

Trauma-Informed Mediation: A Path to Healing and Resolution

Rather than being dangerous, conflict holds within it vital messages, regarding unmet needs and areas of necessary change. Given this understanding, safety is increased not by avoiding conflict, but by moving toward it with the intention of hearing the messages within.

– Elaine Shpungin and Dominic Barter¹

Mediators are often trained to treat family law matters like any other conflict – to impartially facilitate communication and negotiation, promote voluntary decision-making by parties to the dispute, help parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.² However, anyone who has participated in a contested domestic mediation will say it is not always that simple. In practice areas such as family law, immigration, child welfare, and criminal law, the goals of mediation are particularly strained since the parties utilizing mediation services are often in a highly vulnerable or emotional state.

Many domestic litigants are survivors of intimate partner violence, have spent years in protracted custody litigation, or have experienced other significant traumatic events that are relevant to their family court matters. Simply being in a state of prolonged stress can be a trauma.³ A recent study about custody at divorce showed that 93 percent of divorcing parents tried some form of alternative dispute resolution.⁴ However, only 82 percent of

¹ Elaine Shpungin & Dominic Barter, *The Fight Room*, TIKKUN MAG., Jan. 10, 2012, <https://tikkun.org/the-fight-room/>.

² MODEL STANDARDS OF CONDUCT FOR MEDIATORS 2 (American Arbitration Association, American Bar Association, Association for Conflict Resolution, Sept. 2005), https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf.

³ Dawn Kuhlman, *Trauma Informed Mediation*, 4:23 (Ted talk x Overland Park, Overland Park, Kansas, Nov. 2018), https://www.ted.com/talks/dawn_kuhlman_trauma_informed_mediation [hereinafter “Kuhlman TedTalk”].

⁴ Ben Coltrin, *What the Statistics Tell Us About Divorce and Custody Mediation*, MEDIATE.COM (July 14, 2022), <https://mediate.com/what-the-statistics-tell-us-about-divorce-and-custody-mediation/>.

low-income respondents of the same study reported using an alternative dispute resolution method, compared to 93 percent for middle and high-income respondents, likely due to actual or perceived costs associated with it.⁵ In some states, divorce mediation is a mandatory first step, particularly if there are custody or visitation issues.⁶ Many states have exemptions from mandatory mediation in divorce proceedings if there are allegations of domestic abuse. However, the appropriateness of mediation within the context of domestic violence generally continues to be a hotly contested issue.⁷ Therefore, it is still quite possible that mediators will come into contact with parties who have been victims of or perpetrated domestic violence and thus must be equipped with the tools and skills necessary to address traumatic responses in such a situation.

Outside the realm of domestic violence, many family mediations will be impacted by trauma. By necessity, mediating parties must share some of the most intimate and painful details of their lives, which often can be retraumatizing and trigger responses that inhibit the mediation process. Domestic mediations, therefore, command greater attention to the impact that trauma plays on the behavior of the parties, compelling mediators to train themselves in trauma-informed principles and practices that will drive parties toward settlement and, perhaps, even genuine resolution and healing.

This comment provides information necessary for mediators to begin understanding and adopting trauma-informed practices. It sheds light on the ethical and practice implications of trauma, and addresses ways to support mediators and legal professionals encountering trauma, especially in alternative dispute resolution settings. Part I provides a brief introduction to the historical and philosophical underpinnings of trauma-informed mediation. Part II explains what trauma is, the biology behind it, and how it affects the brain, body, and behavior of an individual, and specifically, a mediating party. Part III provides an overview of the principles

⁵ *Id.*

⁶ Donna Saadati-Soto, *An Innovative Alternative or an Institutional Failure of Family Courts?: A Critical Perspective on the Experience of Latinx Families in an Anglo-Centric Mediation Process*, 31 *BERKELEY LA RAZA L.J.* 25, 26 (2021).

⁷ Richard McCutcheon, *Addressing Domestic Violence in Mediation: The Need for More Uniformity and Research*, *HARV. NEGOTIATION L. REV.* (May 2021), <https://journals.law.harvard.edu/hnlr/2021/05/addressing-domestic-violence-in-mediation-the-need-for-more-uniformity-and-research/>.

of trauma-informed mediation. Part IV addresses the reasons to adopt trauma-informed mediation. Part V acknowledges both the social challenges to implementing such an approach and concerns about preventing the mediator's secondary trauma.

I. Introduction to Trauma-Informed Mediation and Practice

A. *Historical Framework and the Prevalence of Trauma*

First established in the public and mental health context, the principles of trauma-informed care have been adopted in other professional service contexts, such as education, healthcare, and substance abuse treatment, and now legal practice is joining the list.

Birthing from the ad hoc efforts of the feminist, domestic violence, and child abuse recognition movements of the 1970s and 1980s, and later implemented by veteran service providers after the Vietnam War, the concept of trauma-informed care has evolved significantly over the past forty years and is now applied to a wide range of settings, including public health, education, substance abuse, child welfare, and the criminal justice system.⁸ Since the 1990s, research on the individual and collective experiences of and responses to trauma has rapidly increased, “ranging from customized health and wellbeing support for the physical or mental-emotional impact of trauma to government policies and new legislation addressing trauma at the federal or regional level.”⁹ In 2018, the U.S. House of Representatives unanimously approved House Resolution 443, acknowledging that millions of Americans have experienced trauma that negatively impacts their mental, physical, spiritual, economic, and social wellbeing.¹⁰ The Resolution encouraged the use of trauma-informed care in federal

⁸ Charles Wilson, Donna M. Pence, & Lisa Conradi, *Trauma-Informed Care*, *ENCYCLOPEDIA OF SOCIAL WORK* (Nov. 4, 2013), <https://doi.org/10.1093/acrefore/9780199975839.013.1063>.

