

## MINDFUL MEDIATION

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A Twitter search for the word mediation finds that many tweets on the subject are misspellings of the word meditation. It is common to observe tweets such as, “Mediation will save you by revealing there is no you to be saved,” and “If you don’t have 30 minutes to read, 90 minutes to exercise, or 10 minutes for mediation every day, you are just making excuses.” Indeed, mediation and meditation share nine letters in common and mistakes are inevitable. In researching this article, I even found typos of the same kind in professional bar journals and law reviews.<sup>1</sup>

The title of this article is not an error. Mediation is a process in which two or more individuals in a conflict sit down with an impartial third party to communicate and explore the issues in dispute.<sup>2</sup> Mindfulness, another word for meditation, is the moment to moment awareness of our present experience, without judging it as it unfolds.<sup>3</sup> Both processes promote peace through ritual.<sup>4</sup> Meditation often involves focusing on the breath or a mantra as a means of developing focused attention.<sup>5</sup> While formal mindfulness practice may involve a daily practice of sitting meditation, informal practice can be done at any time or place, including while doing dishes, while driving a car, or even while mediating. As renowned Buddhist monk Thich Nhat

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1. See, e.g., Rhonda V. Magee, *Educating Lawyers to Meditate?*, 79 UMKC L. REV. 535 (2011); Suzanne Craig Robertson, *Just Breathe: How Mindfulness & Mediation Can Ease Stress in Your Life and Law Practice*, 52-SEP TENN. B. J. 12 (2016).

2. Robert A. Creo, *Mediation 2004: The Art and the Artist*, 108 PENN ST. L. REV. 1017, 1055 (2004).

3. See Leonard L. Riskin & Rachel Wohl, *Mindfulness in the Heat of Conflict: Taking Stock*, 20 HARV. NEGOT. L. REV. 121, 131 (2015).

4. Barry Nobel, *Meditation and Mediation*, 43 FAM. CT. REV. 295 (2005).

5. Jeena Cho, *Starting Small: It's Time to Make an Achievable Lawyer Well-Being Resolution*, 104 JAN A.B.A. J. 28 (2018).

Hanh notes, “Don’t do any task in order to get it over with. Resolve to do each job in a relaxed way, with all your attention. Enjoy and be one with your work.”<sup>6</sup>

The benefits of mindfulness are well established. Mindfulness has been touted as leading to greater productivity,<sup>7</sup> enhancing emotional intelligence,<sup>8</sup> improving cognition,<sup>9</sup> focusing attention,<sup>10</sup> reducing anxiety, stress, and fatigue,<sup>11</sup> and improving information gathering, processing, and learning.<sup>12</sup> It has also been described to improve decision-making<sup>13</sup> and to support ethics and professional development.<sup>14</sup> Mindfulness programs and courses are now widespread in U.S. law schools,<sup>15</sup> law firms, bar association programs, and conferences.<sup>16</sup> There is even a Mindfulness in Law Society, dedicated to supporting mindfulness in the legal profession.<sup>17</sup>

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6. THICH NHAT HANH, *THE MIRACLE OF MINDFULNESS: AN INTRODUCTION TO THE PRACTICE OF MEDITATION* 29 (reprt. 1999).

7. See Tony Schwartz, *More Mindfulness, Less Meditation*, N.Y. TIMES (Jan. 31, 2014), <https://dealbook.nytimes.com/2014/01/31/more-mindfulness-less-meditation/>.

8. See DANIEL GOLEMAN, *FOCUS: THE HIDDEN DRIVER OF EXCELLENCE*, 204-05, 224-26 (reprt. 2015); Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 46-48 (2002).

9. See Michael D. Mrazek et al., *Mindfulness Training Improves Working Memory Capacity and GRE Performance While Reducing Mind Wandering*, 24 PSYCHOL. SCI. 1, 5 (2013).

10. R. Lisle Baker & Daniel P. Brown, *On Engagement: Learning to Pay Attention*, 36 U. ARK. LITTLE ROCK L. REV. 337 (2014); Katherine A. MacLean et al., *Intensive Meditation Training Leads to Improvements in Perceptual Discrimination and Sustained Attention*, 21 PSYCHOL. SCI. 829 (2010).

11. Tim Iglesias, *Offering and Teaching Mindfulness in Law Schools*, 49 U.S.F. L. REV. F. 24, 26 (2015); Schwartz, *supra* note 7.

