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Surfing to Success as a Mindful Negotiator

Leslie Larkin Cooney

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Surfing to Success as a Mindful Negotiator

Leslie Larkin Cooney*

While not all lawyers are litigators, nearly every lawyer negotiates in some aspect of his or her practice, and many informally negotiate at least one matter daily. Improving one’s ability to negotiate more successfully is therefore likely to have greater appeal to most attorneys. Mindfulness “means being aware, moment to moment, without judgment, of one’s bodily sensations, thoughts, emotions and consciousness.” It is a mental discipline, which requires paying attention to what is happening in the present rather than being either distracted or avoiding reality. Lawyers who develop a practice of daily mindfulness can improve their negotiation skills.

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*Leslie Larkin Cooney is a Professor of Law at Nova Southeastern University, Shepard Broad College of Law. The author wishes to thank Professor Lynn A. Epstein for her longstanding guidance on negotiation theory as well as her professional assistance in skills teaching. She also wishes to thank Amanda Carbone and Henry Norwood for their technical and research support.


2. Carolyn Schatz, Mindfulness Meditation Improves Connections in the Brain, HARVARD HEALTH PUBLICATIONS: HARVARD MEDICAL SCHOOL, (April 08, 2011, 11:15 AM), http://www.health.harvard.edu/blog/mindfulness-meditation-improves-connections-in-the-brain-20110408225. Once engaged, mindfulness can have a profound impact on the individual. Id. Studies have been conducted during and post mindfulness training, but interestingly, the brains of the volunteers were not scanned before the training for a complete comparison and analysis of whether mindfulness was responsible for the positive results that were garnered. Id. “At the moment, scientists can only speculate about the relationship between these brain changes and the health benefits associated with mindfulness meditation.” Id. However, people who teach and practice meditation have made many claims about what regular meditation practice may foster, including joy, peace, equanimity, calm, greater ability to focus attention or concentrate, changes in states of consciousness, self-actualization, stability of emotions, forgiveness, love, compassion, improvements in physical health, improvements in mental health, and more.

skills and familial relationships. It has had an impact on a wide array of law-related functions. At the onset of their careers, some law students are introduced to the techniques and benefits of mindfulness as part of their law school curriculum. This has been shown to lessen the ineffectiveness associated with worry and anxiety, permitting students to focus better on assigned tasks. Similarly, in the courtroom, mindfulness has aided practicing lawyers and judges to "clarify their thought processes," allowing them to pick up verbal and nonverbal clues to enhance their performance.

In the criminal justice system, prisoners who have practiced mindfulness have experienced a reduction in "anger, hostility, and mood disturbances, [which helped] with their rehabilitation and reintegration."

Although popular mindfulness is often taught in a more secular form, it draws its inspiration from meditation with both religious and philosophical roots. One begins by developing a concentration on breathing and the breath; next, one turns attention to the "bodily sensations, emotions, and thoughts," then progresses to "bare attention" or nonjudgmental awareness, finally fixing attention where one wishes it to be. Mindfulness—which is continuous awareness—is the opposite of multi-tasking or task switching. When one is mindful, he or she can assess a situation from several perspectives, process the information received in


5. Garfield, supra note 3; Mindfulness, supra note 4.


7. Riskin, supra note 1, at 85.


10. Applications and Uses of Mindfulness, supra note 4.

11. Id.


14. Id. (explaining that many law schools are integrating mindfulness into their curriculum because of the following benefits: concentration; treatment of agitation; cultivation of compassion; which are all necessary skills "for the study and practice of law"); Applications and Uses of Mindfulness, supra note 10.

15. Id.

16. Id.

17. Mindfulness, supra note 4.

18. Shaina L. Shapiro et al., Toward the Integration of Meditation into Higher Education: A Review of Research, CIT FOR CONTEMPLATIVE MIND IN SOCTY 1, 6 (Oct. 2008) available at http://www.contemplativemind.org/files/MedanHigherEd.pdf. With its growing popularity among secular forms, the teachings no longer require participants to conform to the culture and religion typically associated with meditation. Id.; see also Hart, supra note 2, at 24-25.

19. Riskin, supra note 1, at 83. Riskin opines that the practice of meditation in mindfulness is distinguished "from the other major form of meditation, known as 'concentration.'" Id. at 83 n.25.

20. R. Lisle Baker & Daniel P. Brown, On Engagement: Learning to Pay Attention, 36 UALR L. REV. 337, 354-55 n.81, 82 (2014). Multi-tasking creates an illusion of productivity; and task-switching creates a discontinuous awareness, where one's attention gets divided. Id. at 354-55. The illusion created by multi-tasking hides the interferences, which results in less mental efficiency. Id. This mental inefficiency is also the result of discontinuous awareness, which distracts from important skills—such as attention and perspective. Id. at 355.

11. Id.
Origining nearly 2,500 years ago, mindfulness was first an emphasis on spiritual and intellectual development among the Buddhists. However, in the modern world, a secular practice of mindfulness has increased in popularity. Specifically, in the past three decades, the discipline has experienced widespread growth, and is now used to improve psychological and physical health. It entered the American mainstream in 1979 with the launch of a mindfulness program at a medical school. It has since been used across a wide array of disciplines—everything from corporate settings to personal relationships—and its benefits have been astounding. For example, military veterans trained in mindfulness show a reduction in Post-Traumatic Stress Disorder symptoms.

Meanwhile, in the classroom setting, it helps reduce aggression, increases happiness, and fosters a longer attention span. In the workplace and boardroom, mindfulness is offered to all level of employees, starting with Chief Executive Officers. Mindfulness is present in hospitals as a source of therapeutic relief to assist patients in their journey to wellbeing. Individuals who have experienced mindfulness in their workplace capacity have transferred its application to their personal lives—fighting obesity, becoming more compassionate and patient, and developing stronger parental skills and familial relationships. It has had an impact on a wide array of law related functions. At the onset of their careers, some law students are introduced to the techniques and benefits of mindfulness as part of their law school curriculum. This has been shown to lessen the ineffectiveness associated with worry and anxiety, permitting students to focus better on assigned tasks. Similarly, in the courtroom, mindfulness has aided practicing lawyers and judges to "clarify their thought processes," allowing them to pick up verbal and nonverbal clues to enhance their performance. In the criminal justice system, prisoners who have practiced mindfulness have experienced a reduction in "anger, hostility, and mood disturbances, which helped with their rehabilitation and reintegration.

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novel ways, contextualize it, and finally, create new categories for the information to enhance an overall understanding.21 Mindfulness cuts through any miasma of thought by increasing awareness and understanding.22

Before examining how to achieve mindfulness, it is perhaps helpful to understand what mindfulness is not. It is not self-analysis, nor is it the seeking of enlightenment; rather, mindfulness is about experiencing “it” as “it” is—feeling all of “it.”23 Mindfulness is a bodily state, and it is not about achieving blissfulness; it is not about having nice, happy feelings; mindfulness is really not about anything.24 To speak in the affirmative, mindfulness brings our attention to the conceptual framework through which we view the world. It has the qualities of an inherent trait as well as a learned state; even with little or no training people differ greatly in their attention regulation.25 For instance, a person who has more inherent trait mindfulness also has more brain activity associated with emotional regulation.26 While an inherited trait may obviously have much to do with biology and genetics, as a learned state, mindfulness can be increased and expanded through exercises and practice.27

It is deceivingly simple to do once, but maintaining a state of mindfulness is much more difficult. Begin by taking a breath and feel your body take that breath; focus on that breath, as your mind wanders away from the breath, gently pull your attention back to it.28 You have now been mindful in that one moment for that one time. You could perhaps begin to practice mindfulness by focusing your attention on a simple task, such as walking to a store or eating an apple, but the common focal point for mindfulness is generally the breath. “Breath is the bridge which connects life to consciousness, which unites your body to your thoughts. Whenever your mind becomes scattered, use your breath as the means to take hold of your mind again.”29