⁹ *TRAUMA-INFORMED LAW: A PRIMER FOR LAWYER RESILIENCE AND HEALING* 18 (Helgi Maki, Marjorie Florestal, Myrna McCallum, & J. Kim Wright, eds. American Bar Association: Law Practice Division, 2023) [hereinafter *TRAUMA-INFORMED LAW*].

¹⁰ H. Res. 443, *Recognizing the Importance and Effectiveness of Trauma-informed Care* (Feb. 2018), <https://www.congress.gov/bills/115th-congress/house-resolution/443/text?q=%7B%22search%22%3A%5B%22gallagher%22%5D%7D>.

agencies and programs, finding that trauma-informed care could effectively assist individuals, children, and families in overcoming trauma and leading healthy lives.¹¹

A greater awareness of the prevalence of trauma in American society can be credited to the Adverse Childhood Experiences (ACE) study, performed in 1996 and 1997, which found a connection between traumatic adverse childhood experiences and many of the leading causes of death in adults.¹² Almost two-thirds of the general population of the United States report experiencing at least one indicia of trauma (such as domestic violence or abuse) before adulthood.¹³ Trauma has been labeled a “public health epidemic.”¹⁴

Over the last decade, there has been a movement to implement trauma-informed principles in the legal field, with the America Bar Association’s Law Practice Division producing *Trauma-Informed Law: A Primer for Lawyer Resilience and Healing* in just 2023.¹⁵ In recent years, there has been a growing recognition of the profound impact trauma has on individuals involved in mediation processes.¹⁶ However, while the subject has garnered attention from major players like Congress and the American Bar Association, efforts to teach trauma-informed practice in the mediation context remain largely ad hoc, with local and regional bar associations and community leaders sharing materials

¹¹ *Id.*

¹² See generally Vincent J. Felitti et. al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14(4) AM. J. PREV. MED. 245 (1998).

¹³ Centers for Disease Control and Prevention, *Fast Facts: Preventing Adverse Childhood Experiences* (updated Apr. 6, 2022), <https://www.cdc.gov/violenceprevention/aces/fastfact.html#:~:text=Preventing%20ACEs%20could%20potentially%20reduce,or%20more%20ACEs%20than%20others> (indicating 64% of American adults reported experiencing at least one traumatic event in their childhood).

¹⁴ TRAUMA-INFORMED LAW, *supra* note 9, at 32.

¹⁵ *Id.* at 17-18.

¹⁶ In-Person Interview with Dawn Kuhlman, in Liberty, Missouri (Sept. 7, 2023) [hereinafter “Kuhlman Interview”]. Dawn Kuhlman is the executive director of M.A.R.C.H. Mediation, a Missouri Nonprofit that provides free mediation services to families that are IV-D recipients. She has spent the last ten years crafting her own trauma-informed mediation model that she now teaches to mediators all over Missouri and in programs around the United States. Her work has informed much of this paper.

and training as the concept becomes popular in their community. Because of this, there is no single definition or guidebook for “trauma-informed mediation.” One goal of this Comment is to sort through an abundance of methodologies, philosophies, and practices employed by attorneys nationwide, especially those relevant to family law mediators.

B. *Underpinnings and Goals of Trauma-Informed Mediation*

Simply put, trauma-informed practice is “when the practitioner puts the realities of the client’s trauma experiences at the forefront in engaging with the client, and adjusts the practice approach informed by the individual client’s trauma experience.”¹⁷ It is “grounded in an understanding of and responsiveness to the impact of trauma, that emphasizes physical, psychological, and emotional safety” and provides “opportunities for survivors to rebuild a sense of control and empowerment.”¹⁸ This approach also encompasses the practitioner employing modes of self-care to counterbalance the effect the client’s trauma experience may have on the practitioner.

Applied to the context of mediation, trauma-informed practice acknowledges and addresses the traumatic experiences of participants, fostering a safe and supportive environment that empowers them toward healing and resolution. It seeks to inform mediation participants and make them more mindful of their own cognitive, behavioral, and emotional responses as a result of trauma. Traditional mediation often fails to consider the underlying trauma that parties may have experienced. This oversight can exacerbate feelings of powerlessness, fear, and retraumatization during the process. By contrast, trauma-informed mediation recognizes that unresolved trauma can significantly impede effective communication and decision-making.

Through a trauma-informed lens, an individual’s behaviors are viewed more compassionately as a response to surviving trauma, re-framing the opening question from: “What is wrong with you?” to

¹⁷ Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLIN. L. REV. 359, 360 (2016). This article discusses how to teach trauma-informed lawyering through direct examples of pedagogical approaches.

¹⁸ Laura Athens, *Trauma-Informed Care in Mediation*, OAKLAND CNTY. LEGAL NEWS (May 30, 2023), <https://mediate.com/trauma-informed-care-in-mediation/>.

“What has happened to you? or “What did you experience?”¹⁹ The first question pathologizes trauma when it can be an expected or even predictable response to an overwhelming situation, while the second question ensures that a person’s lived experience and environment are specifically included when considering the factors that influence behavior.²⁰ Mediating parties frequently experience trauma in the form of a divorce, an accident, an assault, malpractice, death of a loved one, loss of employment, or other injury. Litigation itself can be a traumatic experience, forcing parties to relive the pain and anguish that led to the lawsuit.²¹ As one mediator notes, “the pervasive and harmful impact of traumatic events on individuals, families, and communities and the unintended but similarly widespread retraumatizing of individuals within our public institutions and service systems makes it necessary to rethink doing ‘business as usual.’”²²

The impact of trauma can show up in responses and behavior that do not fit with the way legal processes, and more specifically, the mediation process, are designed to work, thus complicating the mediator’s role. The psychobiological impacts of trauma can limit a mediator’s capacity to resolve conflict and the parties’ abilities to advocate for their own best interests. Understanding the prevalence of trauma can change the perspective of mediators, who can then approach each situation with a presumption that one or both parties may exhibit a traumatic response during mediation. Mediating parties, especially in the realm of family law, often face adversity that rises to the level of trauma, which is exacerbated by issues involving race, gender, religion, child custody, domestic violence, substance abuse, mental health, poverty, access to opportunities, and more.