12. Shailini Jandial George, *The Cure for the Distracted Mind: Why Law Schools Should Teach Mindfulness*, 53 DUQ. L. REV. 215, 226-27 (2015).

13. Peter H. Huang, *Can Practicing Mindfulness Improve Lawyer Decision-Making, Ethics, and Leadership?*, 55 HOUS. L. REV. 63, 86-92 (2017).

14. Iglesias, *supra* note 11, at 26; Leonard L. Riskin, *Awareness and Ethics in Dispute Resolution and Law: Why Mindfulness Tends to Foster Ethical Behavior*, 50 S. TEX. L. REV. 493 (2009); Scott L. Rogers & Jan L. Jacobowitz, *Mindful Ethics and the Cultivation of Concentration*, 15 NEV. L. J. 730 (2015).

15. See *Awareness and the Legal Profession: An Introduction to the Mindful Lawyer Symposium*, 61 J. LEGAL EDUC. 634 (2012); Scott L. Rogers, *The Mindful Law School: An Integrative Approach to Transforming Legal Education*, 28 TOURO L. REV. 1189 (2012); Selina J. Schultz & Robert A. Creo, *Harnessing the Power of Mindfulness in Mediation*, 39-APR PA. LAW. 42, 44 (2017).

16. Leonard L. Riskin, *Mindfulness: Foundational Training for Dispute Resolution*, 54 J. LEGAL EDUC. 79, 86 (2004).

17. MINDFULNESS IN LAW SOCIETY, <https://mindfulnessinlawsociety.com/> (last visited Nov. 2, 2018).

There are numerous writings touting the advantages mindfulness may impart on mediators, the parties, and the process of mediation itself.<sup>18</sup> Mindfulness is seen as particularly effective for helping the mediator be impartial and avoid implicit bias.<sup>19</sup> In this article, I share my personal mediation practice and how I incorporate mindfulness to such a degree that I think of my mediations as being meditations. One of the mediation field's greatest challenges is our lack of universally accepted or differentiated practices and norms;<sup>20</sup> and this article is not intended to be prescriptive or address those differences.

#### I. MINDFUL MEDIATION BEGINS WITH THE MEDIATOR'S INTENT

For years I struggled to facilitate communication as a mediator. I could not seem to think of the right question, understand the dynamics taking place at the table, or even feel that I could help the parties navigate their often-strong emotions. I became a much better mediator when I realized that I was making settlement my goal, and it was negatively impacting my ability to be present in the moment. While the parties were attempting to communicate, I was busy trying to think of a mutually satisfactory solution and which questions would magically unlock it. I was not listening to the parties, I was not present with them, and I honestly was ineffective. I assumed that I needed more training as I had the tools - identifying interests, asking open-ended questions, and reality testing options, but I was never taught how to facilitate dialogue moment to moment. After a second forty-hour training and individual tutoring, I was told that I was not skilled enough to be a volunteer mediator.

I was devastated. I had turned down a job as a prosecutor and had even developed some paid mediation work on a journey that I thought would lead me to a fruitful and fulfilling career. In reality, after a few sessions of ineffective mediation, the paid work dried up and I was left trying to figure out how to get better as a mediator if I was unable to practice mediating. The

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18. Daniel Bowling & David Hoffman, *Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on The Mediation*, 16 NEGOT. J. 5 (2000); Schultz & Creo, *supra* note 15, at 44 (noting mindfulness "can help mediators be aware of their own biases and personal agendas that hinder their effectiveness."); see also Barry Nobel, *Meditation and Mediation*, 43 FAM. CT. REV. 295 (2005); Douglas E. Noll, *Meditation, then Mediation*, 14 No. 1 DISP. RESOL. MAG. 37 (2007); Riskin, *supra* note 16, at 84-86.

19. Elayne E. Greenberg, *Fitting the Forum to the Pernicious Fuss: A Dispute System Design to Address Implicit Bias and 'ISMS in the Workplace*, 17 CARDOZO J. CONFLICT RESOL. 75 (2015); Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL'Y 71 (2010); Evan. M. Rock, *Mindfulness Mediation, the Cultivation of Awareness Mediator Neutrality, and the Possibility of Justice*, 6 CARDOZO J. CONFLICT RESOL. 347 (2005)..

20. Creo, *supra* note 2, at 1023.

volunteer rejection forced me to think deeply about my weaknesses and to focus on learning how to actually facilitate a conversation.