Generally, meditation is classified into two major types: focused attention and open monitoring.30 There is a difference between focused attention, also known as concentration meditation, and open monitoring.31 Not only are the processes different but the two also have different goals—one improving concentration and the capacity to pay attention, and the other training oneself in moment-to-moment awareness.32 The latter, open monitoring, is more commonly related to mindfulness because there is no specific thought brought to focus. Instead, the mindful practitioner seeks to non-judgmentally acknowledge any thoughts that may arise and return to a state of awareness.33 Such mental clutter, or distractions, are indeed normal and usually need not be suppressed but rather recognized for what they are.34 Sometimes one may be thinking about his or her own past or future, or events, or people, but eventually, one will be able to quiet all the clutter and attention just to the present moment.35

The present moment for a practicing lawyer varies by individual, but practicing lawyers’ work lives are often very similar overall—facing stressful deadlines, pressure to reach quotas for billable hours, and the relentless, ambitious drive for success.36 A typical day includes many

24. Id.
27. SMALLEY AND WINSTON, supra note 25, at 5-7.

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\textsuperscript{22} Van M. Pouns, Promoting a Truthfulness in Negotiation: A Mindful Approach, 40 WILLAMETTE L. REV. 181, 184 (2004), see also JON KABAT-ZINN, WHEREVER YOU GO, THERE YOU ARE: MINDFULNESS MEDITATION IN EVERYDAY LIFE 18 (10th Anniversary ed. 2005).

\textsuperscript{23} See CHARLOTTE JOKO BECK, EVERYDAY ZEN: LOVE AND WORK 50-52 (2007).

\textsuperscript{24} Id.

\textsuperscript{25} SUSAN L. SALMEY & DIANA WINTON, FULLY PRESENT: THE SCIENCE, ART, AND PRACTICE OF MINDFULNESS 5, 7-8 (2010).


\textsuperscript{27} Salmeay and Winston, supra note 25, at 5-7.

\textsuperscript{28} JON KABAT-ZINN, MINDFULNESS FOR BEGINNERS 11 (2012).
demands, and with the technological advances of the modern era, these demands begin long before a practicing lawyer makes it to the law office.37 She or he must screen and respond to emails, voice and text messages, which do not stop for holidays, weekends, or nighttime.38 Once in the office, a lawyer goes through the process again, but add in: document preparation and review, schedule reviews, conference calls, coordination with subordinates and other employees, meetings with clients, requests to demanding partners and judges, as well as countless other tasks.39 As the workday ends, the typical lawyer heads home, exhausted and knowing a similar schedule awaits him or her the next day.40 As a result, men and women report the most common reasons for leaving the field is a desire for a more regular schedule, and improved work-life balance.41

While most lawyers seem to thrive on all of this activity, and some contend pressure makes them more effective because they multitask, studies indicate multitasking creates only the illusion of productivity while interference and distractions actually lead to inefficient mental activity.42 Mindfulness, on the other hand, is an effective technique to improve cognitive function with a wide range of benefits including increased work productivity,43 higher test scores,44 improved health,45 and enhanced physical

performance.46 Where, however, will the busy and stressed attorney find the time to practice mindfulness?

The busier and the more stressed the attorney, the greater the benefits to be derived from practicing mindfulness.47 Far from being time-consuming, it is actually time enhancing and can be quickly practiced anywhere at any time.48

One suggested exercise is to take “STOCK” as developed by Riskin and Wohl.49 When involved in any activity: first, stop; second, take a breath; third, observe and be open to your experience; fourth, consider your intention (do you want to continue); lastly, keep going with the activity after having made any decided adjustments.50 Mindfulness does include some other techniques such as good posture, and its full benefits are likely achieved with regular and long-term practice. But even short exercises,

38. Id.
39. Id. (demonstrating two variations to the typical day of a practicing attorney, both a busy day and a “non-busy” day).
40. Id.

42. Baker & Brown, supra note 20 at 355 n.83; see also René Marcios & Jason Ivanoff, Capacity Limits of Information Processing in the Brain, 9 TRENDS COGNITIVE SCI. 296, 299 (2005). In particular, one laboratory study has shown that “[m]any pairs of tasks interfere with each other quite drastically, even though they are neither intellectually challenging nor physically incompatible.” Thus, it is reasonable to see how it may lead to inefficiency. Harold Pashler, Dual-Task Interferences in Simple Tasks: Data and Theory, 116 PSYCHOL. BULL. 220, 220 (1994).
45. See Hart, supra note 2, at 24-25. Hospitals and healthcare facilities have begun to offer meditation programs that teach relaxation techniques due to the positive impact it has had on patients.
48. A good way to stop all the doing is to shift into the “being mode" for a moment. Think of yourself as an eternal witness, as timeless. Just watch this moment, without trying to change it all. What is happening? What do you feel? What do you see? What do you hear?
49. SMALLEY & WINSTON, supra note 25, at 11. For example, some suggest that practicing mindfulness can be completely spontaneous because with just a little time it can still be highly effective, while others suggest following short training programs. Other alternatives can include devoting time every morning or throughout the day, or even one day a week—such as Saturday or Sunday—to cultivate the habit of practicing mindfulness. CHRISTINE DONKLEY & MAGGIE STANTON, TEACHING CLIENTS TO USE MINDFULNESS SKILLS: A PRACTICAL GUIDE 21-22 (2013); HAND, supra note 29, at 27; Douglas A. Codiga, Reflections on the Potential Growth of Mindfulness Meditation in the Law, 7 HARYN. NEGOTIATION L. REV. 109, 110 (2002).
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53. Katherine Larkin-Wong, A Newbie’s Impression: One Student’s Mindfulness Lessons, 61 J. LEGAL EDUC. 665, 667 (2012). For this method, one needs the requisite intention formed before proceeding with an action, such as a negotiation, then doing it the STOCK method can be applied.
intermittently followed, can yield some positive results. In the Contemplation of Thought from Sikassamuccayaya, thought is likened to the stream of a river—ephemeral because as soon as it is produced, the stream of water breaks up and disappears into the entirety of the river. Thought is considered a magical illusion subject to mistaken perception [f]or thought is immortal, invisible, non-resisting, inconceivable, unsupported, and homeless. Lawyers function in a profession that revives thought. Yet, if thought itself is like a stream or the wind, without staying power, then surely the state of being non-distracted and presently aware will enhance mental stability.

The general public tends to view lawyers as serving a single function: arguing. Media portrayals of lawyers engaged in dramatic courtroom duels give non-lawyers the impression that all lawyers ever do is litigate. However, negotiations and resolutions are far more prevalent than arguments at trial. Approximately ninety-seven percent of all civil litigation cases filed in the United States end either in settlement or dismissal. Even within each civil litigation case, there are often many micro-transactions occurring between the parties that require negotiation. A party or parties to a lawsuit may propose settlement offers, which must be negotiated both between opposing parties and between a lawyer and their client; an opposing party may file a motion for summary judgment. Further, the parties may need to negotiate even earlier conflicts such as venue or disputed discovery issues. Even beyond litigation, lawyers often engage in negotiation to handle matters merely related to their legal work, such as negotiating their own salary, negotiations in the boardroom or business meeting context, and negotiation in real estate transactions, to name a few. The negotiation process represents a substantial portion of a lawyer's professional life and is a critical professional skill, but is often overlooked as a learned skill.

