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Mindful Practices of Law Practices

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Mindful Practices for Law Practices

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ABSTRACT

For lawyers who operate in a near-constant state of stress with high-tech, fast-paced stimuli at each turn, it could be the practice of mindfulness that is the key to settling into the practice of law. Mindfulness reaps near countless benefits. This article explores mindful practices and focuses on the ways in which mindfulness improves communication by developing the practitioner's comfort with silence, itself a powerful tool to encourage others to speak openly, by increasing the practitioner's empathy, by helping the practitioner develop a strong sense of self, and by reducing stress, one of the main roadblocks to effective communication.

WHAT IS MINDFULNESS? WHY WOULD A LAWYER WANT TO BE LIKE A FROG?

"A frog is a remarkable creature."² While a frog is capable of enormous leaps, you could watch one for some time and not know that.³ A frog typically spends its days sitting very, very still, and breathing calmly and evenly.⁴ A frog is aware of the busy world around it but preserves its energy by not reacting to every stimulus in that busy world.⁵ Lawyers, too, are remarkable creatures. Lawyers, too, are capable of enormous feats. Yet, lawyers tend to distract themselves from daily moments, reacting with such regularity to stimuli that the reactions become habitual and the awareness of the world becomes distorted.⁶ When it is time to leap, a lawyer may not realize it, or may be too tired to do it. Mindfulness could help a lawyer embody the qualities of a frog.⁷

1. Assistant Professor of Legal Writing, Brooklyn Law School. With thanks to Brooklyn Law School for its support of my writing through the Stipend Program.

2. ELINE SNEL, SITTING STILL LIKE A FROG: MINDFULNESS EXERCISES FOR KIDS (AND THEIR PARENTS) 24 (2013).

3. *See id.*

4. *Id.*

5. *See id.*

6. *See* 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, 3 (2002).

7. *See* SNEL, *supra* note 2, at 24.

Mindfulness refers to the practice of paying a curious, compassionate, and non-judgmental attention to the moment within which we find ourselves.⁸ It is a practice of neutral observing rather than doing, a state of heightened awareness rather than emptiness.⁹ The career of a lawyer is a bit like an ocean and the moments within that career are a bit like waves—ups and downs.¹⁰ None of us can turn our oceans into still waters, but mindfulness helps us ride the waves instead of ignoring them and allowing them to crush us.¹¹ Mindfulness does not require that each wave is pleasant, nor will it necessarily create happiness.¹² Rather, with an increased awareness of our moments, we can observe how we might be stirring up the waves and we can keep a healthy perspective on what the waves really are—temporary phenomena that, in all but a very few, most extreme circumstances, will not kill us.¹³ Watching waves like a frog, instead of immediately reacting to the turbulence, also helps us know when we must act. Or leap.¹⁴ We can sift the tolerable from the intolerable and “see with greater clarity the way we actually live, and therefore how to make changes to enhance our health and the quality of our life.”¹⁵

This sounds simple, just pay attention to the moment in which you find yourself.¹⁶ But humans, unlike frogs and other animals, often spend considerable time thinking about moments other than those in which they find themselves—“contemplating events that happened in the past, might happen in the future, or will never happen at all.”¹⁷ “Indeed, ‘stimulus-independent thought’ or ‘mind wandering’ appears to be the brain’s default mode of operation.”¹⁸ While this kind of thinking has some key benefits for learning, planning, and reasoning,¹⁹ all key components of a legal career, it also interferes with our perception of and experience in each moment as it occurs.²⁰ Many cultures and religions recognize this and encourage

8. JON KABAT-ZINN, *FULL CATASTROPHE LIVING: USING THE WISDOM OF YOUR BODY AND MIND TO FACE STRESS, PAIN, AND ILLNESS* 21 (rev. and updated ed. 2013).

9. *Id.*

10. See Riskin, *supra* note 6, at 17. The analogy between life and an ocean is not a new one. See e.g., LOUISA M. ALCOTT, *LITTLE WOMEN OR MEG, JO, BETH, AND AMY* 486 (Orchard House ed., 1915). As Louisa May Alcott once sagely observed, “Lovely weather so far; I don’t know how long it will last, but I’m not afraid of storms, for I’m learning how to sail my ship.” *Id.*

11. SNEL, *supra* note 2, at 10.

12. See *id.*

13. See *id.* at 12.

14. See *id.*

15. KABAT-ZINN, *supra* note 8, at lxi.

16. See KABAT-ZINN, *supra* note 8, at lx.

17. KABAT-ZINN, *supra* note 8, at xxxii (quoting Matthew A. Killingsworth & Daniel T. Gilbert, *A Wandering Mind is an Unhappy Mind*, 330 *SCI.* 932 (2010)).

18. *Id.*

19. *Id.*

20. See *id.*

mindfulness by different names and in various ways,²¹ though mindfulness does not require an affiliation with any religion or an adherence to any particular set of beliefs.²² It is “simply ‘a way of *being*—a capacity for moment-by-moment awareness—which doesn’t belong to any one culture or tradition.’”²³ A regular meditation practice is one tool to help us cultivate mindfulness in our daily life to focus a wandering mind.²⁴

There are many ways to meditate as a means to develop mindfulness in daily life and many free, helpful resources to get started.²⁵ The most effective meditation practice for the author is as follows. Very early each morning, I position myself in a comfortable, upright posture and plant my feet firmly on the floor. I allow my body to relax into that posture while consciously straightening my spine and reaching the crown of my head skyward. I roll my shoulders forward and backward and then, proudly and broadly, open my shoulders and my heart. I gently close my eyes, softening the muscles in my face and relaxing my jaw. I rest my hands gently in my lap, palms facing up. I am alert yet relaxed (somewhat like a frog) and allow the chair and the floor do the work of keeping my body grounded and safe.