I improved dramatically once I understood that mediation begins with the mediator's intent. With settlement as my goal, I viewed the parties' statements through a lens used to evaluate and determine what would lead them towards my objective. Not everyone who attends mediation knows they want to settle, believes settlement is possible, or even trusts the mediator to be an impartial facilitator of a process that will result in settlement. I learned that settlement is not the goal of mediation unless it is the parties' goal and that it often takes some time for parties to make that decision. In stating settlement as the goal, I invited each side to seek to influence my opinion and to use me as an instrument to pressure the other side to accept a resolution more favorable to themselves. I also reduced trust with each side as they potentially felt the need to negotiate with me and attempt to convince me to see things their way. This then reduced how open each side would be regarding their bottom lines and their true interests. It made it very difficult for me to do my job of facilitating effective communication and helping people figure out what they wanted.

I put enormous pressure on myself and focused almost singularly on settlement and making their resolution my responsibility. Over time, I learned settlement is not the goal but is the frequent result of a process designed to help people communicate and determine what they want. Putting settlement at the forefront put the cart before the proverbial horse and endangered both my impartiality and the parties' self-determination. Ironically, taking the focus off settlement and onto the communication that helped each side determine whether they want to settle became the key to being a better mediator.

I learned how much unrecognized power a mediator possesses. If I believe the problem is simply about a breach of contract and monetary damages, the parties sensed it and followed my lead as to what should be discussed and even how it was discussed. I learned that if I am open to possibilities, the parties will be. I learned it was essential for me to be aware of my biases and preferences if I wanted to be viewed as an impartial mediator.<sup>21</sup> Once I cared less about the substantive outcome, I improved dramatically. Today, it does not matter to me whether they settle or not, but instead whether I am helping them communicate and figure out what they want (which can include settlement).

In order to stop myself from focusing on outcomes, I set an impartiality definition that has served me through hundreds of mediations and helped me

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21. Rock, *supra* note 19, at 348.

to train thousands of mediators. For me and the students I train, impartiality means the mediator does not state their opinion, provide suggestions, evaluate the merits of the situation, tell anyone what to do, or pressure settlement. If I am listening to evaluate or judge, my mind will problem-solve, and I will not be present with what they are actually saying. I must be present, moment to moment during a mediation. Monitoring my thoughts during a mediation session since became an essential part of being an effective mediator.<sup>22</sup> My mediation practice developed directly as a result of my mindfulness practice. Meditation is what enables me to be a mediator as mediation begins with the mediator's intent.

## II. THE FIVE MEDITATIONS

There are five meditation modes that support my mediation practice. First, I have a mindfulness practice that includes both a daily sitting meditation focused on the breath and a twice-daily transcendental meditation in which I focus on a mantra.<sup>23</sup> I am inspired by Thich Nhat Hanh's accessible form of mindfulness and have previously attended his mindfulness retreats.<sup>24</sup> Second, I meditate prior to every mediation. I arrive early to the site of the mediation and I like to set up the room and then sit quietly for a few minutes. I always end my mindfulness session by putting myself at a specific point in the mediation where I can imagine myself feeling pressure. Sometimes, I imagine myself struggling to ask the right question, to help the participants feel heard, to deal with the parties' anger, or to deal with my own opinions and judgments that arise at the table. I find that by putting myself in that place in my mind and breathing deeply, I am able to relax and "see" myself working through it. I think about what the parties must be feeling prior to entering the room and I remind myself that it is not about me and that I am here for them.

As a third mode of meditation, I also take time during the mediation to center myself at various points. When I notice any nervousness, I take a breath and I remind myself to focus on "doing" instead of "thinking about doing."<sup>25</sup> If during the session I observe myself thinking about solutions, desiring settlement, or feeling a preference for one side or another and I am unable to re-center myself in a place of non-judgment and impartiality, it is impossible for me to be effective. During a break in the mediation, perhaps

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22. *Id.* at 359.

23. TRANSCENDENTAL MEDITATION, [www.tm.org](http://www.tm.org) (last visited Nov. 2, 2018).

24. THICH NHAT HANH, PEACE IS EVERY STEP (1992).

25. Riskin & Wohl, *supra* note 3, at 146-47. Their STOPsi method is a great way to incorporate a moment of mindfulness into mediation.

prior to or after a caucus, I like to take 30 seconds to focus on my breathing and re-center myself while reminding myself of my role in the mediation.

