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The Benefits of Mindfulness for Litigators

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"I am calling for an all-out revolution." These words reverberated through the federal district courthouse in Miami in the spring of 2012, but there was no one calling for security. In fact, it was eerily quiet in the conference room in which the call for revolution was sounded. How can that be? Well, the audience was a group of well-regarded litigation counsel and judges and the revolutionary leader a prominent federal district court judge. The revolution: Mindfulness in law as a vehicle for restoring civility, decreasing stress, and enhancing the fundamental fabric of the legal community.

Judge Alan Gold pondered how counsel might react if he sounded a Tibetan bell rather than a gavel to bring order to his court. Members of the state and federal judiciary, the Federal Bar Association, the Dade County Bar Association, and several law school faculties and law firms were all present to discuss this idea of mindfulness and how it might benefit individual lawyers and the entire legal profession. The conversation that day led to the establishment of the Mindfulness in the Law Joint Task Force, the goal of which is to provide information, training, and the opportunity for lawyers to gather to share mindful meditation sittings.

Mindfulness is an awareness of life in the present moment: Simple to state, but not necessarily so easy to accomplish. Our minds are often cluttered with ruminations about the past and

concerns about the future. We are so busy living in the past or projecting onto the future that often we are not acutely attuned to what is happening in the present moment. The clutter inhibits clarity of thought and increases stress and anxiety.

Mindfulness creates the opportunity to pause, breathe, and connect with one's inner thoughts, feelings, and emotions; in other words, to become aware of how we are reacting in a given situation and to provide ourselves with the opportunity to moderate our reaction and respond thoughtfully.

Scott Rogers, director of Miami Law's Mindfulness in Law Program and cochair of the joint task force, explains how mindfulness works: Through an exercise as seemingly simple as paying attention to the breath, with practice one becomes more expert at noticing the subtle movement of the mind and body as thoughts, feelings, and sensations continuously arise and pass away. The trick, if you will, is to not get so caught in the thought or overwhelmed with the feeling that you are transported away from the object of your concentration and lose your grounding.

When attorneys practice mindfulness, the experience they gain by noticing their minds moving off into distraction, and returning their attention to their breath, makes them better equipped to deal with the unexpected—because they catch the thoughts and feelings that are resisting the moment, and are better equipped to stay on task and respond in proportion to the

challenge. For the same reasons, they enhance their capacity to be more genuine and present for what arises in their interactions with their clients, their colleagues, witnesses and adversaries. They are better able to focus on and enjoy their work.

A Growing Idea

Justice Breyer has shared the importance of his daily 15-minute mental pause, and Steven Keeva's 1999 book, *Transforming Practices: Finding Joy and Satisfaction in Legal Life*, provides early examples of the benefits of mindfulness. Since the publication of Keeva's book, there have been numerous bar journal articles, websites, and meetings all suggesting that mindfulness may be the answer to a kinder, gentler, and more effective legal community.

Miami litigator Harley Tropin explained in the June 2012 issue of the Dade County Bar Association's *Bulletin*:

[As lawyers] we are met constantly with stimulus that demands a response—a provocative letter from an opponent; a ruling from a judge that we think is wrong; a demand from a client that we think is outrageous, etc. When we lengthen the space between these stimuli and a response, we greatly increase the chance for a more appropriate response that is going to yield a better result. As opposed to the reflexive, angry response that will yield to an unproductive and escalating war of words, we may be able to diffuse a difficult situation.

In fact, this changed pattern of response is exactly what Judge Gold is advocating and what Peter Jarvis and Katie Lachter proposed in their recent article, "Civility: The Ultimate Legal Weapon," 2 *Bloomberg L. Reps.—Law Firm Mgmt.* 11 (Apr. 4, 2011). They open their article with the following query:

Half an hour ago, you sent opposing counsel's inexcusably incendiary e-mail to your client. Now in your in-box is your client's outraged demand that you fight fire with fire. Although you are satisfied that you have been sufficiently provoked to justify a scorched earth response and you certainly know how to make one, perhaps you should first consider a simple question: is it tactically wise to do so?

Jarvis and Lachter suggest that pausing and considering "firmness with a heaping dose of civility" may ultimately be the most cost-effective and productive strategy. Mindfulness is a tool that enhances the probability that a lawyer in that situation will effectively respond rather than impulsively react and overlook or undermine the opportunities for efficient resolution inherent in the conflict.

Because lawyers by nature are a skeptical group, recent neuroscience findings may make mindfulness a more compelling alternative. Scott Rogers, who in 2007 offered one of the nation's first continuing legal education programs that integrated neuroscience, mindfulness, and the law, explains the importance of those findings:

There is growing excitement as the technologically sophisticated field of cognitive neuroscience is surprising itself with the brain's capacity to change well into adulthood. These findings support an extraordinary opportunity for the enhancement of human growth and experience. Of great promise is research exploring the connection between mindfulness practices and structural and functional changes to the brain, and ultimately our capacity as human beings to develop greater clarity of mind and well-being.

Translation: We can actually alter the physiology of our brains with mindfulness.

Achieving Mindfulness

How does one achieve a state of mindfulness?