Having a better understanding of trauma, as well as clear tools for addressing it in practice, can help lawyers and mediators reconsider that a so-called difficult client may instead be reacting out of trauma. Understanding this, the mediator can endeavor to prevent retraumatization, improve communication, increase

¹⁹ Kuhlman Interview, *supra* note 16. See also BRUCE D. PERRY & OPRAH WINFREY, *WHAT HAPPENED TO YOU?: CONVERSATIONS ON TRAUMA, RESILIENCE, AND HEALING* (2021).

²⁰ TRAUMA-INFORMED LAW, *supra* note 9, at 20. See also Liz Wall, Daryl Higgins & Cathryn Hunter, *Trauma-informed Care in Child / Welfare Services* (CFCA Paper No. 37) (2016), https://www.researchgate.net/publication/294775580_Trauma-informed_care_in_childwelfare_services_CFCA_Paper_No_37.

²¹ Athens, *supra* note 18.

²² *Id.*

litigant satisfaction with the legal process and outcomes, and expand access to justice by removing trauma-related barriers. At its core, legal practice is a helping profession. Mediators therefore must work to meet the needs of clients and mediating parties with compassion and competency and be willing to bear discomfort and inconvenience in the service of justice and resolution. Due to the pervasiveness of trauma, it is highly likely that practicing attorneys and mediators have already encountered trauma in their practice and their personal lives and will continue to do so in the future. However, integrating a trauma-informed approach can help mediators anticipate and respond to trauma appropriately, potentially mitigating vicarious trauma as a result.

II. The Effects of Trauma on the Brain, Body, and Behavior

A. *Trauma Defined*

Originating from the Greek word for “wound,”²³ trauma denotes injuries that are often unseen or misinterpreted. There is no one definition of trauma,²⁴ and the various fields employing a trauma-informed approach disagree on the most appropriate way to frame the issue. From a public health perspective, trauma can be defined as a person’s response to a situation, whether an acute or chronic situation, whether personal or systemic, that overwhelms their human ability to cope effectively.²⁵ Traumatic experiences can

²³ Amar Dhall, *The Neuro-Somatic Approach to Trauma-Informed Lawyering: From Survival of the Fittest to Fittest for Survival*, in *TRAUMA-INFORMED LAW*, *supra* note 9, at 43. Dr. Dhall says “The essence of trauma is that the experience encounters an event that they cannot integrate into their body-mind (e.g. they experience a disintegration), which leads to some form of either rigidity or chaos.” *Id.*

²⁴ The Substance Abuse and Mental Health Services Administration defines trauma as resulting from “an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual’s functioning and mental, physical, social, emotional, or spiritual well-being.” SAMHSA’s Trauma and Justice Strategic Initiative, *SAMHSA’s Concept of Trauma and Guidance for a Trauma-Informed Approach*, HHS Publ’n No. (SMA) 14-4884 (2014), <https://store.samhsa.gov/sites/default/files/d7/priv/sma14-4884.pdf>.

²⁵ *TRAUMA-INFORMED LAW*, *supra* note 9, at 19 (“To facilitate the growing practice of trauma-informed lawyering and the evolving nature of this

emerge from everyday life, such as divorce and infidelity, or can result from more significant events, such as abuse and neglect.²⁶ Even prolonged stress can become a source of trauma, which is especially prevalent among family court litigants, some of whom have been in litigation for years. Trauma is not the experience of the event itself, but rather the body and mind's response to the event; thus, even people's thoughts can become a trauma trigger.²⁷ Kate Porterfield, a psychologist who works at the Bellevue Program for Survivors of Torture,²⁸ describes trauma as a "biopsychosocial" experience in which the deep distress of trauma disrupts people's ability to engage all of their biological, psychological, and social skills and resources and puts people in survival mode.²⁹

Anyone can be impacted by trauma. Responses to trauma may be emotional, physical, cognitive, or behavioral and may be temporary, prolonged, acute or chronic, mild or severe.³⁰ No two people experience trauma in precisely the same way. Thus, consequences of the same traumatic experience will differ as "their past accumulated traumas, histories, backgrounds, and childhoods all factor into how exhausted their body already is and how fast it may be able to bounce back this time."³¹ Trauma responses begin forming very early in childhood, so many people erroneously mistake such responses as part of their personality.³² Some people may be more resilient to trauma than others. Growing up in a loving and supportive home, having a good education, and maintaining strong family and friend connections can help reduce the harm caused by a traumatic event, while people who are raised in broken or

information due to the continuing advancement of trauma studies, we have taken a 'working definition' approach, defining trauma in public health terms rather than strictly clinical terms.").

²⁶ Kuhlman TedTalk, *supra* note 3, at 0:15.

²⁷ Dhall, *supra* note 23, at 43.

²⁸ Dr. Porterfield has provided clinical care to adults and children who have experienced war and refugee trauma and torture for over 25 years. She regularly consults on issues pertaining to trauma, including in cases at the Guantanamo Bay Detention Center, in U.S. federal courts, and at the International Criminal Court, as well as with journalists and human rights organizations.

²⁹ TRAUMA-INFORMED LAW, *supra* note 9, at 15.

³⁰ Athens, *supra* note 18.

³¹ TRAUMA-INFORMED LAW, *supra* note 9, at 26. *See also* Mallika Kaur, *Trauma and Myths*, in TRAUMA-INFORMED LAW, *supra* note 9, at 25-26.