As a fourth mode, and fundamental to my mediation style, I am actually meditating while I mediate. So far, I have mainly discussed internal mindfulness; being aware of what is going within me as a way to monitor my impartiality.<sup>26</sup> I also focus on creating an awareness of what is happening around me. In this way I am using both internal and external forms of mindfulness.<sup>27</sup>

During the mediation, instead of using my breath or a mantra as the focal point, I use active listening and the words of the parties. Active listening becomes the “breath” of my meditation. Active listening is more than nodding, short verbal responses, or maintaining eye contact, and it requires helping someone actually know that you heard them.<sup>28</sup> I am very good at appearing to listen through non-verbal and short verbal communications.<sup>29</sup> Reflecting something someone says is the only way for someone to actually *know* you heard them. Reflecting interests and emotions is yet a higher level of listening as they demonstrate to each side that you heard and *understand* them.

Reflection is the secret to my mediation practice. It is not the reflection itself that makes the difference, but my mental preparation for the reflection. If I know that I will reflect something that you say, it stops me from thinking about what you are saying. It keeps me present with what you are saying in the moment. It quiets my mind and makes me responsible for the communication. Knowing I am responsible for reflecting quiets my inner dialogue and helps me to listen to what is being said. It is being prepared to reflect, not the reflection itself that matters, and I do not reflect every statement. As a form of focused attention, I return my attention to their words and my reflection when I notice my mind wandering or judging.<sup>30</sup> I vary the depth of the reflection, sometimes adding an interest or noting an emotion, and I also vary the breadth of the reflection, sometimes reflecting just a word and sometimes restating very directly.

The more important something is being said (e.g., “Jane has always been a great mother, but I want to be included in the decision-making”), the more likely it is that I will restate it word for word. I begin with an introductory

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26. Clark Freshman, Shauna Shapiro & Sara de Sousa, *Mindful “Judging” 1.5: The Science of Attention, “Lie Detection,” and Bias Reduction - With Kindness*, 2016 J. DISP. RESOL. 281, 285-86 (2016).

27. *Id.*

28. R. Hal Ritter Jr. & Patricia A. Wilson, *Developing the Fine Art of Listening*, 210 AUG N.J. LAW. 32, 33 (2001).

29. As determined by my wife Debbie.

30. Rogers & Jacobowitz, *supra* note 14, at 732.

phrase such as “it sounds like,” “you feel,” “for you,” “I’m hearing,” and many others as I may be misunderstanding, and this protects my impartiality. I reflect, “You feel Jane has always been a great mother,” while glancing at Jane to make sure she heard what was said. I would continue, “but it’s important for you to be included in decision-making.” People often follow compliments with criticism, and the positive part of the message is lost.

What remains constant, regardless of whether I reflect, is my readiness to reflect. That is the secret and what allows me to quiet my inner voice. Reflection then becomes the hinge for my mindfulness. Anytime I’m feeling less than confident in what’s taking place—maybe I am thinking about other things or I am judging the parties—I return to the reflection and I think to myself (“stay with them”).

There are multiple advantages to my reflection practice. First, I am then able to see the communication in all of its complexity. Partly, this is because as I restate things, I am verbally processing out loud. I can see the questions, the interests, and I do not have to think about what is happening. I truly do not think at all; I react. It is a very intuitive process in which the parties take me point by point through the mediation. A reflection leads me to a question that then leads to another reflection and then another question. I am never thinking about questions. I base my questions off of my reflection and I craft them in the moment following my reflection. I never ask a question that is not related in some way to what is being said in the moment. If I let them, parties will talk about what is important and what they want and need to talk about. Reflection allows me to be present and to watch the flow of the conversation without judgment, supporting both my impartiality and the parties’ self-determination.

Second, my reflection creates space for the parties to digest what is happening. It allows me to control the pace and where necessary, slow down the pace of the conversation. For example, if James makes an offer or asks a very direct question to Bill, I can often sense that Bill is not ready to respond or will respond reactively (which in itself is not necessarily a bad thing). Through reflection and asking James questions about his statement, I give Bill space to reflect and to decide how he wants to respond. I am creating the space for their careful consideration, their mindfulness and a “wedge” of awareness before they respond.

