



# **MINDFUL Negotiation Techniques for More Effective, Ethical, and Meaningful Mediations**

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**Florida Supreme Court Certified Civil Mediator**

## **Patrick Russell, Esq.**

- ▶ Mediator / Arbitrator with Salmon & Dulberg
- ▶ Florida Supreme Court Certified Civil Mediator (2009)
- ▶ Chair – ADR Section of The Florida Bar (2021-2022)
- ▶ WIND Certified Umpire for appraisal of insurance claims
- ▶ Nearly 3 decades of legal experience:
  - ▶ Small and Big firm experience
  - ▶ Both Plaintiff and Defense work
  - ▶ Ethics Trial Lawyer for The Florida Bar



# Patrick Russell, Esq.

## Types of Cases:

- ▶ Insurance Claims
- ▶ Personal Injury
- ▶ Premises Liability
- ▶ Commercial and Contract Disputes
- ▶ Real Estate and Condominium Associations

# DISCUSSION TOPICS

- **What is a Meaningful Mediation?**
- **How is a Meaningful Mediation different from a traditional mediation?**
- **How do you have a Meaningful Mediation?**
- **What is mindfulness?**
- **How is mindfulness applied to mediation?**
- **What are the benefits of mindfulness for mediation?**
- **What impact does mindfulness have on ethics?**