³² Dhall, *supra* note 23, at 44.

dysfunctional homes have been abused, neglected, or abandoned as a child, or who lack healthy role models may be more adversely affected by a traumatic event.³³

B. *The Biology of Trauma*

All complex animals (of which homo sapiens is one) move through the world with their nervous systems sending the world with one priority question at the fore: "Am I safe?"

– Dr. Amar Dhall³⁴

When trauma occurs, the human brain is wired to find a way to survive. The brain perceives trauma as a threat, triggering a fear response. The brain enters a dysregulated state due to an actual or perceived lack of control.³⁵ Under normal circumstances, human brains operate out of the prefrontal cortex, which controls “executive functions” such as attention, the capacity to integrate memories into narrative, and the ability to plan and make decisions; those functions are suppressed when the trauma response is triggered. The mediation process, which includes brainstorming, problem-solving, decision-making, and negotiation, requires operating out of the prefrontal cortex. However, when mediating parties are tasked with reliving a traumatic experience, a task that is often necessary to the mediation process, their brains may begin to operate out of the fear-based parts of their brain instead.

When the brain responds out of fear, the limbic brain, rather than the prefrontal cortex, is activated.³⁶ The limbic brain governs the functioning of emotions, memory encoding (i.e., how memories are stored), and survival responses. The limbic brain functions more quickly than the prefrontal cortex to ensure survival, causing the brain to short-circuit, picking “neural pathways that may not be the most rational response.”³⁷ Two significant structures of the limbic system are the hippocampus and the amygdala. The amygdala—the part of the brain that governs one’s response to fear and informs the body to fight, flight or freeze—functions as

³³ Athens, *supra* note 18.

³⁴ Dhall, *supra* note 23, at 43.

³⁵ TRAUMA-INFORMED LAW, *supra* note 9, at 25-26.

³⁶ *Id.* at 33.

³⁷ *Id.* at 26.

an alarm system, signaling the presence of danger.³⁸ The amygdala grows as a result of trauma, impacting one's ability to communicate effectively and making it difficult to regulate emotions.³⁹ It takes twenty to sixty minutes to calm the brain back down when the amygdala is triggered.⁴⁰ Fight, flight, freeze, or fawn mode kicks in, resulting in behaviors such as hypervigilance, dissociation, withdrawal, and disrupted memories or narratives.⁴¹ The hippocampus facilitates the production of cortisol under stress.⁴² Chronic stress leads to neuron death in the brain, which results in issues with memory.⁴³ Under threat, the brain becomes focused on survival instead of forming memories or narratives; as a result, memories or narratives may not be linear or chronological.⁴⁴

Ultimately, to employ a trauma-informed approach in mediation, it is less important to understand the precise neurobiology of trauma than it is to understand resources for meeting trauma in clients, communities, and themselves as it arises. The goal of a trauma-informed approach is to calm the brain to operate out of the prefrontal cortex, which governs problem-solving, reasoning, logic, attention, and predicting consequences of actions, rather than out of the amygdala, so that participants can engage constructively in the mediation process.⁴⁵ Despite the level of information amassed regarding the lasting impacts of trauma on individuals, mediators do not need to become experts in psychology to understand some

³⁸ *Id.*

³⁹ Dawn Kuhlman, *Trauma-Informed Mediation 3-Hour Webinar* given via Zoom to mediators across the United States (May 13, 2022), <https://drive.google.com/file/d/1CqvhS55q9xMTEmY7XdzBjqug90XwKHLn/view> [hereinafter "Kuhlman Webinar"]. See also DAN SIEGEL, *POCKET GUIDE TO INTERPERSONAL NEUROBIOLOGY: AN INTEGRATIVE HANDBOOK OF THE MIND* (2012); BESSEL VAN DER KOLK, *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* (2015).

⁴⁰ Kuhlman Interview, *supra* note 16.

⁴¹ TRAUMA-INFORMED LAW, *supra* note 9, at 32.

⁴² *Id.* at 26.

⁴³ Kuhlman Webinar, *supra* note 39.

⁴⁴ TRAUMA-INFORMED LAW, *supra* note 9, at 33. For more on the neurobiology of trauma and other important trauma concepts, including the trauma of racism, see ALISHA MORELAND-CAPUIA, *TRAINING FOR CHANGE: TRANSFORMING SYSTEMS TO BE TRAUMA-INFORMED, CULTURALLY RESPONSIVE AND NEUROSCIENTIFICALLY FOCUSED* (2019); ALISHA MORELAND-CAPUIA, *THE TRAUMA OF RACISM: EXPLORING THE SYSTEMS AND PEOPLE FEAR BUILT* (2021).

⁴⁵ Kuhlman Webinar, *supra* note 39.

of the effects of trauma on the brain and body. By employing this informed approach, mediators can better understand the impact of trauma on the brain and body, helping them connect with and have greater empathy for the parties they are mediating. It also helps them give guidance regarding individuals who are struggling with emotion regulation during mediation.