Third, reflection allows me to guide the conversation by identifying the unasked and unanswered questions. For example, James might say, “I don’t understand why this happened, and you knew what was in the contract, and it’s a simple matter of following the contract!” I might respond, “So for you, the contract is clear, and you feel Bill understood its parameters. For you, this is about follow-through and you’re not sure why that didn’t happen.” I

can then stop, and someone will fill the gap in the silence. Or I can address the underlying assumptions of the statement, assumptions I would not be able to see unless I were present and mindfully prepared to reflect.

There are multiple assumptions within James's statement; first, that Bill understood the contract. Second, that Bill and James have the same understanding of the contract. Third, that it was simple for Bill to follow the contract. Finally, there is an assumption that understanding the contract would lead to following it. This is a communication knot similar to that large ball of tangled computer wires and electronic cords that we all have in a box or drawer somewhere in our homes. The mediator's job is to untie the knot by facilitating the conversation. These assumptions are all James's unasked questions, unasked because they are phrased less than directly in the form of accusations that are not always easy for Bill to hear or understand. After my reflection I can ask Bill, "Tell us more about your understanding of the contract," or "What are your thoughts about how the contract was followed," or "Why did this happen from your perspective," or "How did the execution of the contract look from your perspective?" Or I can first ask James questions that will likely help Bill to understand his concerns: "Say more about why you feel Bill understood the contract's parameters," or "Can you tell us what following the parameters of the contract would have looked like to you?" In this way, questioning is like that bundle of cords and I am picking one and following it by choosing a question from my reflection. Their answers will indicate to me what is important to them and I can continue to reflect, expand information and move in whatever area they would like. Mediation is a process, but it is not necessarily linear or done in a straight line.

I use questioning to move the conversation forward by untying the knots and helping to restore constructive interaction. To do so, I stay present by focusing on the reflection. It is the "breath" of my mediation meditation. Reflection also allows me to see the interests in a party's statement. This helps to amplify their view and helps the speaker and the other side to better understand the statement's meaning.

With James's original statement above, I might reflect as I originally did, "So for you, the contract is clear, and you feel Bill understood it's parameters. For you, this is about follow-through and you're not sure why that didn't happen." I could alternatively state (or add), "For you this is about knowledge and responsibility . . ." The follow-through on the contract was especially important to you." This leads us to a place of discussing the true issues—why was follow-through, knowledge, and responsibility important, and how are the parties' definitions and expectations varying on these issues.

Mediation is not about asking easy or indirect questions. It's about getting greater information and restoring constructive interaction between the parties. If I ask the unasked or assumed questions, I keep both sides engaged and I begin to untie the communication knots. At some point, there is a tipping point in which one side says, "I think I understand" or some statement that demonstrates progress. It does not mean they like each other or necessarily agree; it means they are ready to move forward and figure out what to do with the issue. This understanding and reduced negative emotions expand the potential bargaining ranges as decisions are based on negative emotions and misconceptions.

I do not always reflect, but I am always prepared to do so. When I do not reflect, it can be for several reasons. First, if I do not have any indication from my introduction, the parties' stories, or the agenda setting stage that there are issues with the parties' communication, I always sit back and let them speak uninterrupted until an issue develops. But where there has been tension and it is clear that a free and open conversation will not be productive, I am very likely to use reflection each time between their statements as I initially guide the conversation. Second, at certain points I will then omit my reflection and provide space for them to address one another—this helps me to see whether they are now constructively interacting, so I can reduce my involvement. Sometimes that requires an iterative process of me being very active and less so and then very active again as I seek to restore constructive interaction. Third, people respond to reflection in different ways. In some instances, they like to be given a lot of space to finish their thoughts. In others, they are comfortable with me jumping in to reflect, knowing that I am doing so to listen. In the same way, some people trust more readily, and my reflection directly addresses their views. For others, they watch me reflecting and through their body language, I notice they are more cautious. In those situations, I tend to mirror their words more exactly, so trust can be built that I am not trying to alter their words or move them in any specific direction. Finally, I may omit my reflection where something is so direct and so simply stated that to restate it becomes monotonous.

