

SOLO/SMALL FIRM COMMITTEE PRESENTS...

MINDFUL NEGOTIATION TECHNIQUES FOR MORE EFFECTIVE, ETHICAL, AND MEANINGFUL MEDIATIONS



Patrick Russell, Esq.

Florida Supreme Court Certified Civil Mediator

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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



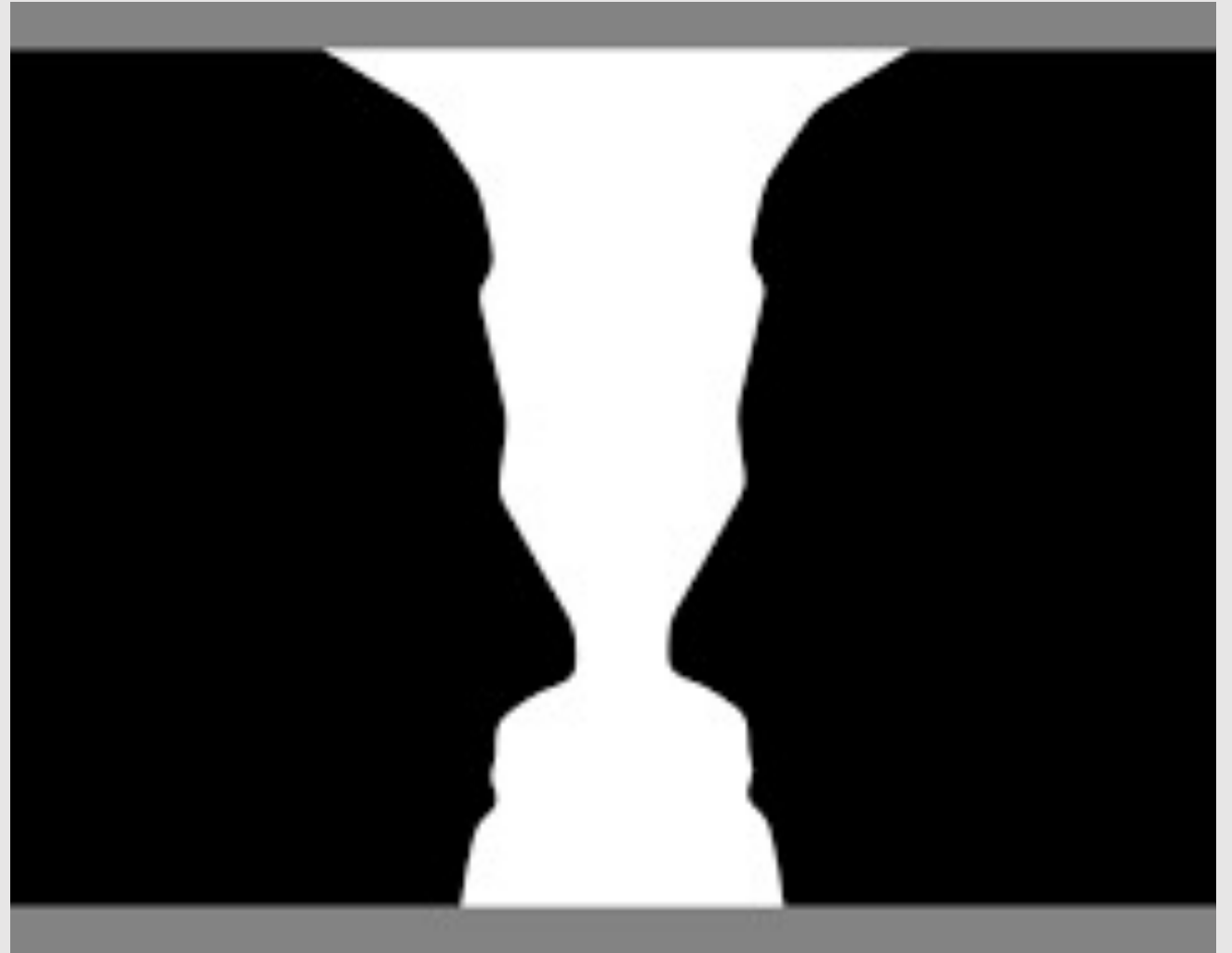
DISCUSSION TOPICS

- **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

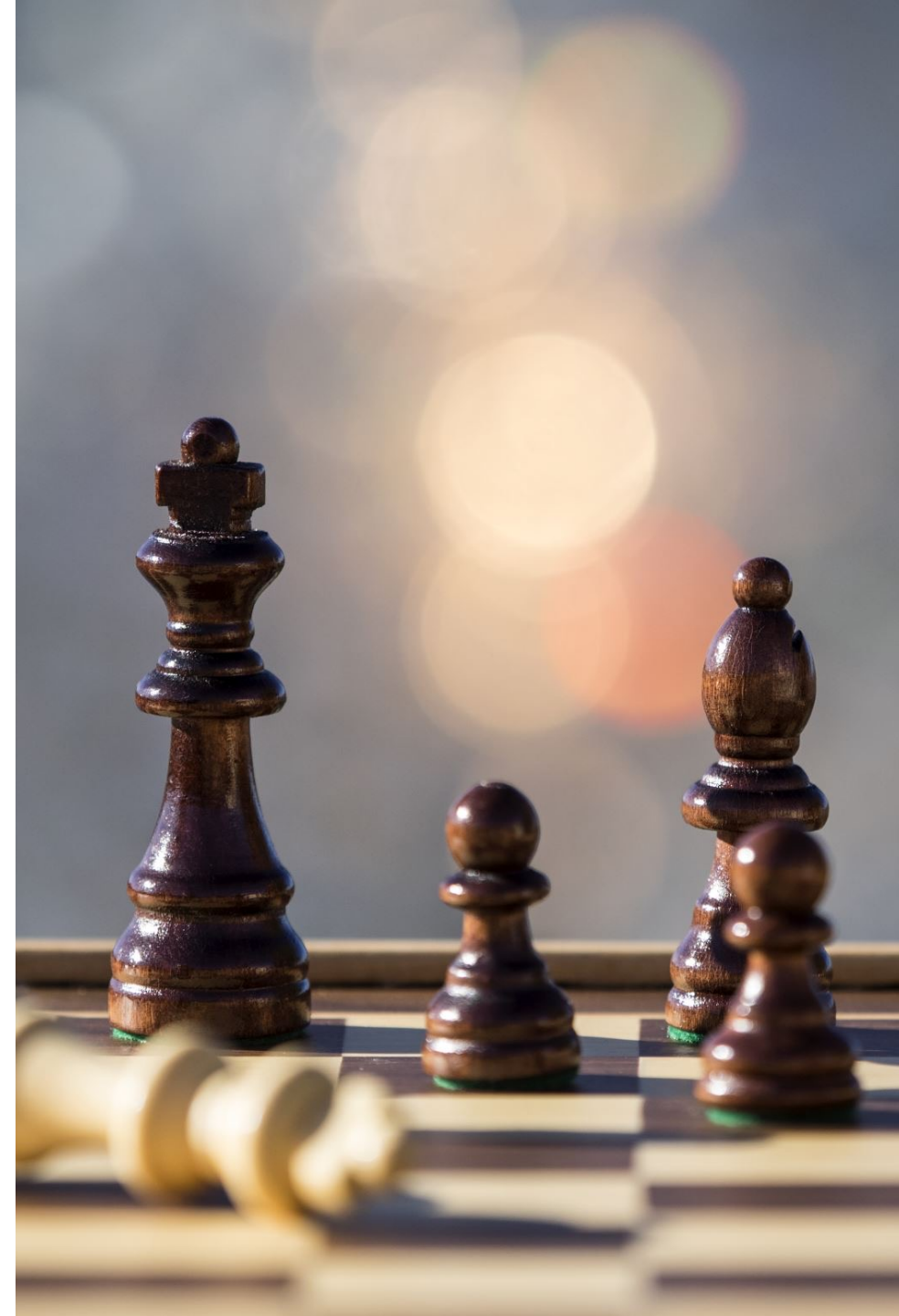
GETTING TO WE

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?

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

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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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Effective 07/01/2012 Archived

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



Attorney? Please join the ADR Section of the Florida Bar if you haven't already!

Membership Benefits:

- Updates on the latest changes in mediation & arbitration
- *The Common Ground* publication plus *News & Tips* newsletter
 - Discounted CLE and CME training sessions
 - Mentoring Academies
 - Retreat and Social Mixers
 - Great networking opportunities

Find out more at www.FLBarADR.com/membership/



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Certificate of Accreditation for Continuing Legal Education

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Miami, FL 33131-3302

November 23, 2021

Reference Number:	2109671N
Title:	Mindful Negotiation Techniques for More Effective,
Level:	Intermediate
Approval Period:	12/14/2021 - 06/30/2023

CLE Credits

General	1.0
Ethics	1.0

Certification Credits

Salmon & Dulberg

DISPUTE RESOLUTION



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