Although the descriptors vary, negotiation theory divides into two basic models: one being competitive or positional, and the other being problem solving or interest based. Most negotiators associate a more adversarial methodology with the competitive/positional approach, while associating a more cooperative/functional methodology with the problem solving/interest approach. In a positional negotiation, each side takes a position, argues in its favor, and reaches a compromise making a series of concessions. Often described as win/lose, positional negotiators may seek extreme results in trying to maximize their own outcome by making unrealistic opening offers and focusing on viewpoints rather than neutral standards. Closed and untrusting, these negotiators frequently use threats and rarely disclose information, but instead attempt to manipulate adversaries.

Conversely, the problem solving approach may be described as win/win and involves a cooperative negotiator moving psychologically toward the opponent, seeking reasonable results while trying to maximize returns for both parties. This approach is characterized by a more collaborative and integrative mindset, where the goal is to find mutually beneficial solutions that satisfy both parties, rather than追求 one-off gains at the expense of the other. The key to effective negotiation is to understand and engage the other party's interests and aspirations, rather than simply focusing on one's own goals.

66. Id. at 365-66.
68. CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 11 (7th ed. 2012); Gifford, supra note 67, at 46-47.
70. Hyman, supra note 69, at 19; SPENCER PUNNETT, REPRESENTING CLIENTS IN MEDIATION: A GUIDE TO OPTIMAL RESULTS BASED ON INSIGHTS FROM COUNSEL, MEDIATORS, AND PROGRAM ADMINISTRATORS 399 (2013); CRAVER, supra note 68, at 11-12.
71. PUNNETT, supra note 70, at 398-99, Gifford, supra note 67, at 47; CRAVER, supra note 68, at 11-12.
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\textsuperscript{64} See generally Anne Tucker Nees, Who’s the Boss? Unmasking Oversight Liability within the Corporate Power Puzzle, 35 Del. J. Corp. L. 199 (2010).


\textsuperscript{68} Charles B. Craver, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 11 (7th ed. 2012); Gifford, supra note 67, at 46-47.


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\textsuperscript{71} Punnett, supra note 70, at 398-99; Gifford, supra note 67, at 47; Craver, supra note 68, at 11-12.
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each side.\textsuperscript{72} Remaining courteous and sincere, this negotiator will focus on the interests of both sides.\textsuperscript{73} The interest-based problem solver carefully discloses a maximum amount of information at appropriate times to gain his or her opponent’s trust and confidence and to encourage an exchange of information.\textsuperscript{74} Using this information and relying on objective standards to guide the discussion, he or she looks to creatively satisfy the interests of both sides.\textsuperscript{75}

One study found only twenty-four percent of lawyer negotiators to be competitive and adversarial, while sixty-five percent were problem solving and cooperative.\textsuperscript{76} At first blush, these figures may be surprising given the reputation most attorneys have for preferring to engage in gladiator type arguments.\textsuperscript{77} While it is true that competitive negotiators are more likely to obtain extreme results, they are also more likely to be caught in failed negotiations that end in stalemates or non-settlements.\textsuperscript{78} On the other hand, cooperative negotiators more frequently reach agreement with their opponents.\textsuperscript{79} So one could be tempted to conclude that a negotiator planning his or her style and strategy must choose between reaching the highest or best result while risking a non-settlement or being more likely to reach agreement but perhaps with a somewhat less desirable outcome.

A middle ground does exist.\textsuperscript{80} The most effective negotiator has the ability to employ all styles and strategies in any single session by slipping easily in and out of the win/lose or value claiming and the win/win or value creating mindsets.\textsuperscript{81} Naturally, this calls for more extensive preparation, focus, and perceptive reading of one’s opponent.\textsuperscript{82} This highly successful negotiator will be a forceful yet realistic advocate who is ethical and polite at all times.\textsuperscript{83} The goal is to maximize the client’s position while always moving toward settlement.\textsuperscript{84} The extensive preparation not only encompasses relevant facts and law to enhance the arguments supporting a positive claim but also requires complete anticipation of the opponent’s arguments, effective counter arguments, and a realistic evaluation of the weaknesses of both sides.\textsuperscript{85} Ultimate success calls for a negotiator to carefully plan his or her methodology from the initial icebreaking moments\textsuperscript{86} through the desired final agreement stages.\textsuperscript{87} This planning includes a consideration of alternative modifications necessitated by any number of possible changed circumstances; depending on the opponent’s tactics, a skilled negotiator must be prepared to alterate styles and strategies in response.\textsuperscript{88} Flexibility is a key to a successful negotiation.

Rather than merely seeking information for the power it offers to a negotiator to claim value, the highly skilled negotiator will gather and share

\textsuperscript{72} FISHER & URY, supra note 69, at 44-47; Gerald S. Clay & Maryann G. Sasaki, Mediation: Justice Without Going to Court, 20 MAY HAW. B.J. 4, 9 (2016); Gifford, supra note 67, at 46; CRAVER, supra note 58, at 11-12.

\textsuperscript{73} PUNNETT, supra note 70, at 411, 416, 417; Gifford, supra note 67, at 46; CRAVER, supra note 68, at 11-12.

\textsuperscript{74} ROBERT H. MOOGEN ET AL., BEYOND WINNING NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 24-29 (2000); PUNNETT, supra note 70, at 410-11; Gifford, supra note 67, at 46; CRAVER, supra note 68, at 11-12.

\textsuperscript{75} PUNNETT, supra note 70, at 412; Gifford, supra note 67, at 46; CRAVER, supra note 68, at 11-12.

\textsuperscript{76} One often used example involves an orange. \textit{Paul J. Zwier & Thomas F. Guernsey, Advanced Negotiation and Mediation: Theory and Practice} 4-5 (1st ed. 2005).

\textsuperscript{77} Imagine that two parties are sent to a late night grocer shortly before closing. Both want an orange. They each reach for the orange at the same time and each established a firm grip on the orange. How do they resolve who gets the orange? Their option seems to be to resort to violence. The stronger or more ruthless will be the only one getting the orange. Now imagine, instead that the parties talk to each other. One wants the orange for its juice, to make a cake. One wants the orange for the rind, to make a drink. If they are able to find out why each wants the orange, the problem-solver will be able to suggest a win/win solution to the problem. They split paying for the orange, and each feels it and each takes the part they need.

\textsuperscript{78} Id. at 4-5.

\textsuperscript{79} CRAVER, supra note 68, at 12. The remaining 11% were considered “unclassifiable.” \textit{Id.}

\textsuperscript{80} The data comes from a study by Professor Gerald Williams study of attorneys in Denver and Phoenix. \textit{Id.}

\textsuperscript{81} Richard Birke & Craig R. Fox, Psychological Principles in Negotiating Civil Settlements, 4 HARV. J. ENVTL. REV. 1, 54-55 (1999).

\textsuperscript{82} Kathleen O. Connor & Peter Carnevale, A Nasty But Effective Negotiation Strategy: Misrepresentation of a Common-Value Issue, 25 PERSONALITY & SOC. PSY. BULL. 504, 512 (1999); PUNNETT, supra note 70, at 399, 417.

\textsuperscript{83} 97355

\textsuperscript{84} Id. at 391, 393.

\textsuperscript{85} PUNNETT, supra note 70, at 393, 441.

\textsuperscript{86} Id. at 391, 393, 441.

\textsuperscript{87} Id. at 391, 393, 441.
each side. Remaining courteous and sincere, this negotiator will focus on the interests of both sides. The interest-based problem solver carefully discloses a maximum amount of information at appropriate times to gain his or her opponent’s trust and confidence and to encourage an exchange of information. Using this information and relying on objective standards to guide the discussion, he or she looks to creatively satisfy the interests of both sides.