As a form of open monitoring, I attend to the flow of the communication and not the substance of the communication.<sup>31</sup> For example, I am less interested that the person believes the other is wrong or that they might be wrong and more interested in what the person is expressing with the statement. For example, if Bill says to James, "You never even contacted me to inform me of the error!" I might reflect this statement and then ask Bill what the impact was of not being informed, or how it would have been

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31. *Id.*

different if James had informed him. Or I may ask James the steps they went through when they discovered the error. I am not trying to determine the truth of whether James was informed, and I am not judging the statement as unhelpful or irrelevant to them reaching an agreement. I am interested in the communication's dynamics and the information each side is seeking. I am working to expand information and helping them discuss the issues. To do so begins with my intent to stay present with their communication and I use reflection as the impetus to achieve that objective.

I do not refer to my mediation "practice" as the cases I mediate for compensation. My mediation practice is something I do regularly in order to hone my skills and my ability to mediate. This is about seeing the questions and observing the patterns. Experience can help anyone improve, but it's about perfect practice, not just practice in order to master these skills. Mediation is an onion, and there are layers and layers. If I make a mistake in one mediation, it is unlikely to come up in the next mediation. I will make a different mistake in the next mediation and it continues like that on and on. Practicing as a mediator is about overcoming failure and being able to continuously learn. My mindfulness practice thus has a final element- the fifth meditation takes place as I take the time after each mediation to breathe and meditate for a few moments. I then debrief with my co-mediator, another colleague, or my students about what I did well and what I could have done better. I focus most intently on what I was thinking as feeling as I did what I did as it all starts with my intent!

### III. MINDFULNESS TO OVERCOME BARRIERS TO MEDIATING

Training mediators in my "mindful" method is a meditation in itself. I tend to spend twenty-four or more of the forty hours in full mediation role plays. I do not believe there is any problem in mediation that cannot be fixed through being aware of it. If I am aware, whatever problem I am having will simply disintegrate over time. But it is impossible for me to fix a problem if I am unaware of it. Below are the two most fundamental problems I see, and mindfulness is typically the solution.

#### *1. I Do Not Know What to Ask. I Cannot Keep Them Interested in Communicating Together.*

This is a problem that is often three problems in one. I am always trying to determine if it is an intent issue, a reflection issue, or a questioning issue. They are all usually related. Question form is very important in mediation. If I keep my questions open-ended, I will gather greater information. I start my questions with "Tell us more about . . ." and "What are your thoughts

about . . .” to keep my questions open. Note how the question can be tailored to be closed as to subject. If I ask closed-ended questions seeking a yes or no answer, I will get shorter answers, limiting the depth and breadth of any possible reflection. It is important to keep the questions open ended, and also to be willing to ask the simple questions. The more perfect I try to make the question, the less likely it is to be valuable. My best questions are usually “stupid” questions that I previously would not have asked for fear of looking uninformed.

Assume I reflect James’s statement: “So for you, the contract is clear, and you feel Bill understood it’s parameters. For you, this is about follow-through and you’re not sure why that didn’t happen.” I then want to use my open-ended starters, “Tell me more about” or “What are your thoughts about . . .” Finally, I want to pick a topic from my reflection- it can be the parameters of the contract, Bill’s follow-through on the contract, the clarity of the contract, or Bill’s understanding of the contract. I might say, “Tell me more about how you see the clarity of the contract.” Like a game of ping-pong, sometimes the mediator simply has to get the ball back over the net. The reflection-question-reflection sequence helps me to be more present with the conversation.

Often issues with questions begin with the reflection. I need to let the question “hang,” meaning I am not thinking of my question while a party is speaking and instead I formulate it in the moment after my reflection. If I am thinking about my question, I am not present and as a result I will not be able to reflect appropriately. I would never have developed the ability to ask questions in the moment if I were always thinking ahead of time about my question. The key to being a superior questioner is to learn how to ask them in the moment. Doing so requires practicing doing just that!

If I am afraid I will not have a question, it often causes me to “cheat off the reflection,” as I am thinking of a question while the parties are speaking, resulting in me asking poorer questions, likely closed-ended and not related to what was being said. Cheating off the reflection to think about the question makes it more difficult to reflect and hurts the quality of the reflection- which in turn makes it more difficult to see the question. The reflection’s depth (addressing the core of the concern that may be behind the words) is more important than the breadth (reflecting everything). New mediators often need practice with breadth to be able to see depth. This is why new mediators may over reflect as they recap in their mind what was said, attempting to “see” the question and the patterns. Interests work very similar to questions, as they “pop-up” from the reflection, similar to the show VH1 pop-up video in which thought bubbles “pop-up.” I am never trying to “see” the questions or the interests as that effort in itself makes it more difficult to do so. Instead,

if I am present moment to moment and relaxed in my work, the questions and interests appear to be everywhere!