C. *Implications of Trauma on the Behavior of Mediating Parties*

The impact of trauma on a mediating party will vary considerably based on the source and type of trauma, that person's resilience, and the social and community supports that person has available. Examples of the various categories of trauma include: early childhood trauma, complex trauma, intimate partner or family violence, community violence, natural disaster and refugee trauma, medical trauma, sex trafficking, sexual abuse, and traumatic grief.⁴⁶ When a person experiences a trauma response, their human capacity to respond with all possible resources is diminished. Because thoughts themselves can be a trigger, an essential aspect of being a trauma-informed practitioner is "to understand that all trauma work is performed in the present, and why (as a corollary) sharing presence and mindful attention with traumatized clients is an appropriate way to work, because it will help them to ground themselves in the present."⁴⁷ Traumatized parties often operate out of a dysregulated state, making it difficult to recall memories, regulate their emotions, set goals, be logical or reasonable, be attentive, predict the consequences of their actions, problem-solve, or manage conflict.⁴⁸

Additional patterns that may be observed when a person experiences a trauma response include:

- gaps in memory, narrative, learning, and decision-making;
- hyperarousal or hypoarousal (also known as fight, flight, freeze, or fawn response);

⁴⁶ For more information on the nuances of particular types of trauma, see the National Child Traumatic Stress Network, *Trauma Types*, <https://www.nctsn.org/what-is-child-trauma/trauma-types> (last visited Jan. 23, 2024). See also Center for Substance Abuse Treatment (US), *Chapter 2, Trauma Awareness*, in *TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVICES* (2014). (Treatment Improvement Protocol (TIP) Series, No. 57.) <https://www.ncbi.nlm.nih.gov/books/NBK207203/>.

⁴⁷ Dhall, *supra* note 23, at 43.

⁴⁸ Athens, *supra* note 18.

- hypervigilance or hopelessness manifested in fearful thoughts and moods, anticipating disaster, or giving up;
- inability to grieve;
- lack of emotion, extreme emotions, or an inability to identify emotions;
- withdrawing or inundating with communication;
- key body functions disrupted, such as sleep;
- feeling unsafe and unable to trust and anxious, insecure, or disorganized attachment patterns; and
- an inability to seek or accept help.⁴⁹

Understanding the prevalence of trauma can change the perspective of mediators, who can then approach each situation with a presumption that one or both parties may exhibit a trauma response during mediation. Acknowledging the biopsychosocial impact of trauma, Kate Porterfield argues that lawyers must become prepared to meet trauma “not just with intellectual strategy or cognitive responses but also to consider how to include biologically calm, psychologically safe, and socially trustworthy approaches” in their work.⁵⁰

III. Principles of Trauma-Informed Mediation

The principles of trauma-informed lawyering are evolving, and various approaches have been proposed by lawyers, clinics, law schools, trauma experts, and government agencies. The trauma-informed approach to mediation acknowledges and addresses the traumatic experiences of participants, fostering a safe and supportive environment that empowers them toward healing and resolution. It seeks to inform mediation participants and make them more mindful of their own cognitive, behavioral, and emotional responses as a result of trauma.⁵¹ Mediators must, therefore, cultivate an awareness of trauma responses in psychobiological terms, which may be complex, counterintuitive, or at first appear to be (or be perceived as) so-called “difficult behavior.”⁵² It is important to note that lawyers do not need to be therapists to be

⁴⁹ TRAUMA-INFORMED LAW, *supra* note 9, at 34-35.

⁵⁰ *Id.* at 29.

⁵¹ Kuhlman Interview, *supra* note 16.

⁵² TRAUMA-INFORMED LAW, *supra* note 9, at 65.

trauma-informed. The mandate of the mediator is to increase safety, trustworthiness, choice, collaboration, and empowerment to guide parties through their trauma responses, making it more likely that they will settle their case.

Dawn Kuhlman is a mediator who has spent the last decade crafting her own trauma-informed mediation model that she now teaches to mediators all over the state of Missouri, and in programs around the United States. Kuhlman's model integrates aspects of the transformative style of mediation with mindfulness, an awareness of trauma neuroscience, and a realistic assessment of the parties' ability to mediate.⁵³ Her work provides a frame of reference upon which other mediators can continue to build.

Transformative mediation places the principles of empowerment and recognition at the core of helping people in conflict change how they interact with one another. The mediator can empower parties by reminding them they have choices and providing them with resources and coping skills, reframing a victim mindset into the mindset of someone empowered to make decisions about their future.⁵⁴ Empowerment can also be cultivated by focusing on individuals' strengths, self-determination, autonomy, choices, and control.⁵⁵ Here, control involves enhancing a litigant's ability to be an active part of the legal process, which can be accomplished by asking for permission and feedback from the parties throughout the mediation.⁵⁶ Mediators can also encourage and challenge the parties to have greater recognition for the person across the table. They can affirm the parties when they do so, simply telling them, "You did a good job on that."⁵⁷ Validating the source of the traumatic experience and the parties' attempts to work through the process can motivate them to engage constructively with one another. Recognition between the parties should be encouraged, as should recognition by the mediator of the parties' successful efforts to engage constructively.

Integrating mindfulness, meditation, and visualization techniques can help the parties self-regulate. Kuhlman, who began using these techniques in 2014, found that "people weren't always

⁵³ Kuhlman TedTalk, *supra* note 3, at 2:25.

⁵⁴ Kuhlman Interview, *supra* note 16.

⁵⁵ Athens, *supra* note 18.

⁵⁶ Katherine Porterfield, *Trauma-Informed Client Communication Strategies for Lawyers*, in *TRAUMA-INFORMED LAW*, *supra* note 9, at 69.

⁵⁷ Kuhlman Interview, *supra* note 16.

able to do this . . . so it was my job to help them calm down. I was doing deep breathing with people. Sometimes we'd just sit in silence."⁵⁸ This may also help people identify and be mindful of their thoughts and behavior and how they treat others. Explaining the neuroscience of trauma can go hand-in-hand with the concept of mindfulness, and it may be effective for the mediator to help the parties take a more clinical view of their trauma responses. Such a tactic may also help normalize the effects of trauma and encourage the parties to rise above what is afflicting them.

Safety and trust must be prioritized and considered in everything from the physical space to the mediator's communication style. Individuals who have experienced a trauma that threatened their fundamental sense of safety and security sometimes "operate in the world as if they are still in danger."⁵⁹ This priority on safety shapes the mediator's approach in everything from the physical layout of the meeting space to the way topics are introduced and anticipated.⁶⁰ Dr. Katherine Porterfield, a psychologist who regularly consults in the U.S. federal courts, has developed three recommendations to enhance safety through communication.