One study found only twenty-four percent of lawyer negotiators to be competitive and adversarial, while sixty-five percent were problem solving and cooperative. At first blush, these figures may be surprising given the reputation most attorneys have for preferring to engage in gladiator type arguments. While it is true that competitive negotiators are more likely to obtain extreme results, they are also more likely to engage in failed negotiations that end in stalemates or non-settlements. On the other hand, cooperative negotiators more frequently reach agreement with their opponents. So one could be tempted to conclude that a negotiator planning his or her style and strategy must choose between reaching the highest or best result while risking a non-settlement or being more likely to reach agreement but perhaps with a somewhat less desirable outcome.

A middle ground does exist. The most effective negotiator has the ability to employ all styles and strategies in any single session by slipping easily in and out of the win/lose or value claiming and the win/win or value creating mindsets. Naturally, this calls for more extensive preparation, focus, and perceptive reading of one’s opponent. This highly successful negotiator will be a forceful yet realistic advocate who is ethical and polite at all times. The goal is to maximize the client’s position while always moving toward settlement. The extensive preparation not only encompasses relevant facts and law to enhance the arguments supporting a positive claim but also requires complete anticipation of the opponent’s arguments, effective counter arguments, and a realistic evaluation of the weaknesses of both sides. Ultimate success calls for a negotiator to carefully plan his or her methodology from the initial icebreaking moments through the desired final agreement stages. This planning includes a consideration of alternative modifications necessitated by any number of possible changed circumstances; depending on the opponent’s tactics, a skilled negotiator must be prepared to alternate styles and strategies in response. Flexibility is a key to a successful negotiation.

Rather than merely seeking information for the power it offers to a negotiator to claim value, the highly skilled negotiator will gather and share

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72. FISHER & URy, supra note 69, at 44-47; Gerald S. Clay & Maryann G. Sasaki, Mediation: Justice Without Going to Court, 20-MAY HAW. B.J. 4, 9 (2016); Gifford, supra note 67, at 46; CRAVER, supra note 68, at 11-12.
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80. CRAVER, supra note 68, at 15.
81. Id. at 15; Gifford, supra note 67, at 57-58.
82. PUNNETT, supra note 70, at 393, 408.
83. Id. at 416, 417; Gifford, supra note 67, at 57-58.
84. PUNNETT, supra note 70, at 416, 417.
85. Id. at 391, 393.
86. PAUL J. ZWIER & THOMAS F. GURNEY, supra note 75, at 77-85 (outlining the purposes of icebreaking to develop relationships, put both sides at ease, increase the willingness to provide information, and begin the evaluation process). Negotiators should take the time to develop positive support with the other side to enhance the likelihood of a more cooperative and open interaction because if the initial encounter commences in an unpleasant manner, the subsequent talks are more likely to be adversarial. Charles B. Craver, The Benefits To Be Derived from Post-Negotiation Assessments, 14 CARDOZO J. CONF. RESOL. I, 10 (2012) (citing BOB WOOLF, FRIENDLY PERSUASION 34-35 (1990)).
information in order to create value. Needs, desires, and interests of both sides must be ascertained so one can creatively design (often on the spot) options attractive to each side. This negotiator seeks as much information as possible while carefully not inadvertently disclosing any information he or she wants to keep confidential. This requires one to observe carefully and probe the opponent to ascertain his or her perception of the situation. A negotiator who asks neutral questions to learn the underlying basis for his or her opponent’s assumptions, values and goals can better evaluate what concessions will be most attractive. During this process of careful assessment, any nonverbal communication will be an independent source of valuable information for the negotiator which can help one confirm theories or assumptions.

A single nonverbal cue is rarely dispositive. Instead, a negotiator must be able to read and assess multiple nonverbal cues while still maintaining a quick moving verbal exchange concerning the issues being discussed. Experts agree reading nonverbal cues can be an "effective way to expose the competitive negotiator who seeks to mislead with a friendly style." Nonverbal communication includes the concepts of chronemics, kinesics, and paralinguistics, and while readings may not be as

90. Punnett, supra note 70, at 412; Gifford, supra note 67, at 60-62; "Creativity is not an innate and mysterious personality trait possessed only by artists and others like them. Creativity is the process of solving problems through insights." STEPHAN H. KRIEGER & RICHARD K. NEUMANN, JR., ESSENTIAL LAWYERING SKILLS, 35 (4th ed. 2011).
91. Punnett, supra note 70, at 391, 393, 408-11; Gifford, supra note 67, at 60-62.
92. Punnett, supra note 70, at 391, 393; Gifford, supra note 67, at 60-62; Clark Freshman, Yes, And: Core Concerns, Internal Mindfulness, and External Mindfulness for Emotional Balance, 10 INT’L L.J. 365, 376-79 (2010).
93. Gifford, supra note 67, at 60-62; Freshman, supra note 92, at 376-79.
94. Punnett, supra note 70, at 391; Gifford, supra note 67, at 60-62; Freshman, supra note 92, at 376-79.
95. Freshman, supra note 92, at 376-79.
96. DONALD J. GIFFORD, LEGAL NEGOTIATION THEORY AND PRACTICE 107 (2d ed. 2007); see also Freshman, supra note 92, at 376-79.
98. Kinesics is communicating by body movement and is the most well-known non-verbal communication. Changingminds.org (June 22, 2016), http://changingminds.org/explanations/behaviors/body_language/kinesics.htm.
99. Proxemics is the use of space between speakers and the placement of objects to affect the communication. Margaret E. Montoya, Silence and Silencing: Their Centripetal and Centrifugal

complex as it sounds, it is important that the negotiator does not unconsciously misjudge such information. For example, since it is relatively easy for an opponent to learn to control his or her facial expressions, it can also be easy for this same opponent to manipulate the nonverbal message through a contrived expression. The skilled negotiator must observe multiple nonverbal cues to judge the accuracy of any single other nonverbal cue. So while seeing the contrived expression, the skilled negotiator is also taking in any other body movements, positioning, sounds or timing. All of this information must then be processed and compared to the multiple instances of nonverbal communications sent by this same opponent during the entire negotiation session to judge the accuracy of the inferences to be drawn. Rending nonverbal communication is, of course, the backdrop to the exchange of verbal information in the foreground. In gathering information, the negotiator should carefully consider questions as part of his or her planning for the negotiation. No matter how extensive this part of the planning is, the negotiator will also have to revise, rework, and create new questions during the actual negotiation. Using a variety of questions, both closed-ended and open-ended, will assist the negotiator in maximizing his or her information gathering techniques.

Most negotiators also employ active listening techniques to enhance communication. Neutral statements, particularly those followed by

100. Paralinguistics is the use of the voice itself in the communication – pace, rhythm, pitch, inflection, volume, pauses, etc. Steven Wisotsky, Sounds and Images of Persuasion, FEB. FLA. B.J. 40, 42 (2010).
102. See Freshman, supra note 92, at 376-79; see also Krivis & Zadeh, supra note 101, at 122-23.
103. Id.
104. Id.
105. Id.
106. See Krivis & Zadeh, supra note 101, at 122-23.
108. See CRASER, supra note 68, at 89-91.
109. Id. at 89.
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A single nonverbal cue is rarely dispositive. Instead, a negotiator must be able to read and assess multiple nonverbal cues while still maintaining a quick moving verbal exchange concerning the issues being discussed. Experts agree reading nonverbal cues can be an “effective way to expose the competitive negotiator who seeks to mislead with a friendly style.” Nonverbal communication includes the concepts of chronemics, kinesics, proxemics, and paralinguistics and, while readings its signs may not be as complex as it sounds, it is important that the negotiator does not unconsciously misjudge such information. For example, since it is relatively easy for an opponent to learn to control his or her facial expressions, it can also be easy for this same opponent to manipulate the nonverbal message through a contrived expression. The skilled negotiator must observe multiple nonverbal cues to judge the accuracy of any single other nonverbal cue. So while seeing the contrived expression, the skilled negotiator is also taking in any other body movements, positioning, sounds or timing. All of this information must then be processed and compared to the multiple instances of nonverbal communications sent by this same opponent during the entire negotiation session to judge the accuracy of the inferences to be drawn. Reading nonverbal communication is, of course, the backdrop to the exchange of verbal information in the foreground. In gathering information, the negotiator should carefully consider questions as part of his or her planning for the negotiation. No matter how extensive this part of the planning is, the negotiator will also have to revise, rework, and create new questions during the actual negotiation. Using a variety of questions, both closed-ended and open-ended, will assist the negotiator in maximizing his or her information gathering techniques.