Intent is usually one of the biggest challenges with asking questions. There are several root causes for a mediator struggling to develop a question. If I am trying to solve the problem, that is my place of focus. Often, I was paralyzed because every question I asked was directive or settlement-focused and I was not sure how to protect my impartiality and stay with the parties. My intent issue was greatly improved by setting my impartiality standard and by using my modes of mindfulness to be more aware while mediating of my thoughts, preferences, and judgments.

Ultimately these issues are all about relaxing and allowing our minds to see what is taking place. Each of the five meditation modes are helpful in allowing this to take place. In addition to taking a moment for mindfulness, there are multiple other techniques I can use in a mediation simulation to help with questioning issues. The first is to simply tap my pen whenever someone misses a reflection. Remember that I do not always reflect, but I know with early mediators that a lack of reflection is not done on purpose. I can also tap my pen whenever someone asks a closed-ended question. I prefer not to stop the session each time, but I want to bring their awareness to these issues. My pen becomes a moment of mindfulness to bring the student back to the present. I can also have the student reflect, while I (or preferably an observer or co-mediator) ask the questions based on their reflection. Taking away the worry about not being able to find the question often fixes the reflection as they can focus on that element. Focusing on the reflection helps them to see the question. Alternatively, I will take over the reflection and have the student mediator only ask questions based on my reflection. In some situations, I have even had the student plug their ears and only listen to my reflection (not what the party said) and then craft a question from my reflection. In those situations, the small group is often amazed at the quality of the questions asked from a mediator listening to another's reflection and not the party's statement.

## 2. *I Cannot Maintain Control.*

Without control, mediation cannot happen. From the mediator's introduction through the agenda, I have a front row seat to how the parties are interacting. When things are tense, the joint session will proceed with me intervening after each of their statements. Where there is no indication of communication issues, I will sit back and watch. Where there is higher conflict, I will take control through reflection and then release control as I test to see if they are able to communicate productively. This requires me to be very aware of my own preferences. Am I uncomfortable with the

communication because it is not my preferred style? I have mediated cases in which people's voices were raised the entire time, but it was how they preferred to communicate and for me to stop it was limiting their conversation. I teach that you have to be comfortable mediating and in that situation many people many not be the right mediator.

Often mediators are afraid of exploring anger and hostility and would rather stop or ignore it, but this is often a mistake.<sup>32</sup> With reflection, I have complete control of the session and I can assist with a conversation that occurs under control. To stop an argument that is unproductive, I never use their names and force a full "stop" to the communication. Mediators who do that repeat the party names back and forth, "Bill, James, Bill, James, Bill" until both sides stop. Instead, I use what I describe as a "double reflection." To Bill I state, "Bill, you're angry because you believe James has violated the contract and done so on purpose." Then I turn to James and say, "But James you feel the opposite, that your actions did not violate the contract and there wasn't any negative intent on your part."

To do this, I have to interrupt. In fact, most reflection involves finding their in-breath and jumping in. When things become counter-productive, usually indicated by the parties talking over one another, I will jump in with a double reflection. I need to be in their sight lines, I need to use their names, and sometimes I need to raise my voice to their level. I always reflect to the person who spoke last and then to the other side. Once I have completed this double reflection (and note I am being specific about what they are saying), I then have the floor to ask a question or set a ground rule for the conversation. I have regained control. Often mediators in this situation retreat quickly to caucus,<sup>33</sup> but the culprit may not be parties and their conflict; it may be the mediator's inability to facilitate and control the conversation.

In the above situation, I might ask James to say more about what he was thinking as he took the actions he did: "James, walk us through your thought process as this all happened." This enables Bill to assess for himself James's intent. Or I can ask Bill to say more about why he feels the contract was violated purposefully. Can he provide an example? In this way, I am leaning into the difficulty in mediation instead of away from it. I use reflection to affirm each side's statements and I am building trust as they know that I have heard what they are saying. I am not trying to change their statements or move them in any specific direction. This allows me to ask more direct questions and to receive honest answers because they trust me to be impartial.

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32. Kenneth F. Dunham, *I Hate You, But We Can Work It Out: Dealing with Anger Issues in Mediation*, 12 APPALACHIAN J.L. 191, 191 (2013).