So positioned, I set a timer for twenty or thirty minutes and I begin breathing, slowly and steadily, in and out. I count to five as I breathe in and count to five as I breathe out. As I maintain my focus on my breath, wayward thoughts often arise. Rather than become frustrated by the intrusion, I acknowledge the thoughts, at times label them as pleasant thoughts or unpleasant thoughts, and turn back to my breath. A meditation is a deeply focused time experiencing the present—the breath, the posture, the body.²⁶ Some days this is easier than other days, but at the end of a meditation, I always emerge more balanced. One way to think of this balance is as a jar of

21. Sarah Rudell Beach, *Is Mindfulness a Religion?*, HUFFINGTON POST (last updated Dec. 7, 2017), https://www.huffingtonpost.com/sarah-rudell-beach/is-mindfulness-a-religion_b_6136612.html (“Virtually every spiritual tradition has practices for mindful contemplation and silence, and direct awareness of experience, such as Catholic centering prayer, Buddhist meditation, the Jewish Shabbat or Sufi mysticism.”); Drake Baer, *How the Pope Does Mindfulness*, FAST COMPANY (Mar. 21, 2013), <https://www.fastcompany.com/3007253/how-pope-does-mindfulness> (Another Catholic practice, called “examen,” encourages a person to make a “quick examination of [his or her] state of mind” on a daily basis.); Barbara O’Brien, *Right Mindfulness: A Foundation of Buddhist Practice*, LEARN RELIGIONS (last updated Jun. 25, 2019), <https://www.thoughtco.com/right-mindfulness-450070> (Similarly, Buddhist meditation teaches a person to be mindful of “the four frames of references”: the body, the “feelings or sensations,” the mind, and the “mental objects or qualities.”).

22. See Beach, *supra* note 21 (“[M]indfulness is simply part of the human experience.”).

23. Peter Huang, *Can Practicing Mindfulness Improve Lawyer Decision-Making, Ethics, and Leadership?* 55 HOUS. L. REV. 63, 70 (2017) (quoting TESSA WATT, INTRODUCTION TO MINDFULNESS: A PRACTICE GUIDE 1 (2012)).

24. *Id.* at 71.

25. See e.g., *Free Resources*, THE FREE MINDFULNESS PROJECT (last visited OCT. 12, 2019), www.freemindfulness.org/download.

26. See Peter Huang, *supra* note 23, at 71; see e.g., REBECCA Z. SHAFIR, THE ZEN OF LISTENING: MINDFUL COMMUNICATION IN THE AGE OF DISTRACTION 76 (2003) (explaining how to meditate).

water and sand.²⁷ When agitated, the mixture becomes cloudy and difficult to see through.²⁸ After a few minutes of stillness, “the sand settles to the bottom, [and] the water clears.”²⁹ The stillness of meditation seems to have the same effect on our minds, so that the clutter of thoughts or emotions about past or future events can settle and stop clouding our vision of the present.³⁰ The more regular a meditation practice becomes, the more fluidly we can bring that balance into our daily lives.³¹ That is mindfulness.

STATE OF LEGAL PRACTICE

Lawyers, a group with the consistent, well-documented, and inauspicious distinction of being among the most stressed professionals,³² could particularly benefit from mindfulness. In addition to high rates of clinical disorders, including depression, anxiety, and stress, lawyers also suffer from high rates of divorce, problematic use of alcohol, “suicide, social alienation, work addiction, sleep deprivation, job dissatisfaction, . . . complaints of work-life conflict, incivility, [and] a narrowing of values so that profit predominates.”³³ Among young lawyers and law students, it is even worse.³⁴

As lawyers, we face two particular challenges. First, we are humans³⁵ and, as humans, evolution has disadvantaged us.³⁶ After all, among early humans, it was the jumpy sort, clamoring up a tree at the slightest crunching sound along the jungle floor and hoarding fruit and nuts and wood before the

27. SHAFIR, *supra* note 26, at 78.

28. *Id.*

29. *Id.*

30. *Id.*

31. *See id.*

32. NATIONAL TASK FORCE ON LAWYER WELL-BEING, THE PATH TO LAWYER WELL-BEING: PRACTICAL RECOMMENDATIONS FOR POSITIVE CHANGE 7 (2017) (“[B]etween 21 and 36 percent [of lawyers] qualify as problem drinkers, and . . . approximately 28 percent, 19 percent, and 23 percent are struggling with some of level of depression, anxiety, and stress, respectively.”).

33. *Id.*; *see* Riskin, *supra* note 6, at 10.

34. NATIONAL TASK FORCE ON LAWYER WELL-BEING, *supra* note 32, at 7 (“[Y]ounger lawyers in the first ten years of practice and those working in private firms experience the highest rates of problem drinking and depression.”). *See also* Jonathan White, *Moving the Meter on Lawyer Well-Being*, COLO. SUP. CT. (2017), <http://coloradosupremecourt.com/Newsletters/Fall2017/Well-Being%20National%20Task%20Force.htm> (citing J. M. Organ et al., *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116, 117, 129 (2016)) (Another survey polling law students from 15 schools across the United States found that, among those willing to respond, “53 percent reported drinking to the point of inebriation in the past thirty days. 43 percent binge-drank in the past two weeks. This compared to 39 percent of graduate students reporting drinking to the point of inebriation in the past thirty days and 36 reporting binge drinking in the past two weeks. In terms of mental health, thirty-seven percent of law students surveyed screened positive for anxiety, compared to an average of fifteen percent for other graduate students.”).

35. Lawyer jokes notwithstanding.

36. *See* NANCY LEVIT & DOUGLAS O. LINDER, THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW 21 (2010).

first frost set in, who lived to contribute their genes to future generations.³⁷ Meanwhile, their relaxed neighbors who marveled at the lush, verdant forest leaves instead of the jaguar crouching beneath them or basked in the pleasure of the sun beating down on their faces instead of worrying about a cold, far-off winter, failed to contribute their untroubled attitudes to future generations.³⁸ So “nature has programmed us to better see the negative than the positive.”³⁹

Second, and more specifically, lawyers tend to be introverted and pessimistic sorts of humans.⁴⁰ In other words, it may not be the profession itself that causes worrisome conditions like depression and anxiety, but rather, that the personality traits that seem to propel individuals to become lawyers and to succeed in the profession are traits that also strongly correlate to these conditions.⁴¹ Extroverted, optimistic risk takers “tend to be relatively happy,” while “introverted, pessimistic, risk-averse people” and, above all, those with neuroses, “tend to be relatively unhappy.”⁴² Unsurprisingly, in the field of law, with its focus on “contemplation, preparation, and writing skills” and its tendency toward “quiet, private” work spaces, introverts outnumber extroverts.⁴³ This disproportionate representation of introverts in the field of law is even more striking given that, among the general United States population, “extroverts outnumber introverts by a three-to-one margin.”⁴⁴ The practice of law attracts and rewards not only introverts, but, specifically, *pessimistic* introverts.⁴⁵ Pessimism, which carries a “well-documented [and] major risk” of unhappiness, is strongly correlated with “success in law school.”⁴⁶ It would be the most dire pessimist who could most deftly summon the worst-case scenarios against which to draft a contract or defend a client.⁴⁷

Though whether these worrisome conditions are the chicken or the egg is somewhat beside the point. For law students and lawyers who come to the practice of law without the innate inclination to “sit still like a frog,”⁴⁸ they will find themselves ill equipped to navigate the lawyerly ocean in which they

37. *See id.* at 22.

