space

- Nonverbal Response
  - Caucus to gather information
    - “I couldn’t help but notice [party’s behavior]. Would you feel comfortable telling me more about what you’re feeling?”



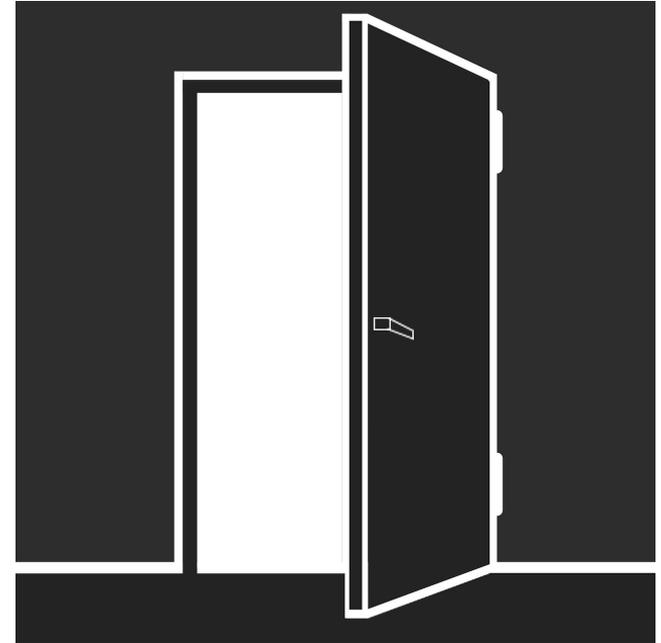
# Mediator Response to Burnout: Active Listening

- Be genuinely **curious**
- Listen to **understand** participants'
  - Concerns
  - Needs
  - Wants
- NOT to prepare your response
- Focus on posture/facial expression



# Mediator Response to Burnout: Open Questions

- **Open-Ended questions** place the focus and attention on the other person
- **Close-Ended questions** are more leading and more targeted



# Mediator Response to Burnout: Open Questions

## What is an Open Question?

Open questions begin with “What” or “How” or an action verb like “Tell” or “Describe”

*What did you mean when you said XYZ?*

*How does that make you feel?*

*Tell me more about your experiences?*



# Mediator Response to Burnout: Reassess

- Ethical Responses:
  - Maintain the quality of the process
  - Withdraw
  - Invite co-mediator to assist/take over
  - Break



# Managing Burnout

- Personal Strategies
  - Reach out to those closest to you
  - Set boundaries
  - Make sleep and exercise a priority
- Organizational strategies
  - Acknowledge and assess the problem
  - Cultivate the community at work
  - Promote flexibility and work-life integration



# Ways to Improve Response to Burnout

- Subject matter specific training
  - Contemporary socio-political issues
  - Mental health issues
- Strengthening network of service providers for the purpose of referrals and interventions
- Creating safe spaces for mediators to discuss burnout and receive treatment



Hypos



# Hypothetical 1

- Sarah is a mediator who has had a rough few months
- She takes on a last minute volunteer mediation
- She is struggling to stay focused and objective during the mediation

**What are Sarah's ethical considerations?**

**What should Sarah do?**





# Hypothetical 2

- Tom has brought a FLSA complaint against his employer
- He is not represented by an attorney
- He does not want to speak

**What should the mediator notice?**

**What can a mediator do?**





# Questions?

Please stay in touch:



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