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silence, often encourage the speaker to continue talking. 111 The negotiator may also take a more direct approach by claiming to understand the speaker in order to encourage the speaker to continue. 112 While concepts surrounding active, as opposed to just passive or neutral listening, are certainly important, the most important concept is the listening part. 113 "Of all the skills available to negotiators and mediators, effective listening may be the most important." 114

The affirmative argument articulated by the negotiator will be effective when it is even-handed and seemingly objective and presented in a logical, orderly, and comprehensive manner to enhance its cumulative effect. 115 This forces the opponent to reconsider his or her perception of the matter at issue and respond to it based upon this provided framework. 116 The skilled negotiator must not rush the information gathering process nor should one hesitate in returning to it after one or both sides have presented offers. 117 The most skilled negotiators are often the most patient. 118

Indeed, patience becomes even more important the deeper one gets into the negotiation. 119 Negotiators who lack patience and make excessive or unreciprocated concessions in an effort to conclude the deal are quite likely to lose the effect of any gains they achieved earlier in the negotiation. 120 When the negotiator begins to realize that an agreement is close at hand, he or she is likely to become unconsciously and psychologically committed to settlement. 121 If the negotiator is impatient and intolerant in that respect, she will become over-anxious and will frequently rush to closing, abandoning caution and his or her deliberative plan of carefully thought-out strategies and step by step concessions that moved the negotiator to this point. 122

Anyone who has ever negotiated can vouch for the fact that a lot goes on during bargaining. For the lawyer and negotiator who wants to maximize the possibility of a positive outcome with increasing the likelihood of settlement, employing multiple strategies and styles when bargaining improves his or her odds. Mindfulness is the tool that can upgrade any practitioner's abilities in this regard. As Jon Kabat-Zinn said, "[y]ou can't stop the waves, but you can learn to surf." 123 You may not learn to surf just by practicing mindfulness, but the practice of mindfulness can make you a stronger negotiator in seven ways.

First, mindfulness will increase concentration as well as overall brain activity. 124 In addition to helping one recognize when the mind is wandering and return to focusing on the matter at hand, mindfulness allows the culling of irrelevant information and avoiding that distraction. 125 Mindfulness increases concentration and focus, which, in turn, assists one in processing information and becoming more knowledgeable. 126 Negotiators can further increase their capacity to remain vigilant to the task at hand by engaging in focus attention exercises. 127

Many of us experience a loss of concentration in our daily lives, such as when we drive to a specific location, only to arrive there without realizing the precise route we actually took in the process. 128 One very popular exercise to improve concentration is to turn your attention to one single object, such as a raisin, and to focus on its physical attributes for an extended period of

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111. Craver, supra note 68, at 92; Cohen, supra note 110, at 748-49; see Epstein & Epstein, supra note 110, at 18-19, 33.
112. Cohen, supra note 110, at 748-49.
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114. James R. Holbrook & Benjamin Cook, Advanced Negotiation and Mediation: Concepts, Skills, and Exercises 67, 67-68 (1st ed. 2013) ("Negotiators who are able to listen effectively increase the likelihood of overcoming impasses, understanding their own and the other side's interests, and generating more options that better satisfy their own and the other party's interests").
115. Deepak Malhotra & Max H. Bazerman, Negotiation Genius: How to Overcome Obstacles and Achieve Brilliant Results at the Bargaining Table and Beyond 34-36 (2007).
116. Id. at 34-36.
117. See Craver, supra note 68, at 93.
118. Id.; see Epstein & Epstein, supra note 110, at 19.
119. See Craver, supra note 68, at 93.
120. Id.
121. Id.
122. Id. at 123-24.
124. Maria Konnikova, The Power of Concentration, N.Y. TIMES (Dec. 15, 2012), http://www.nytimes.com/2012/12/16/opinion/sunday/the-power-of-concentration.html?_r=0. After just five one-hour training sessions on a task of attention control, the brain became more efficient at coordinating multiple tasks and older adults who scored higher on mindfulness scales had increased connectivity in two of the brain's major information processing regions. Id.
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\textsuperscript{119} Id.

\textsuperscript{120} Id.

\textsuperscript{121} Id.


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time. Repeating focus attention exercises using any simple object, or even the breath, will make it easier for any negotiator to concentrate during the back and forth of any actual dispute. For a skilled negotiator, improved concentration may make it even easier to expand both psychological and cognitive flexibility.

Second, flexibility takes the negotiator from the level of basic compromise to the higher echelons of nuanced and creative outcome. Mindful awareness appears to promote psychological flexibility. Mindfulness training has been associated with cognitive flexibility as well, including unstructured creative mental tasks and structured word-production tasks. An advanced negotiator will be flexible enough to carefully think about his or her opponent’s reputation, select strategies and styles based upon this and his or her own skill set, consider the client’s position, and change the strategies and styles during the actual negotiation based upon the opponent’s countermoves and the information being presently acquired. Remaining flexible will prevent negotiators from becoming entrenched in preselected assumptions or being risk averse. Flexibility increases a negotiator’s ability to use leverage. Leverage is typically seen as a concept connected with an adversarial or win/lose negotiator, but an advanced negotiator realizes leverage is important even in a win/win negotiation in order to push an adversarial opponent to consider other, creative positions. Mindfulness can also assist the more timid negotiator in handling their own fears, which might otherwise arise when facing an aggressive opponent, by teaching one to recognize the feelings caused by his or her opponent’s conduct and avoiding one’s old habitual response; indeed, mindfulness can help the negotiator embrace the experience and turn it into a source of one’s own energy.

Third, equally as important as flexibility, is patience for a skilled negotiator who wishes to gain the agreement on behalf of his or her client. “[L]awyers should ask themselves if they took sufficient time to establish some rapport and positive environments.” Mindfulness encourages patience because it teaches its practitioners not only to merely pause and reflect but also to maintain a constant calmness of mind and body. Time need not always be filled with activity, and silence can be an effective tool. Reflection can improve overall communications and the entire decision-making process. Mindfulness teaches one that patience is effortless, and patience will encourage the skilled negotiator to ask as many questions as he or she might otherwise during the bargaining session resulting in expanded information gathering. Patience will also help one to keep from divulging important information when it would be more prudent to make an opponent labor to discover it on his or her own.

129. Ivan Starovsky, Mindfulness Exercise – Eating a Raisin, STAROVSKY COUNSELING & PSYCHOTHERAPY (June 22, 2012) http://starovsky.com/blog/mindfulness-exercise-eating-a-raisin-mindfully (citing Speigel, M. D. & Government, D. C., CONTEMPORARY BEHAVIOR THERAPY 5th ed. 2010). The steps of this exercise are: (1) take a raisin and hold it between your fingers to feel the texture; (2) observe the raisin carefully, taking in every part of the raisin and noting what you feel like or dislike about the raisin; (3) bring the raisin to your nose and smell the raisin; (4) bring the raisin to your lips, noting the feeling of your arm and hand moving the raisin toward your mouth; (5) take the raisin into your mouth and chew the raisin, noting its taste and texture; (6) swallow the raisin, noting the feeling and sensation of swallowing; and (7) try to feel the raisin moving down your throat and note how your body feels. See also Jon Kabat-Zinn, Mindfulness-Based Interventions in Context: Past, Present, and Future, ST. UNIV. DEP’T OF PSYCHOL. 148 (1990), http://www-mhp.psych.stanford.edu/psg dokland/buddhism/MBSR2003_Kabat-Zinn.pdf.