There are various methods, and you are best served by exploring what resonates for you. Generally, mindfulness meditation is a process that involves sitting quietly and focusing attention on the breath. Doing so creates a laboratory from within which you notice your mind's tendency to wander. So, when you realize that your mind is wandering, just take note of its wandering, noticing the thought that is distracting you; then decide to let the thought go for the moment and return to a focus on the breath. Some people benefit from joining a contemplative group that sits together in silence or in a guided meditation. Others, like Harley Tropin, close their office doors and listen to a recorded guided meditation. Still others prefer solitude and complete quiet. You may want to visit the website of The Mindful Lawyer (www.themindfullawyer.com) for additional information and suggestions.

So, if mindfulness is a tool for lowering stress, enhancing performance, and bringing about greater civility, what role might it play in the area of professional responsibility and ethics? Civility and ethics are no doubt linked; however, one may politely fail to turn over discovery or charmingly fail at candor to the tribunal. On the other hand, in the heat of a litigation battle, incivility may fuel impulsive reactivity that causes a lawyer to cross into unethical territory without immediately recognizing it. Regardless of the level of civility, the opportunity for impulsive action and ethical missteps has been increased dramatically by the challenging economic climate, radical changes to the business of law, and the advent of technology and social media.

In fact, there are a growing number of ethics advisory opinions and disciplinary actions stemming from the ability to express instantaneously an emotionally charged reaction in a blog post or the ease with which evidence found on Facebook may be improperly gathered or destroyed. Smartphones and the Internet have changed the way people communicate and have severely quickened the pace of our daily lives. Litigation has always been a pressure-packed environment. Today's climate compels a lawyer to pause and consider the challenges of the practice through the lens of technology and its effect on professionalism and ethics. The integration of mindfulness and professional responsibility may play an important role in sharpening that view.

A general discussion of recent neuroscience findings helps satisfy the skeptic and inspire just about everyone. A selection of books and articles can be found in the resources section on the website of the Mindfulness in Law Joint Task Force, www.jtf.mindfulnessinlaw.com.

Law students and lawyers of all experience levels are likely to benefit from learning mindfulness tools alongside a refresher course on legal ethics. In his 2004 *Quinnipiac Law Review* article, "Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible, Choices," Alan Lerner explained that "[i]nvariably, we look for solutions to problems we face by first scanning our memories for similar situations, and applying the principles and methods that we used in those situations. In the case of lawyers, particularly newer lawyers, our memories for solving legal problems were created in law school." An experiential learning activity that integrates mindfulness and professional responsibility may deposit additional legal ethics memories in the mind's experience bank for future reference.

How then does mindfulness really assist a lawyer to achieve the balance that Jarvis and Lachter recommend? If we revisit their familiar example—the client demanding a scorched-earth reaction—a mindful litigator may imagine the exchange, putting herself in the place of the litigator pressed to take aggressive action. What comes next? The mindfulness practice offers the opportunity not only to pause and reflect intellectually on what is taking place but also to turn inward and notice the ways that the event is influencing thoughts, feelings, and body sensations. Doing so, as practically everyone who explores this approach appreciates, changes us and the ways in which we respond. What is important, as Harley Tropin reminds us, is that "[w]e don't become passive or timid; rather, we more clearly see what is actually transpiring and are able to access a response that will maximize our client's best interest, our ability to communicate this to our client and to deliver."

A teaching tool known as "The Spiral," used in the Mindful Ethics workshops I codeveloped, illustrates this process. Think of a particularly stressful event from your practice, and try to

identify the resulting thoughts, feelings, and sensations that may have created a confused state of mind in which it became difficult to think clearly. The key is to recognize the event and observe the spiral it is causing so you are not caught up in the swirling of thoughts, emotions, and sensations that can occur during a stressful event.

An individual does not need to pass judgment on the fear or anxiety; just notice it. In fact, mindfulness is often defined as nonjudgmental awareness. What we need is greater clarity in the moment to understand all of our thoughts and emotions, some of which may not be productive as trigger points for decision making. Fear of losing a client or anger with the opposing counsel are both understandable reactions, but the key is whether those reactions should drive a lawyer's response.

Thoughts, Feelings, and Sensations

It is important to distinguish thoughts, feelings, and sensations, which are often understandably confused. For example, "anger" is a feeling. "I might lose my client if I don't aggressively respond" is a thought. A "racing heart" is a bodily sensation. Once aware of fear, anxiety, and a host of other thoughts and emotions, a lawyer should gain clarity and be able to formulate a more thoughtful response. Perhaps, at this point, the lawyer is better able to consider the suggestions in the Jarvis and Lachter article, which conclude that a scorched-earth response is most likely going to be more costly and ultimately less effective and that it may further escalate the situation. An escalation may also lead to a reactive crossing of an ethical line. Ethical mishaps often occur when the stress of the moment overwhelms our ability to think clearly. Furthermore, the escalation will likely create a second spiral in which the opposing counsel, who has already demonstrated a lack of mindfulness, is no doubt going to become even more reactive. And so it continues on what was an avoidable collision course—unless someone recognizes the event and its resulting spiral, pauses, and engages in mindful reflection.

A litigator who practices law in a fast-paced and high-stakes environment may find that a workshop, classroom, or firm retreat provides a safe space in which to explore mindfulness meditation and learn about its potential to enhance decision making and provide a greater sense of inner peace. However, the essence and beauty of mindfulness is that although it does require patience and practice, it can be practiced almost anywhere at any time by a solitary individual. We are all constantly living in the midst of spirals. The key is that with awareness in the moment, the spirals reveal themselves and mindfulness provides us with the opportunity to pause, disconnect, and choose another path. Perhaps a revolutionary path... on which the chime of incoming emails is modulated by the sound of a Tibetan bell. ■