38. *See id.* at 21-22.

39. *Id.* at 21.

40. *See id.* at 35.

41. *See* LEVIT & LINDER, *supra* note 36, at 34-35.

42. *Id.* at 34.

43. *Id.* at 34-35.

44. *Id.* at 34.

45. *Id.* at 35.

46. LEVIT & LINDER, *supra* note 36, at 35. “Research shows that an optimistic outlook is good for your mental health, . . . [b]ut lawyers are trained to always look for the worst-case scenario. They benefit more from being pessimistic, and that takes a toll.” Douglas Quenqua, *Lawyers with Lowest Pay Report More Happiness*, N.Y. TIMES (May 12, 2015, 2:42 PM), <https://well.blogs.nytimes.com/2015/05/12/lawyers-with-lowest-pay-report-more-happiness/>.

47. LEVIT & LINDER, *supra* note 36, at 35.

48. SNEL, *supra* note 2.

find themselves. Traditional law school curricula⁴⁹ and law firm cultures seem to exacerbate the problem, inclining law students and lawyers towards seeking satisfaction via “external sources,” such as grades, awards, high-paying jobs⁵⁰ at partner-track firms,⁵¹ and general recognition by others.⁵² This inclination comes at the expense of helping these law students and lawyers seek satisfaction from “internal sources,” such as the development of a “secure sense of self” and a motivation based on their own values.⁵³

Yet even outside the ambit of the legal sphere, lawyers and law students may have difficulty experiencing inner calm, at least in part, because of the unrelenting infusion of information saturating their existence. And for lawyers and law students who may already be inclined to escape the moment within which they find themselves, they carry a pocket-sized device⁵⁴ offering a limitless wellspring of distraction. “People, businesses, and devices have all become data factories that are pumping out incredible information to the web each day,” to such an extent that 90% of information available on the internet at this moment “has been created since 2016.”⁵⁵ The smartphone functions as a “supernormal stimulus,” a repository of all this information within a sleek, “radiant object” combining “a mailbox, a newspaper, a TV, a radio, a photo album, a public library and a boisterous party attended by everyone you know.”⁵⁶ The ease with which we can access each of those bits of information, coupled with a dopamine-fueled, evolutionary pull to amass more and more of that information,⁵⁷ creates a

49. MARJORIE M. SHULTZ & SHELDON ZEDECK, IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING 13 (2008) (“Commentators have criticized legal education generally and the admission practices that reflect it, for over-emphasis on academic and cognitive competencies.”).

50. LEVIT & LINDER, *supra* note 36, at 38 (“Wealth is the most overrated of all factors in people’s guesses as to what will improve their happiness.”).

51. Quenqua, *supra* note 46 (“Researchers who surveyed 6,200 lawyers about their jobs and health found that the factors most frequently associated with success in the legal field, such as high income or a partner-track job at a prestigious firm, had almost zero correlation with happiness and well-being. However, lawyers in public-service jobs who made the least money, like public defenders or Legal Aid attorneys, were most likely to report being happy.”).

52. Riskin, *supra* note 6, at 10.

53. *Id.*

54. The typical smartphone is a more powerful computer than NASA had when it began sending astronauts to the moon. Matt Rosoff, *Your Phone Is More Powerful Than the Computer in the Spaceship NASA Launched This Week*, BUS. INSIDER (Dec. 4, 2014, 10:01 AM), <https://www.businessinsider.com/your-phone-is-more-powerful-than-the-orion-computer-2014-12>.

55. Jeff Schultz, *How Much Data is Created on the Internet Each Day?*, MICRO FOCUS BLOG (Oct. 10, 2017), <https://blog.microfocus.com/how-much-data-is-created-on-the-internet-each-day/>.

56. Nicholas Carr, *How Smartphones Hijack Our Minds*, WALL STREET J. (Oct. 6, 2017, 12:36 PM), <https://www.wsj.com/articles/how-smartphones-hijack-our-minds-1507307811>.

57. Susan Greene, *Slow Lawyering: How Law Practitioners Can Slow Down in a High-Speed World and Why It Matters* 43 LAW & PSYCHOL. REV. 1, 5 (2019) (“Research shows that ‘molecular and physiological mechanisms that originally developed in our brain to support food foraging for survival have now evolved in primates to include information foraging . . . [t]he same dopamine neurons process both

tinderbox for anyone seeking to connect with his or her day-to-day moments.⁵⁸

There are many compelling studies demonstrating the extent to which the use of a smartphone removes the user from a moment, but the most compelling story to the author is a recent, personal one. I was in a restaurant with my children and a terrific song started playing. We all agreed that the song was great, but none of us knew who was singing it. So, I strained to make out a few lyrics and punched them into my phone. The song was “Believer”, by the group Imagine Dragons, my phone immediately told me. Great. I wonder if they have any other songs we might like? I wonder where they are from? I wonder if they will be on a tour we could see? Over and over, I sought more information. When I finally looked up, the song was over without my ever having relaxed into the fullness of the musical moment with the people I love most. This was an escape from a moment within which I wanted to be present. Imagine the rabbit hole down which a lawyer could fall to escape a moment within which he or she may not want to be present.

