

# Mindfulness in Mediation: The Key to Avoiding Bad Behavior

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Mediations can often get sidetracked by ‘bad behavior’—by counsel, litigants, or even the mediator—perhaps by all of them, in fact. While not reaching a settlement agreement by the end of a mediation session is not that uncommon, allowing a mediation session—that might have otherwise resulted in a settlement agreement—get derailed by ‘bad behavior’ can certainly be described as an absolute failure. Those bad behaviors by counsel might include constantly threatening to leave the mediation early, arguing in response to every settlement offer that the opposing party is not acting in ‘good faith’, not having a client available to participate or worse not allowing a client to participate. That is where the practice of mindfulness comes into play.

According to the American Psychological Association’s Dictionary of Psychology, mindfulness is defined as “awareness of one’s internal states and surroundings. The concept has been applied to various therapeutic interventions...to help people avoid destructive or automatic habits and responses by learning to observe their thoughts, emotions, and other present-moment experiences without judging or reacting to them.”

In recent years, there have been numerous studies that have found that mindfulness can help attorneys and judges reduce stress, eliminate unintended biases, and for attorneys, provide more appropriate representation to clients. In the context of mediation, and according to Mark Fingerman and Ralph Williams in *Use Mindfulness to Do Better at Mediation*: “the essence of mindfulness is observing, with single pointed focus, what is immediately before you in the present moment, while actively setting aside all other thoughts,

including preconceptions and judgment. [...] Litigators are predisposed to quickly react to any ideas that are contrary to their goals and how they see the case, and they do so while paying attention to what others are communicating. [...] This multi-pointed attention necessarily means you are not giving your full attention to simply observing just what is before you. The unintended consequence is that you are subject to missing information that is available and valuable. Paying mindful attention precisely involves letting go of those multitasking tendencies.”

Before your next mediation, consider taking a more mindful approach. Try to keep in mind that the case is ultimately about the litigants, and not the attorneys. Be patient and do not overreact to what may be perceived as an ‘insulting offer’. Notice if you are falling victim to recency bias in how you are negotiating because of a recent success or failure in a similar case. Be curious and glean as much as you can from information disseminated by the opposing party, as well as from how the opposing party is negotiating. Ultimately, mindfulness is about staying focused in every moment on the one specific task that is right before you. Perhaps practicing meditation or breathing or working out beforehand will help you achieve that level of focus in order to make the most out of your mediation session.



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