33. *Id.*

Sometimes those questions are better asked in caucus, depending on how much trust has been built in the room.

Because I work in the moment, I do not shy away from difficult emotions and situations at the mediation table. Quite the opposite, I need confrontation in order for the parties to work through it productively.<sup>34</sup> Using control, I can build the trust that enables people to have a difficult conversation in a way that does not feel dangerous. If the tension does not lessen as I am reflecting, identifying interests, and labeling emotions, then I need to separate the parties. Safety is not negotiable. But being present with the conversation allows me to monitor each side and to take a break well before things boil over. My mindfulness practice enables me to be present and responsive when an intense emotional exchange occurs.<sup>35</sup> When I hear a mediator describe a physical altercation in a mediation as something that “just happened without warning,” I always wonder how present the mediator was in the conversation. In my experience, these situations seldom “just happen.”

#### CONCLUSION

I anticipate a few questions about my mindful style. First, I acknowledge that impartiality is a goal and it is not truly realizable. You will have thoughts and ideas during your mediation. I refer to the thoughts that arise as instincts, and that we should not push them away. An instinct is used incorrectly to ask a question when the parties are not at that place in the conversation. Often, the question involves making a suggestion or trying to immediately solve the issue, weakening both impartiality and self-determination. As with meditation, we want to observe our thinking in mediation, but we do not try to eliminate our thoughts.<sup>36</sup> Once our intent is aligned with the parties’ self-determination, our instincts can be an excellent tool. How can we use that instinct to ask a question that retains our impartiality and their self-determination? My impartiality standard sets the stage for my intent, and with correct intent I can ask tougher questions and receive honest answers because the parties learn through our session that they are in control of what they want to do. Using our instincts takes great practice and mindful awareness of both our intent and how we are using it during a mediation session.

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34. Don Ellinghausen Jr., *Venting or Vipassana? Mindfulness Meditation’s Potential for Reducing Anger’s Role in Mediation*, 8 CARDOZO J. CONFLICT RESOL. 63, 64-65 (2006).

35. Brian Jarrett, *Exploring and Practising Integral Mediation*, 6 NO. 1 DISP. RESOL. INT’L 37, 67 (2012).

36. Riskin & Wohl, *supra* note 3, at 139.

Second, facilitative mediation is not just for parties who want to have an interest-based negotiation. Plenty of my mediations involve positional negotiation. While I can use interests to help people feel heard, to help each side determine what they want, to expand the pie with collaborative solutions, and to help them make more persuasive offers, it is up to each side how they would like to negotiate. In that vein, I train mediators and mediate cases using this method regardless of whether lawyers are present and regardless of the subject matter. I prefer that lawyers be present as I am not going to provide substantive advice. I do not share this preference with the parties and I treat the lawyers as full participants in the session. Lawyers are no different than anyone else; they too like to be heard and they appreciate a conversation that is facilitated with control and skill.

Third, reflective listening takes enormous practice and skill. I have never heard a mediation participant express, either in person or in a post-mediation evaluation, that they felt they were being parroted. People in conflict love to be affirmed and feel heard. It is imperative that the mediator develop a communications relationship with each person to learn how much and how often to use this tool. If you can use reflective listening with the people closest to you (think partners and spouses) without them knowing, you are on your way to mastering an essential skill! Remember, the key point is not to reflect, but to be ready to reflect.

Fourth, I am not a transformative mediator, but I take that suggestion as an enormous compliment.<sup>37</sup> While I am using reflective listening actively in my mediations, I am asking questions and I am doing more than merely mirroring each side's statements. With my teaching, I am merely trying to improve facilitative mediation- it is not a passive process! I am a very active mediator and I use reflective listening to build trust and elicit information that enables me to help people figure out what they want.

Ultimately, being an effective mediator is about relaxing but few of us can do so by telling ourselves to relax.<sup>38</sup> I tell my students that the difference between you and I is that I am comfortable not knowing what I am doing. Each mediation is different, and I am always nervous at the beginning and always learning and improving. The key is to have an engaged, focused attention; something mindfulness is especially helpful in developing. While the similarity between the words meditation and mediation can sometimes result in an unintentional spelling error, the pairing can be a powerful combination for mediators seeking to master their craft.

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37. See generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RESOLUTION* (rev. 1994).

38. Freshman, Shapiro & de Sousa, *supra* note 26, at 300-01.