This is a critical question, then. There are many reasons to be present with your children, listening to music. But why be present during a difficult moment, paying a curious, compassionate, non-judgmental attention to moments that are difficult, like being berated by a partner, or nerve-racking, like giving an oral argument, or boring, like a rote document review?⁵⁹ The answer is that it is probably not the difficulty, or nervousness, or boredom that will overwhelm us, but rather the fear of how that moment will feel.⁶⁰ Opening ourselves up to a discomfort, allowing ourselves to feel it, allowing it to become “an object of interest to explore . . . its texture, its energy, the pains and tension in it, the resistances to it” means that “[i]nsight, consciousness, [and] freedom” can exist, not in some other moment, “but in any moment in which we really learn to pay attention.”⁶¹ A mindful opening up to the difficulty, nervousness, or boredom requires that we view it non-judgmentally.⁶² Filling it up with “attention and presence” just might cool it

primitive rewards, like food and water, and cognitive rewards, like information.”); ADAM GAZZALEY & LARRY D. ROSEN, *THE DISTRACTED MIND: ANCIENT BRAINS IN A HIGH-TECH WORLD* 13 (2016).

58. Yael Shy, *WHAT NOW? MEDITATION FOR YOUR TWENTIES AND BEYOND* 85 (2017). (Some have observed that smartphones and similar technology are akin to alcohol. They are not “inherently bad or good” and, realistically, they are a part of our lives. Rather, “[h]ow we relate to [and consume] alcohol and technology is what matters.” Can we use them “without losing our awareness, giving ourselves time to process our emotions and feel our loneliness or our boredom?”).

59. As a savvy reader may intuit, the author engaged in many document reviews before transitioning to teaching law.

60. See JOSEPH GOLDSTEIN & JACK KORNFIELD, *SEEKING THE HEART OF WISDOM: THE PATH OF INSIGHT MEDITATION* 50 (2001).

61. *Id.*

62. *See id.*

down.⁶³ “Like everything else in the world, it will finally have its moment and after that, it will fall away” and lose its power.⁶⁴ Gentle acceptance is critical. Or, as “federal judge Michael A. Ponsor advised: ‘Keep tabs on your body. . . . If you are nervous, just be nervous. Do not make it worse by getting upset about it.’”⁶⁵

Helping law students and lawyers to develop a curious, compassionate, non-judgmental attention to any moment within which they find themselves, even less-than-ideal moments, may sound like “someone else’s task” or an issue that lawyers are “too busy to help” with.⁶⁶ But a mindfulness curriculum has key benefits for law schools and law firms and several law schools and law firms already have such curricula in place.⁶⁷ Law schools ask law students to “operat[e] with a multitasking mindset,” arguably at the expense of “self-reflection and self-assessment”⁶⁸ in a world that already predisposes lawyers and non-lawyers towards shallow attention.⁶⁹ Several law schools have already begun to incorporate mindfulness into their programs in various ways, but virtually all law schools would reap benefits from a mindfulness program’s results of “better attention, learning, empathy, creativity, self-compassion, stress-reduction, and general overall well-being.”⁷⁰

63. ALAN LEW, THIS IS REAL AND YOU ARE COMPLETELY UNPREPARED: THE DAYS OF AWE AS A JOURNEY OF TRANSFORMATION 131 (2003).

64. *Id.*

65. Huang, *supra* note 23, at 83 (quoting Michael A. Ponsor, *Playing to the Bench*, A.B.A. J. 70, 71-72 (1995)).

66. White, *supra* note 34.

67. Several law schools have mindfulness programs, including Columbia Law School, Temple University Beasley School of Law, University of Miami School of Law, and Berkley Law. *See e.g.*, *Columbia Law School Mindfulness Program CLS-wide Monthly Summer Mindfulness Meditation Session*, COLUM. L. SCH. (last visited Oct. 6, 2019), <https://www.law.columbia.edu/events/columbia-law-school-mindfulness-program-cls-wide-monthly-summer-mindfulness-meditation-session>; *LAW 5054: Mindful Lawyering: Techniques for Effective Counseling, Negotiation, and Advocacy*, TEMP. U. BEASLEY SCH. L. (last visited Oct. 6, 2019), <https://www4.law.temple.edu/Courses/Bulletin/Offering/2109>; *Mindfulness in Law Program*, U. MIAMI SCH. L. (last visited Oct. 6, 2019), <https://www.law.miami.edu/academics/mindfulness-in-law-program>; *Mindfulness in Legal Education*, BERKELEY L. (last visited Oct. 6, 2019), <https://www.law.berkeley.edu/students/mindfulness-at-berkeley-law/resources/mindfulness-in-legal-education/>. Law firms are also starting to provide mindfulness training for their employees. *See* Jeena Cho, *Changing Minds: 4 Strategies for Effectively Implementing a Mindfulness Program*, A.B.A. J. (May 2018), http://www.abajournal.com/magazine/article/changing_minds_implementing_mindfulness_program. Mindfulness for Lawyers, a mindfulness training service, has worked with law firms such as Baker McKenzie, Cleary Gottlieb, and Davis Polk. *See* MINDFULNESS FOR LAWYERS: HELPING LAWYERS REDUCE STRESS AND IMPROVE PERFORMANCE, (last visited Oct. 6, 2019), <http://www.mindfulnessforlawyers.com/>.

68. Shailini Jandial George, *The Cure for the Distracted Mind: Why Law Schools Should Teach Mindfulness*, 53 DUQ. L. REV. 215, 239 (2015).

69. *See* Greene, *supra* note 57, at 7-8.

70. George, *supra* note 68, at 239.

Law firms, likewise, have incentives to develop lawyers' capacity for acceptance of each moment as it arises.⁷¹ Lawyers are the most valuable asset of a law firm and lawyer dissatisfaction leads to attrition and lack of productivity.⁷² By one estimate, thirty-seven percent of associates at large firms leave within three years and seventy-seven percent leave within five years.⁷³ With replacement costs estimated at about \$200,000 to \$500,000 per departing associate on top of "behind-the-scenes costs—such as lost productivity time . . . client notification . . . as well as a morale drop among lawyers who remain," the cost to a firm of lawyers who cannot find peace in moments as they arise is high.⁷⁴ By contrast, attorneys who develop a mindfulness practice to feel more grounded and at peace in their moments may experience greater productivity, creativity,⁷⁵ and attention.