# MEANINGFUL MEDIATION

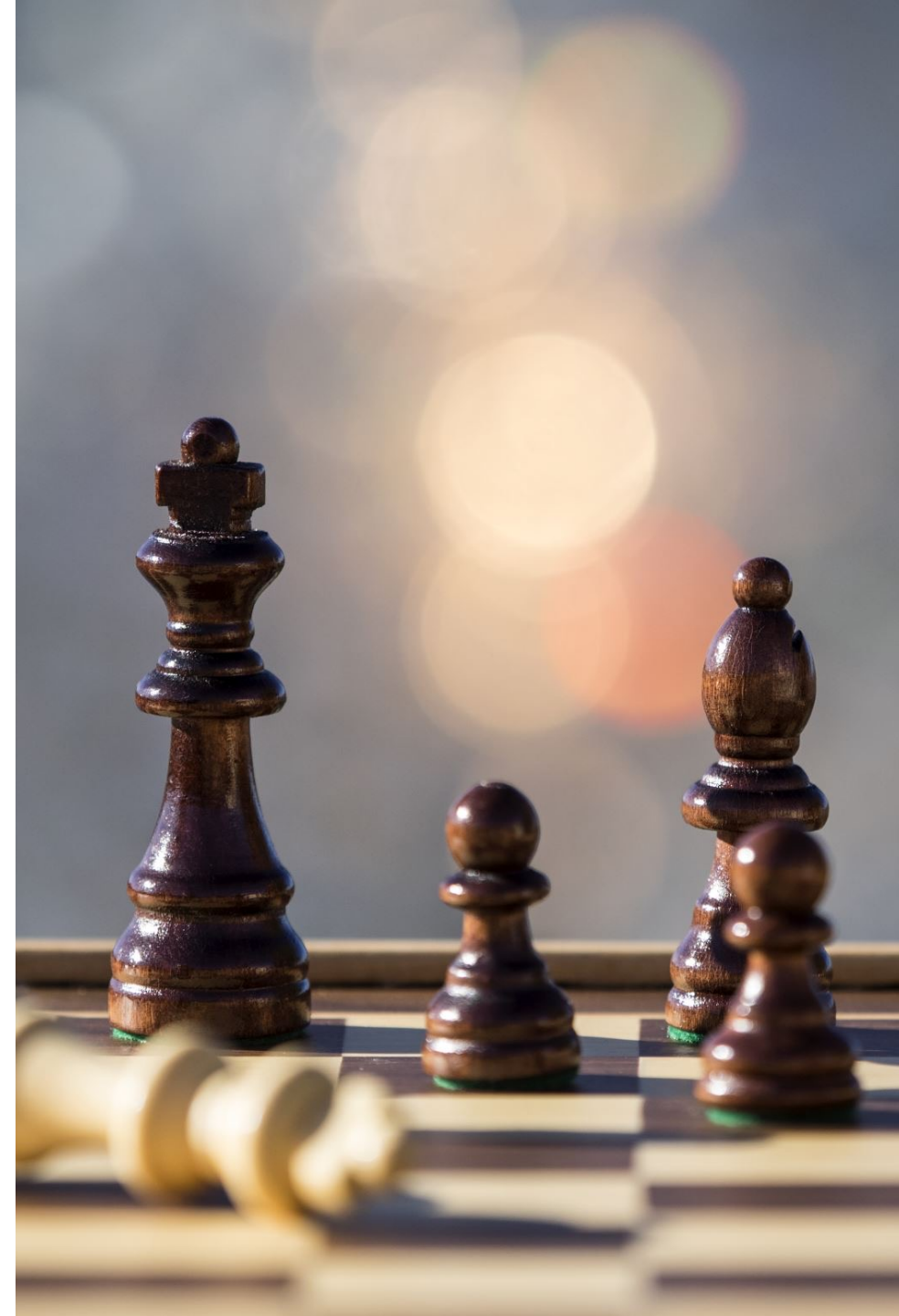
GETTING TO WE

CHANGE THE PERSPECTIVE



# TYPICAL MEDIATION

- Zero-Sum Game, I win you lose
- It is about me, not we
- Reactive
- Same legal arguments are rehashed
- Information sharing is limited
- Distrust
- Emotions can be a barrier
- No collaboration
- Hard to make informed decisions
- Number running and splitting the difference





# MEANINGFUL MEDIATION

- Intent is to solve a problem
- Intent is to learn something new
- Proactive
- Collaborative environment
- Build rapport and trust
- Honest sharing of information
- Joint problem solving
- Rationale decision making
- **GETTING TO WE**

# How to Have a Meaningful Mediation

Adjust your mind





# Encouraging a Meaningful Mediation through Mindfulness

- Change in Perspective
- Like everything, it is a process
- Everyone can do it
- Four Simple Ways to apply Mindfulness:
  - Listening
  - Speaking
  - Acting
  - Empathy



# What is Mindfulness?

“Mindfulness is awareness that arises through paying attention, on purpose, in the present moment, non-judgmentally.” – Jon Kabat-Zinn



# Mindfulness Basics

- ▶ Intentional Non-Judgmental Awareness
- ▶ Paying attention, staying focused
- ▶ Being Present in the Moment
- ▶ It is not about “not thinking”





Mind Full, or Mindful?

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# Awareness is the First Step for Mindfulness

- Distraction and Reaction are not Mindful states. Recognize these?
  - Multi-tasking
  - Interruptions
  - Over-stimulation (news sources, social media, etc.)
  - Emergency Mode: Always putting out the latest fire
  - Worrying about the past or the future
- Mindfulness is not elusive
  - You've probably done things mindfully before
  - You already know how to do this
  - We were mindful as children. Watch them play.
- Mindfulness is a state of being that can be brought on through practice
  - You don't have to be a monk living in a cave to be mindful
  - A gentle turning inward - patiently, curiously
  - With practice, over time, you can strengthen your mindfulness qualities

# How to Apply Mindfulness to Mediation

- ▶ Change your perspective for what you are trying to achieve.
- ▶ Set an intention for collaboration and problem solving
- ▶ Prioritize building rapport and trust
- ▶ Practice mindful/helpful:
  - ▶ Listening
  - ▶ Speech
  - ▶ Actions
  - ▶ Empathy

# Benefits of a Mindfulness Practice

## - For the Mediator

Sets an example  
for the Attorneys  
and Parties

Keeps the  
mediation on  
track and focused

Gets to the root  
of an issue

Avoids reactivity  
and judgment

Remains neutral

Is present in the  
moment

Actively listens

Enhances  
creativity and  
problem solving

# Benefits of Mindfulness

## - For Attorneys and the Parties



LOWER STRESS AND  
ANXIETY LEVELS



LESS REACTIVITY  
AND MORE FOCUS



LESS JUDGMENT  
AND MORE  
CURIOSITY



MORE SHARING OF  
INFORMATION



MORE  
UNDERSTANDING



WILLINGNESS TO  
COLLABORATE





# How Does Mindfulness Impact Ethics?

- Mindfulness reduces likelihood for bad behavior or communication
  - Insults
  - Bullying
- Mindfulness encourages honesty and openness