130. See J. A. Brefczynski-Lewis et al., Neural Correlates of Attentional Expertise in Long-Term Meditation Practitioners, 104 PNAS 11483, 11483 (2007).


134. Schneider, supra note 131, at 31.

135. See Chambers, supra note 132, at 305.


140. See generally Kabat-Zinn, supra note 116, at 148. Achieving ultimate patience takes time; indeed, one might, with tongue in cheek, say it takes patience to learn patience! When one first begins practicing mindfulness, it is almost impossible to keep in the moment and deter other thoughts and sensations from interfering with the present awareness. Most attorneys, having been trained in the art of “thinking like a lawyer,” will find this even more difficult. One suggestion is to use a simple mantra whenever you find yourself a victim of mind chatter. For example, as soon as you feel yourself straying away from present awareness, return your focus to your breathing and mentally say to yourself “hmm” as you inhale and “er” as you exhale. Continue with this exercise until you return to present awareness. Id.

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142. See D. KLEIN, Thinking Fast and Slow (2011); see generally N. KLEIN, THINKING FAST AND SLOW (2011).

143. See supra note 107, at 513-14.

144. See supra note 107, at 14.
time. Repeating focus attention exercises using any simple object, or even the breath, will make it easier for any negotiator to concentrate during the back and forth of any actual dispute. For a skilled negotiator, improved concentration may make it even easier to expand both psychological and cognitive flexibility.

Second, flexibility takes the negotiator from the level of basic compromise to the higher echelon of nuanced and creative outcome. Mindfulness awareness appears to promote psychological flexibility. Mindfulness training has been associated with cognitive flexibility as well, including unstructured creative mental tasks and structured word-production tasks. An advanced negotiator will be flexible enough to carefully think about his or her opponent’s reputation, select strategies and styles based upon this and his or her own skill set to consider the client’s position, and change the strategies and styles during the actual negotiation based upon the opponent’s countermoves and the information being presently acquired. Remaining flexible will prevent negotiators from becoming entrenched in preselected assumptions or being risk averse. Flexibility increases a negotiator’s ability to use leverage. Leverage is typically seen as a concept connected with an adversarial or win/lose negotiator, but an advanced negotiator realizes leverage is important even to a win/win negotiator in order to push an adversarial opponent to consider other, creative positions. Mindfulness can also assist the more timid negotiator in handling their own fears, which might otherwise arise when facing an aggressive opponent, by teaching one to recognize the feelings caused by his or her opponent’s conduct and avoiding one’s old habitual response; indeed, mindfulness can help the negotiator embrace the experience and turn it into a source of his or her own energy.

Third, equally as important as flexibility, is patience for a skilled negotiator who wishes to gain the agreement on behalf of his or her client. “If lawyers should ask themselves if they took sufficient time to establish some rapport and positive environments,” mindfulness encourages patience because it teaches its practitioners not only to merely pause and reflect but also to maintain a constant calmness of mind and body. Time need not always be filled with activity, and silence can be an effective tool. Reflection can improve overall communications and the entire decision-making process. Mindfulness teaches one that patience is effortless, and patience will encourage the skilled negotiator to ask twice as many questions as he or she might otherwise during the bargaining session resulting in expanded information gathering. Patience will also help one to keep from divulging important information when it would be more prudent to make an opponent labor to discover it on his or her own.


130. Ana J. Bresciani-Kosinski et al., Neural Correlates of Attentional Expertise in Long-Term Meditation Practitioners, 104 PNAS 11483, 11483 (2007).

131. Andrea Kupfer Schneider, Teaching a New Negotiation Skills Paradigm, 39 Wash. U. J.L.


134. Schneider, supra note 131, at 31.

135. See Chambers, supra note 132, at 305.


139. CRAPTER, The Benefits To Be Derived from Post-Negotiation Assessments, supra note 85, at 11.

140. See generally Kabat-Zinn, supra note 116, at 148. Achieving ultimate patience takes time; indeed, one might, with tongue in cheek, say it takes patience to learn patience! When one first begins practicing mindfulness, it is almost impossible to keep in the moment and deter other thoughts and sensations from interfering with the present awareness. Most attorneys, having been training in the art of “thinking like a lawyer,” will find this even more difficult. One suggestion is to use a simple mantra whenever you find yourself a victim of mind clutter. For example, as soon as you feel yourself straying away from present awareness, return your focus to your breathing and mentally say to yourself “hmm” as you inhale and “it” as you exhale. Continue with this exercise until you return to present awareness. Id.


143. See Movius, supra note 107, at 513-14.

144. See CRATER, supra note 86, at 14.
Of course, in many negotiations, there will come a time when it could be quite advantageous to affirmatively reveal certain information, and someone trained in mindfulness is better able to selectively reveal information in this regard. Revealing certain information during a negotiation can be a starting point to brainstorming different ideas pertaining to the negotiation, which results in more ideas and greater productivity. This type of creative approach to negotiation, as opposed to a strictly adversarial one, can enhance the outcome of the negotiation for both parties. Mindfulness has increased creativity in a variety of contexts. Researchers have found that individuals struggling with a creative problem-solving task benefited by taking a break and engaging in mindful exercises. Increased patience established by practicing mindfulness can reduce biases and default responses during negotiation.

Fourth, in addition to helping one respond intellectually, flexibly, and patiently to the ongoing demands of the negotiation session, mindfulness can enhance the potential for creativity because it affords one the opportunity to experience time in a nonlinear way, which is very different for most attorneys. "Effective negotiators are resourceful and imaginative, demonstrating creativity and a commitment to reflective learning." Although it is often neglected, creativity can boost a negotiator's efficacy. Creativity has been described as the combination of three components: (1) fluency: "the number of different ideas an individual is able to think of"; (2) flexibility: "the number of different categories or types of ideas an individual is able to think of"; and (3) originality: "the uniqueness of the ideas." Creativity is perhaps most effective when negotiators place different values

on the items or variables to be negotiated. The negotiators can employ their creativity skills to expand the agreement and reach a result where each party is rewarded according to the value they place on the items of the negotiation. This type of negotiation has been described as integrative negotiation. This approach can be contrasted with distributive negotiation, which focuses on which party receives how much of a certain item. Creativity can be especially beneficial to integrative negotiation in that negotiators can distribute the items up for negotiation (and perhaps items that were not originally up for negotiation) in different ways based on the values of the parties involved. Research has demonstrated that as creativity increases in a negotiator, the joint profit derived from the negotiation (the profit or value derived from all parties involved in the negotiation) also increases. This finding holds true even if one negotiator demonstrates above average creativity and the other negotiators involved do not.

Fifth, mindfulness leads to greater awareness first of self, then of others, and provides an ability to focus on the totality of the situation. In being more self-aware, the mindful negotiator is more equipped to control his or her reactions to the negotiation.
Of course, in many negotiations, there will come a time when it could be quite advantageous to affirmatively reveal certain information, and someone trained in mindfulness is better able to selectively reveal information in this regard. Revealing certain information during a negotiation can be a starting point to brainstorming different ideas pertaining to the negotiation, which results in more ideas and greater productivity. This type of creative approach to negotiation, as opposed to a strictly adversarial one, can enhance the outcome of the negotiation for both parties. Mindfulness has increased creativity in a variety of contexts. Researchers have found that individuals struggling with a creative problem-solving task benefitted by taking a break and engaging in mindfulness exercises. Increased patience established by practicing mindfulness can reduce biases and default responses during negotiation.