MINDFULNESS DEVELOPS COMMUNICATION SKILLS

*"Words empty as the wind are best left unsaid."*⁷⁶

The first and finest lawyer this author ever knew⁷⁷ spoke exceedingly rarely. Hands folded in his lap, eyelids heavy, people sometimes paused while telling him their story to make sure he was awake. He always was. "I'm just listening to you," he'd say. When someone would ask him a question, whether from the bench or over the breakfast table, he would pause for a few beats, and speak slowly and thoughtfully when he was ready. He had the two hallmark qualities that define good listeners: others enjoyed speaking with him and being around him.⁷⁸ It is doubtful that he would have known in his 1980s heyday that his approach to communication was a mindful one, but indeed it was. Communication, critical to effective lawyering,⁷⁹ directly benefits from mindfulness.

71. See generally LEVIT & LINDER, *supra* note 36, at 161-63 (providing reasons law firms should make sure their lawyers are happy).

72. *Id.* at 161-62.

73. *Id.* at 162.

74. *Id.*

75. Greene, *supra* note 57, at 10.

76. *Quote By Homer: Words Empty as the Wind are Best Left Unsaid*, GOODREADS (last visited, Oct. 17, 2019), <https://www.goodreads.com/quotes/920484-words-empty-as-the-wind-are-best-left-unsaid>.

77. Her grandfather.

78. SHAFIR, *supra* note 26, at 18.

79. SHULTZ & ZEDECK, *supra* note 49, at 26-27 (Speaking and listening are two attributes among 26, each of which Marjorie Shultz, a Berkeley professor of law, and Sheldon Zedeck, an industrial-psychology expert (and Berkeley's vice provost for academic affairs and faculty welfare) identified as factors that make for effective lawyering. Most of the factors the authors identified were not knowledge-based or analytical, but rather soft skills, including integrity, passion, and practical judgment.); See Jane Korn, *Teaching Talking: Oral Communication Skills in a Law Course*, 54 J. LEGAL EDUC. 588 (2004), for further information about the importance of effective communication in the legal industry; See also Marcia

Mindfulness involves paying a curious, non-judgmental attention to the moment in which we find ourselves.⁸⁰ This is particularly important when we meet with a client, negotiate with opposing counsel, or make a presentation to a partner. If our mind wanders away from the present, we may ascribe qualities to a person or a moment that rely on assumptions from the past or guesses about the future.⁸¹ The reality of *that person, at that moment*, is lost forever.⁸²

“As it pertains to listening, [a lawyer with a regular meditation practice can] hear with less distortion new ideas and points of view,”⁸³ in part by conditioning the meditator to “learn to pause before” speaking.⁸⁴ Mindfulness through meditation practices instill within the meditator a comfort with silence, itself “one of the most powerful response modes” and the “key to [a speaker’s] treasury of information.”⁸⁵ For a lawyer, the value of access to that treasury, be it of a client, a co-worker, a judge, or an adversary, is beyond measure. Mindful listening, with a goal of quieting our “internal noise” to better understand others, in turn tends to “quiet down *their* internal noise,” so that speakers “feel freer to cut out the layers of pretense to say what’s really on their minds.”⁸⁶

Yet, listening with presence and concentration presents its own challenges due to the mathematics of speaking and understanding.⁸⁷ While “the average person speaks at a rate of 125 words per minute . . . we can process up to 500 words per minute.”⁸⁸ For listeners who stay in that moment, with that speaker, there is a wealth of riches to be found in that lag time.⁸⁹ Mindful listeners can “summarize what the speaker has said so far[,] see the possibilities in what the speaker is proposing[,] . . . note the emphasis in his voice or the degree of concern in his gestures and facial expressions.”⁹⁰ In a comfortable silence, cleared of mental “traffic” or worries about, for example, how the speaker will perceive him, the mindful lawyer can integrate what the

Pennington Shannon, *Cultivating the Art of Effective Client Communications*, A.B.A. (Feb. 17, 2017), www.abalcc.org/2017/02/17/cultivating-art-effective-client-communications/; Cynthia Thomas, *Legal Keys to Become a Successful Lawyer*, L. PRAC. TODAY (Apr. 13, 2018), <https://www.lawpracticetoday.org/article/legal-keys-become-successful-lawyer/>.

80. KABAT-ZINN, *supra* note 8, at 21.

81. *See id.*

82. *See id.* at 465.

83. SHAFIR, *supra* note 26, at 75.

84. *Id.* at 149.

85. *Id.* at 129.

86. *Id.* at 13.

87. *See id.* at 108.

88. SHAFIR, *supra* note 26, at 108.

89. *See id.* at 109.

90. *Id.* at 108.

speaker has said into his own body of knowledge, taking in the “whole message” and developing a response with care and thoughtfulness.⁹¹

Thus, of the near countless benefits a mindful lawyer can reap by bringing his or her attention to the practice of law, several relate directly to the key lawyerly skill of communication. In this section, this article will explore the relationship between mindfulness and communication and suggest that mindfulness builds strong communication skills by (1) inspiring empathy; (2) inspiring a strong sense of self; and (3) diminishing stress.⁹²

1. *Mindfulness Inspires Empathy*

“Three-fourths of the miseries and misunderstandings in the world [would] disappear if we step in[to] the shoes of our adversaries and understand their viewpoint.”⁹³

Empathy “allows us to understand the minds of others and to resonate emotionally with those states.”⁹⁴ Empathy itself is a critical quality of an effective lawyer⁹⁵ and it serves as a backbone for effective, lawyerly communication. The author experienced a realization of the emotional wellspring of others in dramatic fashion about a year and a half ago when my father, who had suffered from a “mild cognitive decline” over the previous year, suffered a massive loss in cognition over a two-month period, and one of the steepest declines into Alzheimer’s one doctor had seen. Witnessing his rapid disintegration from a unique and utterly complicated, major character in my life into an entirely one-dimensional caricature remains the most difficult experience of my life. The most acutely painful moment, in that already trying period, was the precise moment at which my father first looked at me without a glimmer of recognition. It occurred one morning just a few short hours before I began conferencing with four of my students on drafts of briefs that they had submitted to me. I worried that a rogue wave from the ocean of emotions that swirled just below the surface would betray my mask of tranquility. When no such wave surfaced perceptibly, and those four conferences proceeded as any others, first I regretted that my tremendous

91. *Id.* at 149.