First, the attorney (or mediator) should acknowledge the physical space.⁶¹ The mediator should be aware that the office where the mediation takes place can be intimidating or imposing. The presence of adversaries may increase the individual's threat perception.⁶² Porterfield recommends that the lawyers explicitly begin by asking if the litigant is comfortable in the current meeting conditions, proposing a variety of questions that can be utilized, including: "Is this an okay place for us to speak?" and "It's important that you feel safe speaking to me here. Do you feel able to talk?"⁶³ While simple, these questions signal to litigants that their experience is critical to the mediation process.

In addition to acknowledging the physical space, the mediator should anticipate what will happen next in the mediation and

⁵⁸ Kuhlman TedTalk, *supra* note 3, at 7:30.

⁵⁹ Porterfield, *supra* note 56, at 72.

⁶⁰ *Id.* at 70.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* For more information on responding to trauma in the moment, see Rebecca M. Stahl, *Embodied Trauma and How to Respond to It*, in *TRAUMA-INFORMED LAW*, *supra* note 9, at 124.

explain their role in detail. Traumatized individuals have often experienced severe helplessness and unpredictability in their environments.⁶⁴ Therefore, the mediator should make every effort to decrease uncertainty by giving a clear overview of the mediation process, explaining the purpose behind caucusing, the reasoning for their recommendations, and the limitations of their role as a mediator.

Creating a safe environment for a client lays the foundation for communication to proceed constructively. Mediators can also foster safety and dignity by taking a non-judgmental approach to communication with the parties, providing them time and space to discuss their needs and preferences.⁶⁵ Mediators should be mindful of their tone and how the parties will perceive their communication style. The ABA Legal Practice Division encourages attorneys to have a “relational practice” by communicating with genuine curiosity and empathy to establish trust with the parties, allowing for relationship formation instead of goal-oriented, transactional communications only.⁶⁶ Reflecting back what the individual has said without interpretation, analysis, or disagreement can “create a powerful feeling of being a subject in one’s own story, rather than being seen as an object in another’s interpretation.”⁶⁷ The mediator should make known to the parties that she genuinely wants to understand their respective positions and help them reach a resolution if possible. Additionally, rather than abruptly ending the mediation session, which can leave the parties feeling exposed and distressed, the mediator can provide closure in ways that recognize the work the parties have done, the stress they might be under, and the need for a sense of what is happening next.⁶⁸ The mediator can use closure to transition the parties away from the traumatic material, increasing their satisfaction with the process and buy-in on their settled agreement.

Mediators using a trauma-informed approach sometimes hold pre-mediation sessions with each party to foster trust and a sense of safety. These sessions, often one hour long, allow the mediator to listen to each party’s story privately and without interruption, helping them

⁶⁴ *Id.*

⁶⁵ Athens, *supra* note 18.

⁶⁶ TRAUMA-INFORMED LAW, *supra* note 9, at 65.

⁶⁷ Porterfield, *supra* note 56, at 73.

⁶⁸ *Id.* at 74.

feel heard and supported.⁶⁹ This time can also be utilized to explain the process in detail and place parameters around how the parties will interact with one another in mediation, identifying triggers and equipping them with coping skills before the mediation even starts.⁷⁰ The mediator can encourage shared agreements regarding what to do if a party gets trigger during the session, thereby avoiding re-traumatization and respecting personal boundaries.⁷¹ This will assist the mediator in setting an agenda and identifying “low-hanging fruit,” or issues that are more easily resolved, to be addressed at the beginning of the mediation and in a manner that does not waste time.⁷² Pre-mediation sessions encourage transparency and accountability, which can help mitigate the impact of trauma on mediating parties by preparing and respectfully educating them about the mediation process in advance, clearly articulating what they can expect and giving an overview, and being a reliable facilitator by doing what they say they will do.

Some mediators admit that this approach is not very practical in attorney-assisted mediations,⁷³ while others insist that hearing from attorneys can help reduce retraumatization.⁷⁴ Additionally, parties do not always have four hours to spare for mediation. However, when parties exhibit difficulty regulating their emotions and are unrepresented at mediation, a pre-mediation session with both parties can go a long way toward de-escalating and equipping them with the skills to reach a resolution.

Another way to foster a sense of comfort and safety is to offer several formats for mediation: in-person, zoom, or by phone. While many mediators prefer in-person mediations over those of a virtual or auditory format, there are benefits to allowing parties to attend from the comfort of their own homes, in the presence of their pets or comfort objects. Mediators utilizing this approach reflect that offering such formats can reduce trigger responses and help the parties calm down more quickly when they get upset.⁷⁵ However, in

⁶⁹ Kuhlman Interview, *supra* note 16.

⁷⁰ *Id.*

⁷¹ Mediators Beyond Borders, *Trauma-Informed Conflict Engagement*, <https://mediatorsbeyondborders.org/what-we-do/conflict-literacy-framework/trauma-informed/> (last visited Jan. 23, 2024).

⁷² Kuhlman Interview, *supra* note 16.

⁷³ *Id.*

⁷⁴ Terri Round, Interview via Zoom (Sept. 13, 2023), Kansas City, Missouri.

⁷⁵ Kuhlman Interview, *supra* note 16.

online mediations, there should be built-in breaks for participants to have an opportunity to recharge or consult with their attorneys.⁷⁶ Regardless of the format, the mediator must frequently monitor the participants' comfort level and sense of security.