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Fifth, mindfulness leads to greater awareness first of self, then of others, and provides an ability to focus on the totality of the situation. In being more self-aware, the mindful negotiator is more equipped to control his or
her own emotions. It is critical for a negotiator not to be controlled by his or her own emotions nor let an opponent become aware of any of his or her unintended reactions lest one cede a transfer of power in the process. Mindfulness will help the practitioner have more options and avoid knee-jerk reactions. Increased self-awareness enhances social skills and intuition. It lessens the chance that one will be inadvertently misunderstood during the negotiation process. Indeed, mindfulness is the foundation of emotional intelligence. Mindfulness leads to awareness, which leads to empathy. "Being empathetic in a negotiation requires a complex mix of skills—a willingness to hear the other side, open mindedness or curiosity, good questioning, and excellent listening, among others."

161. Id. at 315-16; ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE 5-8 (2005).
162. Id. at 294.
164. Riskin, supra note 162, at 325.
165. See also Deborah J. Cantrell, Love, Anger, and Lawyering, 19 RICH. J.L. & PUB. INT. 283, 291 (2016). In discussing the ramifications of misunderstanding in the negotiation process, Cantrell states: The simple practice of paying attention to small sensations in my body helped me to uncover how my brain translated that sensation into a whole cascading series of cognitive choices. I uncovered how the physical sensation that signaled anger could lead my brain to make a quick, possibly inaccurate assessment that a person was "untrustworthy," thereby leading me to discount or dismiss an otherwise relevant statement. I saw how a sensation of anger or love could lead my brain to the potentially inaccurate assumption that if I liked a person, they must like me back, therefore they must want to tell the truth. As a result of that quick cognitive move, I might give too much weight to another's opinion. As my mindfulness practices helped me build new neural pathways in my brain, I uncovered and observed the effects of many such habitual patterns.
166. See generally Rogers, supra note 13 (further citing research that chronicles how mindfulness practices prove and improve neuroplasticity); see generally Kieran Fox, Functional Neuroanatomy of Mediation: A Review and Meta-analysis of 78 Functional Neuroimaging Studies, 65 NEUROSCIENCE & BEHAVIORAL REVIEWS 208 (2016); see also Kieran Fox, Is Mediation Associated with Altered Brain Structure?: A Systematic Review and Meta-analysis of Morphometric Neuroimaging in Mediation, 43 NEUROSCIENCE & BEHAVIORAL REVIEWS 48 (2014).
168. See generally Riskin, supra note 162.
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164. Id. at 294.


166. Riskin, supra note 162, at 323.

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169. See generally Riskin, supra note 162.


171. Schneider, supra note 131, at 13.

172. Id. at 20.


180. Id. at 842-43.
The sixth benefit for negotiators who practice mindfulness is increased awareness of ethical behavior.\(^{181}\) Mindfulness offers an attorney the ability to recognize the real-option of engaging in ethical and professional conduct versus the costs of the real-option of engaging in unethical and unprofessional conduct.\(^{182}\) Van Pounds makes the analogy that practicing mindfulness is like seeing the world astride a motorcycle instead of from inside a car.\(^{183}\) One is but a passive observer of the world in a car, but on a motorcycle, he or she is in contact with the whole experience.\(^{184}\) Mindfulness is more like riding a motorcycle because it allows the practitioner to transcend traditional barriers and facilitates the recognition of more truthful behavior.\(^{185}\) Incorporating mindful awareness into daily activity, increases opportunities to behave ethically because it encourages interconnectedness, awareness of others, and, emotional control.\(^{186}\) Indeed, ethics and mindfulness may have a symbiotic relationship in that deliberate attentiveness to the rules of conduct can help further develop the practice of mindfulness.\(^{187}\) Mindfulness also includes the ability to objectively analyze when an opponent acts in bad faith, and respond with a more aggressive style prior to losing any advantage for his or her client.\(^{188}\)

Mindful negotiators will experience a seventh benefit in qualifying stress while remaining open to whatever might unfold.\(^{189}\) In addition to lowering stress levels,\(^{190}\) mindfulness can improve the quality of sleep, increase resilience,\(^{191}\) and confront with the unexpected, and lessen the connection to factors giving rise to anxiety.\(^{192}\) Widely used in medical settings to assist patients in the management of chronic pain and stress, mindfulness can help lawyers handle stress and sustain higher energy levels.\(^{193}\) The beauty of mindfulness is “that our lives and our professions are not dictated by a metronome. We can slow down, even if for only a moment, to just breathe or think or smell or look or listen or sit still or notice what is right in front of us.”\(^{194}\) Judge Susan Miles suggests before any stressful situation an attorney pause, feel his or her feet on the floor, come into awareness of his or her whole body, let go of any tensions, and breathe deeply.\(^{195}\) Mindfulness can assist one in moving from a reactive mode to a position of issuing careful responses in a stressful situation.\(^{196}\) Increased resilience through mindfulness is particularly important during an adversarial negotiation and, of course, would also be helpful in a cooperative one; resilience is becoming recognized as a valuable component of the lawyer’s skill set.\(^{197}\) Professor


\(^{182}\) Id. at 71-73. The article discusses the WRAP process—Widen your options; Reality-test your assumptions; Attain distance before deciding; Prepare to be wrong—and applying a real-options theory analyzing how mindfulness can improve ethical decision-making. Id.


\(^{184}\) Id. at 200.

\(^{185}\) Id. at 198 (urging lawyers to look for the truth within and citing the Tenth Man crossing the Ganges River: "According to lore, ten men commenced a swim across the River Ganges. On reaching the other side, one of the men sought to confirm that all had arrived safely. However, try as he might, he could only find nine others. Whereupon, a fisherman sitting on the riverbank pointed to the seeker and said, "You are the Tenth Man. The seeker is the sought."). CHRISTOPHER TITUS, AN AWAKENED LIFE: UNCOMMON WISDOM FROM EVERYDAY EXPERIENCE 165 (2008). The story of the "Tenth Man" teaches that, while "[w]e imagine we will find what we seek outside ourselves . . . [w]e already are what we are seeking. Until we realize this, we will never find any peace of mind, nor awaken to the totality of things." Id.


Mindfulness practice invites us to shine a spotlight of awareness on the ways we respond to events taking place in our life, moment by moment. Doing so, we gain insight over both the effect of these events on us and the ways they compel us to take action (or refrain from doing so). As a result, we develop greater mastery over our decision-making. Importantly, we see more clearly into the proximate causation underlying our actions. This can be especially important when we find ourselves in challenging situations. Ethical dilemmas pose some of the more interesting and consequential of these challenging scenarios.

\(^{188}\) Jeffrey W. Stempel, Feeding the Right Wolf: A Niebuhrian Perspective on the Opportunities and Limits of Mindful Core Concerns Dispute Resolution, 10 NEV. L. J. 472, 511 (2010).


\(^{191}\) Mary L. Fredrickson, Breathe In. Breathe Out: Mindfulness From the NBA to the Practice of Law, WYO. LAW. 50, 50 (2016).

\(^{192}\) Riskin, Awareness and the Legal Profession, supra note 173, at 659.

\(^{193}\) Riskin, Awareness and the Legal Profession, supra note 173, at 659.


\(^{195}\) Id. at 30 (comments by Judge Colleen Brown).

\(^{196}\) Paula Davis-Laack, Larry Richard & David N. Shereen, Four Things Resilient Lawyers Do: Differently, ABA. LAW PRACTICE TODAY (June 14, 2016).
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\textsuperscript{189} Lyman Williams, The Practice of Being: Mastering Stress & Finding Meaning as a Lawyer, 67 MAR. BENCH & B. MINN. 26, 28 (2010).