92. *See infra* sections 1, 2, & 3.

93. SHAFIR, *supra* note 26, at 90 (quoting Mahatma Gandhi).

94. Matthew Brelsilver, *Mindfulness and Empathy*, MINDFUL SCHOOLS (Mar. 20, 2016), <https://www.mindfulschools.org/foundational-concepts/mindfulness-and-empathy/> (citing Gonzalez-Lienres et al., *Towards a Neuroscience of Empathy: Ontogeny, Phylogeny, Brain mechanisms, Context and Psychopathology* 37 *NEUROSCIENCE & BIOBEHAVIORAL REVIEWS* 1537-48 (2013)).

95. SHULTZ & ZEDECK, *supra* note 49, at 26-27 (Empathy is one attribute among 26, each of which Marjorie Shultz, a Berkeley professor of law, and Sheldon Zedeck, an industrial-psychology expert (and Berkeley’s vice provost for academic affairs and faculty welfare) identified as factors that make for effective lawyering. Most of the factors the authors identified were not knowledge-based or analytical, but rather soft skills, including integrity, passion, and practical judgment.).

talent as an actress had gone unrecognized for all these years.⁹⁶ But reflecting back at the end of the day, I realized that the swirl of emotions inside me during those moments could have been equally present beneath a calm surface of any of my students that day, indeed, any other individual I encounter at any moment. My own well of emotions is no deeper than anyone else's.

Recognizing the emotional complexity of others does not necessarily require a life event like the one this author experienced. Mindfulness through meditation practices can also develop this recognition. Recent neurobiological research has explored the effects of meditation practice and found that it directly affected the brain structures that control empathetic responses – the anterior insula and the cingulate cortex.⁹⁷ In a separate study, one group of participants spent five minutes engaging in mindfulness practices, and a second group spent five minutes in a state of distraction.⁹⁸ At the end of five minutes, both groups of participants were asked to identify an individual's emotions by looking only at a photograph of that individual's eyes.⁹⁹ The group of participants who had practiced mindfulness "dramatically out-performed" the group of participants who had been distracted.¹⁰⁰

Another study similarly concluded that a state of distraction, in other words, the absence of a mindful presence in a moment, reduced empathy.¹⁰¹ In that study, participants had private conversations, in pairs, for ten minutes and then were "given tests of affinity, trust and empathy."¹⁰² "The mere presence of mobile phones," even when they were not in use, "'inhibited the development of interpersonal closeness and trust' and diminished 'the extent to which individuals felt empathy and understanding from their partners.'

96. That feeling was fleeting.

97. Brensilver, *supra* note 94, (citing B.C. Bernhardt & T. Singer, *The Neural Basis of Empathy*, 35 *NEUROSCIENCE* 1, 1-23 (2012)).

98. *Id.* (citing to L.B. Tan & C.N. Macrae, *Brief Mindfulness Meditation Improves Mental State Attribution and Empathizing*, 9 *PLOS ONE* e110510 (2014)).

99. *Id.*

100. *Id.*

101. Carr, *supra* note 56.

102. *Id.* One study measured "available cognitive capacity," that is, how fully an individual's "mind can focus on a particular task," and "fluid intelligence," measuring an individual's "ability to interpret and solve an unfamiliar problem, [in which] [t]he only variable . . . was the location of the subjects' smartphones." *Id.* Some phones were in front of the subjects, some stowed the phones in bags or pockets, and some kept their phones in a different room. *Id.* "In both tests, the subjects whose phones were in view posted the worst scores, while those who left their phones in a different room did the best. The students who kept their phones in their pockets or bags came out in the middle. As the phone's proximity increased, brainpower decreased." *Id.* Perhaps most significantly, "[i]n subsequent interviews, nearly all the participants said that their phones hadn't been a distraction—that they hadn't even thought about the devices during the experiment. *They remained oblivious even as the phone disrupted their focus and thinking.*" Carr, *supra* note 56 (emphasis added).

The [negative effects of distraction] were strongest when ‘a personally meaningful topic’ was being discussed.”¹⁰³

In addition to improving communication through reception of information, mindfulness is also strongly related to speaking.¹⁰⁴ Hearing our speech “through the ears of our listeners” allows us to recognize “overgeneralizations, [] inaccuracies, and [] insensitivit[ies],” so that we can more carefully select our words and present our thoughts.¹⁰⁵

As empathy pertains to the practice of law, recognizing what drives the individual with whom we communicate pays tremendous dividends. Several years ago, KD, an in-house lawyer representing a client on one side of a complicated financial transaction, was engaged in a negotiation with CE, a lawyer at a “Big Law” firm representing the client on the other side of the deal. KD took the lead in drafting the documents as he had worked on this type of deal structure before, and CE, for whom this deal represented a novel financial structure, spent a significant amount of time reviewing the documents. After a few weeks, KD and CE agreed that they were satisfied that these documents reflected a fair deal for both sides and an accurate reflection of their agreement to move forward. KD was surprised, a few hours later, to receive a mark-up of the final documents from CE with substantial comments, both substantive and non-substantive. Furious, KD rejected the comments and CE stood firm that he would not move forward without the changes. KD and CE were at an impasse. KD could not understand why CE was being so unreasonable. KD remembered that it was this kind of attitude that drove him to leave his “Big Law” firm years ago and become an in-house attorney in the first place. As he remembered his time at that firm, he remembered too how stressful it was to charge such high hourly fees to clients and wonder if those clients would see the value in his work. Then he wondered if CE, a younger lawyer who had not drafted the documents and who had largely agreed with the work KD had done, might be concerned that the client would balk at his fee without seeing the value CE had added to those particular documents. KD looked over CE’s markup again, with the eyes of a young lawyer who wanted to prove his worth. KD accepted the non-substantive comments, rejected the substantive comments, and sent it back to CE for final approval. The deal closed two days later.