# **Ethical Issues During Mediation**

**Anger, Abuse, Bullying, Insults, Threats:**

- ▶ **Rule 4-4.4(a) Respect for Rights of Third Persons**
- ▶ **Rule 4-8.4 (d) Misconduct**

# Rule 4-4.4(a) Respect for Rights of Third Persons

## 4 RULES OF PROFESSIONAL CONDUCT

### 4-4 TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

#### *RULE 4-4.4 RESPECT FOR RIGHTS OF THIRD PERSONS*

(a) In representing a client, a lawyer may not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person.

# Rule 4-8.4 (d) Misconduct

## 4 RULES OF PROFESSIONAL CONDUCT

### 4-8 MAINTAINING THE INTEGRITY OF THE PROFESSION

#### ***RULE 4-8.4 MISCONDUCT***

A lawyer shall not:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule;
- (d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic;

# Ethical Issues During Mediation

## Misrepresentation:

- ▶ **Rule 4-4.1** Truthfulness in Statements to Others
- ▶ **Rule 4-8.4 (c)** Misconduct

# Rule 4-4.1 Truthfulness in Statements to Others

## 4 RULES OF PROFESSIONAL CONDUCT

### 4-4 TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

#### ***RULE 4-4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS***

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 4-1.6.

#### **Comment**

##### **Misrepresentation**

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see rule 4-8.4.



# Rule 4-8.4 (c) Misconduct

## 4 RULES OF PROFESSIONAL CONDUCT

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#### *RULE 4-8.4 MISCONDUCT*

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- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule;
- (d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic;

# Ethical Issues During Mediation

## Reporting of Professional Misconduct:

- ▶ **Rule 4-8.3** Reporting Professional Misconduct
  - ▶ Mediation is a confidential process
  - ▶ Thorny issue not considered by many
  - ▶ Lawyers are obligated to report professional misconduct
  - ▶ Misconduct that occurs during mediation is not protected as confidential



# Rule 4-8.3 Reporting Professional Misconduct

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## 4 RULES OF PROFESSIONAL CONDUCT

### 4-8 MAINTAINING THE INTEGRITY OF THE PROFESSION

#### **RULE 4-8.3 REPORTING PROFESSIONAL MISCONDUCT**

**(a) Reporting Misconduct of Other Lawyers.** A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.

**(b) Reporting Misconduct of Judges.** A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

**(c) Confidences Preserved.** This rule does not require disclosure of information;

(1) otherwise protected by rule 4-1.6;

(2) gained by a lawyer while serving as a mediator or mediation participant if the information is privileged or confidential under applicable law; or

jurisdictions, but proved to be unenforceable. This rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

Generally, Florida statutes provide that information gained through a "mediation communication" is privileged and confidential, including information which discloses professional misconduct occurring outside the mediation. However, professional misconduct occurring during the mediation is not privileged or confidential under Florida statutes.

Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of subdivisions (a) and (b) of this rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These rules do not otherwise address

# Mindfulness Resources

University of  
Miami School of  
Law –  
Mindfulness in  
Law Program

<http://www.miamimindfulness.org/>

Professor  
Leonard Riskin

<https://www.leonardriskin.com/>

Meaningful  
Mediation Blog

<https://www.meaningful-mediation.com/mediation-blog>

# BOOK RESOURCES

## MINDFULNESS

- 10 Percent Happier – Dan Harris
- The Power of Now – Eckhart Tolle
- Real Happiness The Power of Meditation – Sharon Salzberg

## ADJUST YOUR RESPONSE

- The Four Agreements – Don Miguel Ruiz

## DIFFICULT PEOPLE

- Never Split the Difference – Chris Voss



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#### CLE Credits

General	1.0
Ethics	1.0

#### Certification Credits