\textsuperscript{191} Mary L. Fredrickson, Breathe In. Breathe Out: Mindfulness From the NBA to the Practice of Law, Wyo. Law., 50, 50 (2016).

\textsuperscript{192} Riskin, Awareness and the Legal Profession, supra note 173, at 639.

\textsuperscript{193} Jan L. Jacobowitz & Scott Rogers, Mindful Ethics—A Pedagogical and Practical Approach to Teaching Legal Ethics, Developing Professional Identity, and Encouraging Civility, 4 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 198, 240 (2014).

\textsuperscript{194} Paul Steven Singerman, The Return on Investment From My Study and Practice of Mindfulness, 90 FLA. B.J. 28, 28 (2016).

\textsuperscript{195} Id. at 30 (comments by Judge Colleen Brown).

\textsuperscript{196} Paula Davis-Laack, Larry Richard & David N. Shearon, Four Things Resilient Lawyers Do Differently,ABA LAW PRACTICE TODAY (June 14, 2016), http://www.lawpracticetoday.org/article/four-things-resilient/ (opining resilient lawyers do these).
Metrow finds mindfulness helps her “shift from experiencing my separation from the world as primary to a felt sense of interconnectedness. And mindfulness has replaced my anxiety-laden attachment to outcomes with a more focused and effective ability to do my best and waste less time worrying about things I cannot control.” 197

Not everyone agrees with the beneficial results of mindfulness for negotiators. Some may argue that mindfulness will lessen a lawyer’s toughness or ability to demand a particular outcome or vigorously represent his or her client’s interests. Other lawyers, some clients, and perhaps some in hiring and firing positions, may agree that, in the real world, the culture of lawyering is “still steeped in over-adversarialism, position-based bargaining” 198 and requires a firmness which is lost when one turns to mindfulness. Yet, there is no evidence to support the fact that acquiring “soft” skills will cause an attorney to lose his or her “hard” skills. 199 Indeed, mindfulness training has not been found to lessen the effectiveness of combat troops. 200 Obviously, if mindfulness does not cause soldiers to lose their combat readiness, it is unlikely to cause a lawyer to lose his or her ability to be firm during a negotiation. Furthermore, all lawyers should also acknowledge that some problems resist left-brain solutions and therefore recognize that something more than intellect or firm positions may be needed to solve a client’s problems. 201 Others may object to the slowing down of the negotiation process because mindfulness and the extended information gathering, in combination with the expanded exploration of the other side’s interests, takes additional time. 202 Although some point out that too much information does not guarantee better decisions or results, 203 in most cases, the expenditure of time and the information gathering by a mindful negotiator will ultimately lead to better results for the client. 204

differently: stay inspired; think in a beneficial way; use stress as an opportunity to connect with others; and give more than they take in relationships.

198 Stempel, supra note 188, at 508.
202 Stempel, supra note 188, at 505.
203 BASTADO & SHAFIR, supra note 125.
204 Stempel, supra note 188, at 505; Riskin, Mindfulness in the Law and ADR, supra note 46, at 13-17.

Even though the objective of mindfulness is subtle, it is a training for one’s mind. The more difficult the negotiation, the more beneficial the negotiator will find it to have the extra tools at his or her disposal.

The most vigorous argument against mindfulness has been that it might inhibit a lawyer from rigorously representing his or her client by becoming “too saintly” to employ common deceptive practices required to achieve the best results in a win/lose negotiation. 205 One answer to this contention is that mindfulness is not synonymous with saintliness, and practicing mindfulness will not only open an attorney to recognizing the advantages of a more truthful negotiation but it will also bring him or her to a higher form of lawyering where one can experience the benefits of ethical integrity. 206 Another answer is that mindfulness will aid the negotiator in detecting when his or her opponent is practicing deception and in making his or her own ethical decisions. Finally, far from creating a dangerous ethical minefield fraught with traps for the “too saintly” lawyer or negotiator, mindfulness is instead used as a pedagogical approach to teach legal ethics. 207 Indeed, the research suggests that when professional responsibility and mindfulness are taught together, law students are able “to anticipate and avoid the ethical pitfalls of legal practice and maintain civility and professionalism.” 208

Negotiation is an important skill for all lawyers and mindfulness can improve one’s ability to negotiate successfully. Mindfulness improves focus and awareness. These in turn will assist a skilled negotiator in achieving greater success by allowing him or her to concentrate more fully and be more flexible during actual negotiation sessions by employing a variety of styles and strategies making critical on-the-spot adjustments to a well thought out plan. Mindfulness teaches and encourages patience as a requirement for a successful negotiator to achieve a maximum deal on behalf of his or her client, and it enhances his or her creativity thereby assisting him or her in designing alternatives and options beneficial to all parties. A mindful negotiator is more equipped to control and recognize his or her own as well as others’ emotional responses, develop stronger social skills, and recognize bias. Mindfulness will not reduce a lawyer’s dedication to his or her client and can, in fact, actually increase ethical behavior as well as

205 Scott R. Peppet, Can Saints Negotiate?: A Brief Introduction to the Problems of Perfect Ethics in Bargaining, 7 Harv. Negot. L. Rev. 83, 90-95 (2002). [A] mindfulness negotiator may constraining himself, limiting his freedom of action in deference to his ethical commitments. And, this, particularly for lawyers, may cause against the lawyer’s understanding—or others’ understanding—of the lawyer’s role.” Id. at 96.
206 Pounds, supra note 22, at 217-23.
207 Jacobowitz & Rogers, supra note 193, at 198.
208 Id. at 202.
Motro finds mindfulness helps her "shift from experiencing my separation from the world as primary to a felt sense of interconnectedness. And mindfulness has replaced my anxiety-laden attachment to outcomes with a more focused and effective ability to do my best and waste less time worrying about things I cannot control." 197.

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207. Jacobowitz & Rogers, supra note 193, at 198.
208. Id. at 202.
reduce stress and strengthen resilience. In addition to becoming a more successful negotiator, the mindful lawyer is just as likely to incur some pleasant side benefits that come with improved physical and mental health.

Calming the Chaos: A Complexity Science Approach to Dispute Resolution on a Macro and Micro Level

Martha E. Simmons

It has been said that we live in an age of complex dynamic systems. Evidence of the preponderance of such systems lies in the rapid rate of change and increasing lack of certainty experienced in many areas of life. The legal dispute resolution world is not immune to this phenomenon. This paper will add these disciplines to the academic conversation of the emerging science of complexity.

The legal system indeed faces complex problems on both a micro and macro level. Moreover, the existence of such problems is on the rise. The Canadian Bar Association's recent Futures report states, "[t]he legal profession in Canada is entering a period of major change. The combined forces of globalization, technology, and market liberalization are creating new services, new delivery mechanisms, and new forms of competition. In addition to a changing profession, studies have documented failings of our legal system, as illustrated by comments such as, "Canadians do not have adequate access to family justice. For many years now, reports have been telling us that cost, delay, complexity and other barriers are making it...

1. Reuben R. McDaniel Jr., Strategic Leadership: A View from Quantum and Chaos Theories, 23(1) HEALTH CARE MGMT REV 21 (1997); see BRINDA. ZIMMERMAN ET AL., EDEWARE: LESSONS FROM COMPLEXITY SCIENCE FOR HEALTH CARE LEADERS (2008). Examples of complex adaptive systems are vast and in Collaborative Law include the stock market, the brain, ecosystems, communities, and social systems. Id.
3. THE CAN. BAR ASS'N., supra note 2, at 4.
4. Id.
5. Id. at 6.
6. Id.