One more consideration to be aware of when implementing a trauma-informed approach to mediation is the parties' present ability to mediate. The mediator needs to be aware if she is working harder than the parties. If this is the case, then their problem is likely bigger than mediation, and the mediator should consider ending the mediation and referring the parties to community resources to obtain specific interventions as necessary.⁷⁷ This is especially noticeable when parties are repeatedly rehashing the same issue and "continually going off the rails."⁷⁸ To avoid burnout, the mediator must recognize the limitations of her position and have resources to which she can refer the parties when their challenges are beyond her role and skill set.

To summarize, trauma-informed mediators should develop skills such as empathy, empowerment, recognition, flexibility, patience, preventing traumatization, rapport building and offering a sense of safety, and identifying opportunities for closure. They must cultivate an awareness of trauma responses in psychobiological terms and increase the mindfulness of the parties in this regard, as well. Having such a skill set can empower parties toward healing and resolution.

IV. Reasons To Adopt Trauma-Informed Mediation

While the context and impact vary drastically from individual to individual, most people have had some sort of traumatic experience, making it exceedingly likely that mediators will encounter parties exhibiting trauma symptoms. Traditional mediation often fails to consider the underlying trauma that parties may have experienced. This oversight can exacerbate feelings of powerlessness, fear, and retraumatization during the mediation process. By contrast, trauma-informed mediation recognizes that unresolved

⁷⁶ Athens, *supra* note 18.

⁷⁷ Kuhlman Interview, *supra* note 16.

⁷⁸ *Id.*

trauma can significantly impede effective communication and decision-making. Mediators should be “keenly aware of the likelihood that parties have been exposed to trauma to such an extent that it colors their perceptions and beliefs, and therefore, influences how they engage in conflict resolution.”⁷⁹ Using trauma-informed tools can help parties engage in the dispute resolution process in a more emotionally regulated manner, allowing for full engagement of the executive function in the brain’s prefrontal cortex, making them more likely to have full access to all of their capacities, make decisions with agency, and be less likely to feel limited by toxic stress or act as if they are still in “survival mode.”

Thomas Hubl, author, teacher, and host of the Collective Trauma Summit,⁸⁰ provides insight into why trauma-informed care matters:

Whether individual or collective, trauma fragments and fractures, it disowns and silences. It creates denial and forgetting to assist in its repair, we must choose to acknowledge, to witness, and to thereby feel together, what has actually occurred, even the most horrific details we would rather close our eyes to. Because to look away, to dismiss, deny, minimize, or willfully forget, is to uphold the institutions of inequality, of inhumanity, that created them.⁸¹

There are significant costs to neglecting the impact of trauma on the legal system. For attorneys representing parties in mediation, failing to acknowledge a client’s trauma may lead to a tolerance of legal services that do not support their best interests, and may even inadvertently harm them. In a representative capacity, attorneys have an ethical duty to pursue the best interests of their clients. To do so, attorneys must explicitly seek to understand their clients’ needs more closely. While mediators do not have such a duty, conflict resolution is best served by having a deeper understanding of the parties’ injuries and needs. The mediator can identify more effective problem-solving strategies by gaining a greater

⁷⁹ Athens, *supra* note 18.

⁸⁰ The Collective Trauma Summit is an annual conference bringing together teachers, coaches, authors, artists, activists, and leading experts in trauma, self-care, health and wellness, mindfulness, and more to illuminate the root causes of trauma and help create a global healing response system.

⁸¹ THOMAS HUBL, HEALING COLLECTIVE TRAUMA: A PROCESS OF INTEGRATING OUR INTERGENERATIONAL AND CULTURAL WOUNDS 79 (New York: Sounds True Inc., 2021).

proximity to the nuances and details of a party's situation, such as their social context, socioeconomic, cultural, or personal factors.

Without trauma-informed lawyering, litigants impacted by trauma risk being inadvertently deprived of justice by the very injuries that the injustice caused in the first place. Ignoring trauma perpetuates its presence as a barrier to accessing justice, legal assistance, or alternative dispute resolution services, dissuading individuals from engaging with a system that remains oblivious to its potential to inflict further damage despite its intentions to aid them. This lack of awareness creates an environment where individuals feel unsupported and discouraged from seeking justice through traditional means. Additionally, overlooking the impact of trauma on lawyers' and mediators' wellbeing poses a considerable problem. Failing to address this issue can have detrimental effects on their ability to effectively represent clients and provide quality service, also increasing the likelihood that the lawyer will run afoul of written and unwritten rules of professional responsibility.⁸² Therefore, lawyers, especially mediators, should turn toward trauma in litigants, in systems, and in themselves, "with the same humanity [they] would offer a fellow human who has experienced a visible injury."⁸³

V. The Challenges

A. Social Influences

Lawyers and mediators may face challenges in applying trauma-informed practice tools because these tools' underlying principles differ drastically from, and are even opposite to, the principles underlying traditional legal training, which teaches that analysis and judgment are the primary skills to be employed in any situation.⁸⁴ By contrast, trauma-informed practice emphasizes the practical utility of nonjudgment, empathy, and compassion. Without practice, employing these skills can be uncomfortable and inconvenient.

⁸² Kenneth Townsend, *Ethics and Professional Responsibility: What Lawyers Should Know and Trauma-Informed Lawyering as a Legal Competency*, in *TRAUMA-INFORMED LAW*, *supra* note 9, at 76.

⁸³ *TRAUMA-INFORMED LAW*, *supra* note 9, at 21-22.

⁸⁴ *Id.* at 101.

Individualizing trauma can overlook the ethical and political dimensions of a party's situation.⁸⁵ Their communities define what experiences are normal or deviant and what the individual's range of possible action looks like. Thus, parties do not always possess the agency to identify their own trauma, tell their story, or advocate for themselves.