As legal writers, lawyers benefit tremendously from stepping into the shoes of the reader. In the legal writing classes I teach, I often ask my students to self-edit their work and peer edit the work of others. Through these exercises, I ask my students to embody the intended audience of the

103. *Id.*

104. See SHAFIR, *supra* note 26, at 18.

105. *Id.*

piece and evaluate the substance and the delivery. When writing a brief, often the gulf between how new lawyers think lawyers should write (with words like “heretofore” or “to wit”) and how judges think lawyers should write (without words like “heretofore” or “to wit”) can be wide.¹⁰⁶ Stepping into the shoes of the intended audience to evaluate each word and determine whether it is likely to sway the intended audience can help bridge that gap.

2. *Mindfulness Inspires Understanding of One’s Self, a Building Block Towards Communication*

“Actions are born from thoughts. Without mastering your thoughts, you cannot master your actions.”¹⁰⁷

A strong sense of self is also a critical quality for a lawyer, specifically with respect to his or her character and professional development.¹⁰⁸ It is also foundational to effective, lawyerly communication. It is axiomatic that an effective communicator must be able to “stand in someone else’s shoes.”¹⁰⁹ Yet, to stand in the shoes of another requires that we first “know what it’s like to stand in our *own* shoes.”¹¹⁰ Mindfulness develops this understanding through self-empathy and self-awareness, allowing the practitioner to “experience the landscape of [his] inner life with more detail and richness, [thus expanding his] ability to understand the inner lives of others.”¹¹¹ As this relates to lawyers, “[p]rofessional formation entails career-long growth toward an internalized moral core characterized by deep responsibilities for others, particularly the client.”¹¹²

The profession of law is unique in its “unwritten social contract” with a public who “grants the profession substantial autonomy” and expects, in return, a commitment to “set and enforce standards” and “to foster the core values and ideals of the profession.”¹¹³ The relationship is symbiotic – “[t]he

106. See Ross Guberman, *Judges Speak Softly; What They Long for When They Read*, ABA GROUP: LITIGATION JOURNAL (June 1, 2018), https://www.americanbar.org/groups/litigation/publications/litigation_journal/2017-18/summer/judges-speaking-softly/.

107. SHAFIR, *supra* note 26, at 78 (quoting JEAN-FRANCOIS REVEL & MATTHIEU RICARD, *THE MONK AND THE PHILOSOPHER* (1998)).

108. See SHULTZ & ZEDECK, *supra* note 49, at 27 (Self-development is one attribute among 26, each of which Marjorie Shultz, a Berkeley professor of law, and Sheldon Zedeck, an industrial-psychology expert (and Berkeley’s vice provost for academic affairs and faculty welfare) identified as factors that make for effective lawyering. Most of the factors the authors identified were not knowledge-based or analytical, but rather soft skills, including integrity, passion, and practical judgment.).

109. Brensilver, *supra* note 94 (citing J. Decety & P.L. Jackson, *The Functional Architecture of Human Empathy*), 3 *BEHAVIORAL & COGNITIVE NEUROSCIENCE REVIEWS* 71, 72 (2004).

110. *Id.*

111. *Id.*

112. Neil Hamilton, *The Qualities of the Professional Lawyer*, in *THE ESSENTIAL QUALITIES OF THE PROFESSIONAL LAWYER* 12 (2013).

113. *Id.* at 14.

higher the public's trust in the social contract, the more likely it is that members of the public will bring problems to lawyers."¹¹⁴ Further, this sense of professional responsibility within a community begets better health and longevity among lawyers and a sense of well-being "from service to others and some suppression of self-serving impulses."¹¹⁵

Yet, developing a strong sense of our professional selves can be challenging. Swedish chemist, inventor, and philanthropist Alfred Nobel experienced this challenge decades ago.¹¹⁶ Dr. Nobel is widely known today for his creation of the Nobel Prizes.¹¹⁷ But, during his early life, he was best known for inventing dynamite.¹¹⁸ One day, he had the unique experience of reading his own obituary—Dr. Nobel's brother had died and a newspaper had mistakenly reported that Dr. Nobel himself had died.¹¹⁹ "Dr. Alfred Nobel, who became rich by finding ways to kill more people faster than ever before, died yesterday," began the obituary.¹²⁰ Horrified at the idea of being remembered for such abject destruction, Dr. Nobel rededicated his life to the pursuit of science, literature, and peace.¹²¹ Indeed, today, we associate the name Nobel with peace far more than with dynamite or destruction.¹²²

Few of us have the benefit of reading our own obituary as a catalyst for change in our lives. But for many of us, imagining our obituary is a helpful tool in determining what is important to us as we navigate our professional and personal journeys.¹²³ Professor Larry Krieger developed a thought-provoking exercise for his law students: he asks them to write their own eulogy.¹²⁴ He asks his students to imagine what they would like to hear from others—a respected judge or attorney, perhaps a life partner or a member of the community—regarding the things about which they would feel best when reflecting back over their lives.¹²⁵ Almost without exception, reports Professor Krieger,

the qualities and values expressed in these eulogies are the most traditional human values and virtues: patience, decency, fairness, humility, courage, caring, integrity, willingness to work hard for

114. *Id.*

115. *Id.*

116. See Nils Ringertz, *Alfred Nobel – His Life and Work*, THE NOBEL PRIZE (last visited Oct. 9, 2018), https://www.nobelprize.org/alfred_nobel/biographical/articles/life-work/.

117. *Id.*

118. *Id.*

119. LEW, *supra* note 63, at 28.

120. *Id.*

121. *Id.* at 28-29.

122. See Ringertz, *supra* note 116.

123. See e.g., LEVIT & LINDER, *supra* note 36, at 158.

124. *Id.*

125. *Id.*

worthwhile goals . . . and so forth. No one thus far in my experience has drafted a eulogy focused on a luxurious home, high grade point average, law review membership, or extraordinary income.¹²⁶

The earlier on a law student or young lawyer can, through moments of sustained self-reflection, determine those key values for him or herself, the more likely he or she will embark on a path that is uniquely suited to him or herself.¹²⁷

3. *Mindfulness Diminishes Stress, a Main Stumbling Block to Communication*

*“To listen well, you have to first settle down the internal noise.”*¹²⁸

Stress management is a critical component of effective lawyering.¹²⁹ High stress levels present a panoply of problems for all of us, but present particular problems for lawyers as communicators. A high level of stress hampers a lawyer’s ability to exercise self-control.¹³⁰ Thus, effective stress management “can mean the difference between suppressing hot impulses and lashing out uncontrollably.”¹³¹ Stress also decreases the “ability to solve complex problems. So people who argue when they are stressed . . . often find that they lack the self-control they might otherwise have. Their problem-solving ability is also impaired, so stress doubly undermines any attempts to resolve conflicts constructively.”¹³² Lack of self-control and poor problem solving can lead to bad decisions and stressed lawyers who “make poor decisions” are wide open to liability.¹³³

Most critically, the body’s responses to stress hamper the ability to communicate effectively.¹³⁴ Stress opens a cascade of physical responses.¹³⁵ With a rush of adrenaline, our “strength increases by at least 20 percent . . .