B. *Preventing the Mediator's Secondary Trauma*

Lawyers are not exempt from the prevalence of trauma. Numerous studies and literature reviews have generally found that trauma is prevalent among lawyers, judges, and law students.⁸⁶ In the context of the legal system, vicarious trauma is the phenomenon experienced by lawyers, judges, and mediators “who hear, see, or read about trauma on a regular basis, then begin to experience adverse mental health impacts similar to those who are directly victimized or traumatized.”⁸⁷ Such trauma can be more prevalent, subtler, and more chronically present than it may first appear, coming from one's own experience or from working with someone who has had a traumatic experience.⁸⁸ Addressing secondary or vicarious trauma, burnout, or compassion fatigue is a continuous process, and no one can provide a universal guide to resilience. The underlying concept, however, involves openly asking ourselves what happened to us and what we have experienced, believed, or assumed.

Adversity is an inevitable part of life, and its impact varies drastically from person to person. This holds true for lawyers as well, as they encounter different forms of trauma in their practice areas. While some areas of law may be more prone to trauma, no field appears to be completely immune to it. Practice areas such as family law, criminal law, immigration law, and personal injury or

⁸⁵ Susanne Van der Meer, *Looking at Law and Trauma Through a Philosophical Lens: Zooming Out from One Victim to a Community of Actors*, in *TRAUMA-INFORMED LAW*, *supra* note 9, at 47-48.

⁸⁶ Dawn D'Amico, *Trauma And Well-Being Among Legal Professionals* (2021); M.-J. Leonard et al., *Traumatic Stress in Canadian Lawyers: A Longitudinal Study*, APA PSYCNET (2023), <https://doi.org/10.1037/tra0001177>; Karen Oehme & Nat Stern, *Improving Lawyers' Health by Addressing the Impact of Adverse Childhood Experiences*, 53 U. RICH. L. REV. 1311 (2018-2019).

⁸⁷ *TRAUMA-INFORMED LAW*, *supra* note 9, at 160.

⁸⁸ *Id.* at 30.

health law often involve personal stories of trauma shared behind the scenes. In the medical field and among therapists, it is widely acknowledged that professionals cannot remain untouched by suffering and loss.

Similarly, lawyers cannot expect to be unaffected by the mix of traumas they encounter daily. The very nature of the legal profession is that it serves victims of crime, victims of poverty, and victims of discrimination; and, while attorneys do not personally experience this victimization, they often internalize it, revisiting it throughout the case.⁸⁹ While recognizing the existence of trauma does not create a pain-free life for lawyers, it can help remind those in the trenches that they are not alone, and help cultivate resilience. Trauma-informed tools such as mindfulness, mental health support from qualified practitioners or groups, emotional literacy, emotional intelligence, self-regulation skills, and maintaining appropriate emotional boundaries are crucial for mental and emotional wellbeing.⁹⁰

Self-care plays a vital role in working with trauma. It is considered integral to “trauma stewardship,”⁹¹ which emphasizes both providing care for others while supporting one’s own capacity to help. Lawyers who regularly hear about or witness traumatic events can experience vicarious trauma similar to those directly affected by it. By committing themselves to learning about trauma and recognizing its effects on their mental health, judges, lawyers, and mediators can begin their journey towards resilience or recovery strategies. Awareness is critical in implementing these strategies effectively. Lawyers, like professionals in other fields, cannot remain untouched by the trauma they encounter. Recognizing and addressing trauma is essential for cultivating resilience and promoting mental health and wellness in the legal profession. Every

⁸⁹ Megan Zwisohn, et. al., *Vicarious Trauma in Public Service Lawyering: How Chronic Exposure to Trauma Affects the Brain and Body*, 2 RICH. PUB. INTEREST L. REV. 22 (2019), <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1455&context=pilr>.

⁹⁰ TRAUMA-INFORMED LAW, *supra* note 9, at 129-30. *See also* Nazanin Moghadami, *Common Signs and Symptoms of Vicarious Trauma*, in TRAUMA-INFORMED LAW, *supra* note 9, at 133-34.

⁹¹ *See* LAURA VAN DERNOOT LIPSKY & CONNIE BURK, TRAUMA STEWARDSHIP: AN EVERYDAY GUIDE TO CARING FOR SELF WHILE CARING FOR OTHERS (San Francisco: Berrett-Koehler Publishers, 2009).

person needs healthy coping strategies to navigate through challenging times.

VI. Conclusion

In conclusion, trauma-informed mediation is a transformative approach that recognizes the psychological impact of trauma on the mediation process. It acknowledges that individuals who have experienced trauma may exhibit specific behaviors and reactions during mediation, which can significantly affect the outcome. By understanding these impacts, mediators can create a safe and supportive environment that promotes healing and resolution. This approach acknowledges the impact of past traumas on participants' wellbeing. It fosters healing while facilitating resolution by creating an environment rooted in safety, empowerment, collaboration, and self-care. Trauma-informed tools allow the mediator or lawyer to better support a litigant's needs rather than taking a purely intellectualized approach often taught in traditional legal settings. Such tools often have the added benefit of supporting the lawyer's wellbeing. No one should leave mediation sessions feeling more traumatized, victimized, marginalized, or dehumanized than when they entered.⁹² Mediators have an opportunity to empower the public toward healing and resolution. As society becomes increasingly aware of the prevalence of trauma within communities, it is imperative to embrace this compassionate method as a means to promote justice and restore harmony among individuals affected by conflict.

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⁹² MYRNA MCCALLUM ET AL., TRAUMA-INFORMED LEGAL PRACTICE TOOLKIT 59 (The Law Foundation of British Columbia: Golden Eagle Rising Society, Sept. 2020), <https://www.goldeneaglerising.org/docuploads/Golden-Eagle-Rising-Society-Trauma-Informed-Toolkit-2021-02-14.pdf>.