126. *Id.*

127. *Id.* at 159.

128. SHAFIR, *supra* note 26, at 78.

129. See SHULTZ & ZEDECK, *supra* note 49, at 13 (Stress management is one attribute among 26, each of which Marjorie Shultz, a Berkeley professor of law, and Sheldon Zedeck, an industrial-psychology expert (and Berkeley’s vice provost for academic affairs and faculty welfare) identified as factors that make for effective lawyering.).

130. Riskin, *supra* note 6, at 46 (quoting Walter Mischel & Aaron L. DeSmet, *Self-Regulation in the Service of Conflict Resolution*, in THE HANDBOOK OF CONFLICT RESOLUTION 256, 270 (Morton Deutsch & Peter T. Coleman eds., 2000)).

131. *Id.*

132. *Id.*

133. Huang, *supra* note 23, at 83 (quoting Leslie A. Gordon, *How Lawyers Can Avoid Burnout and Debilitating Anxiety*, A.B.A. J. (2015)).

134. See e.g., SHAFIR, *supra* note 26, at 173 (explaining the body’s response to fear).

135. *Id.*

[t]he liver demands more oxygen from the heart and lungs as it pumps sugar into the bloodstream” and our blood supply is diverted away from our brain, to our extremities, in support of a fight-or-flight response.¹³⁶ So depleted, our brain lacks its sharp mental focus and, instead of being constructive, we may revert to “becoming defensive and verbally provocative” in our communications.¹³⁷

For lawyers who operate in a near-constant states of stress, mindfulness can provide significant relief, thus supporting critical communication skills. “Mindfulness and empathy are linked through their shared relationship with stress. While mindfulness decreases stress, stress weakens empathy. When our attention is pooled up in our own stress, it’s as if there is less real estate for the concerns of others.”¹³⁸ Many studies indicate that mindfulness through meditation reduces stress.¹³⁹ One theory posits that this is because “meditation lowers the body’s responsiveness to the stress hormone norepinephrine.”¹⁴⁰ Indeed, in one study, two groups of participants, one who meditated twice a day and one who did not, were presented with a stressful situation.¹⁴¹ While both groups experienced a rise in norepinephrine, only the group who had not meditated experienced a rise in blood pressure and heart rate.¹⁴²

Breath practice is a method that is always available to law practitioners who recognize that a stressful situation is arising and seek to combat it.¹⁴³ Any conscious breath in and conscious breath out is a meditation, however brief, and a sustained focus on breath is a vehicle through which we can pay attention to what is happening inside of us and around us at a precise moment in time.¹⁴⁴ A breath practice, for example a deep breath, an expansion of the belly, a pause at the deepest point, and a slow exhale while counting to five, will calm the nervous system.¹⁴⁵ Breath is also an interesting exploration

136. *Id.*

137. *Id.*

138. Brensilver, *supra* note 94 (citing *HANDBOOK OF MINDFULNESS: THEORY, RESEARCH, AND PRACTICE* (2015)); *See generally* Michael S. Krasner, et al., *Association of an Educational Program in Mindful Communication with Burnout, Empathy, and Attitudes Among Primary Care Physicians*, 302 J. AM. MED. ASS’N. 1284, 1288 (2009); *See also* Sauna L. Shapiro et al., *Effects of Mindfulness-Based Stress Reduction on Medical and Premedical Students*, 21 J. BEHAVIORAL MEDICINE 581, 584 (1998); Martin Lamothe et al., *Outcomes of MBSR or MBSR-based Interventions in Health Care Providers: A Systematic Review with a Focus on Empathy Emotional Competencies*, 24 COMPLEMENTARY THERAPIES IN MEDICINE 19 (2016).

139. *See e.g.*, Lamothe, et al., *supra* note 138, at 20; *see also* SHAFIR, *supra* note 26, at 242.

140. SHAFIR, *supra* note 26, at 242.

141. *Id.*

142. *Id.* at 242.

143. *Cf. id.* at 173 (noting that breathing practice is a key component to martial art practices, calming the mind and body to direct the mental and physical focus).

144. *See* SHAFIR, *supra* note 26, at 75-76.

145. *See generally id.* at 173 (“Without practice in breath control. . . mental focus breaks down and you become more physically tense.”).

because it is both within our control (our breaths can be calm and deep or erratic and shallow) and outside our control (our bodies will not allow us to hold our breath for longer than is safe). For law practitioners who struggle through stressful interactions, it is a helpful reminder that the practice of law, like everything else in life, has elements that are both within our control and beyond our control.

CONCLUSION

In one of many excellent books about meditation, the author recounts a Zen story about a young girl being chased by a tiger to the very edge of a steep cliff with a sheer rock face, where, just in the nick of time, she sees a vine and clamors down it.¹⁴⁶ Dangling precariously, she looks a few inches above her and notices some mice chewing on the rope; looking up several feet higher, she sees the ferocious tiger; looking beneath her, she sees an immense chasm; and looking to her immediate right, she sees a little strawberry growing on the rock face and she eats it.¹⁴⁷ And so ends the story.¹⁴⁸ The strawberry will not save the girl from the abyss or from the tiger, but “the pause she takes from her stress and fear . . . drops her into the richness and aliveness of her life” and thus, reflects the author, the “vibrancy of her life is saved.”¹⁴⁹ Mindfulness will not save lawyers from a brief due date or a hostile opposing counsel or an angry client or a demanding partner. But if we challenge ourselves to find strawberries through challenges, perhaps we will save something more important.¹⁵⁰

146. SHY, *supra* note 58, at 63.

147. *Id.*

148. *Id.*

149. *Id.* at 64.

150. *See id.*