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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."<sup>1</sup> It is a mental discipline, which requires paying attention to what is happening in the present rather than being either distracted or avoiding reality.<sup>2</sup> 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.

1. Leonard L. Riskin, *Mindfulness: Foundational Training for Dispute Resolution*, 54 J. LEGAL EDUC. 79, 83 (2004). This definition of mindfulness is a variation from what was established by Jon Kabat-Zinn, "a famous teacher of mindfulness meditation and the founder of the Mindfulness-Based Stress Reduction program at the University of Massachusetts Medical Center." *What is Mindfulness?*, WILDMIND: BUDDHIST MEDITATION, <http://www.wildmind.org/applied/daily-life/what-is-mindfulness> (last visited May 22, 2015).

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,

[p]eople 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.

Jane Hart, *Clinical Applications for Mediation: A Review and Recommendations*, 13 ALTERNATIVE & COMPLEMENTARY THERAPIES 24, 24 (2007).

Originating nearly 2,500 years ago, mindfulness was first an emphasis on spiritual and intellectual development among the Buddhists.<sup>3</sup> However, in the modern world, a secular practice of mindfulness has increased in popularity.<sup>4</sup> Specifically, in the past three decades, the discipline has experienced widespread growth, and is now used to improve psychological and physical health.<sup>5</sup> It entered the American mainstream in 1979 with the launch of a mindfulness program at a medical school.<sup>6</sup> It has since been used across a wide array of disciplines—everything from corporate settings to personal relationships—and its benefits have been astounding.<sup>7</sup> For example, military veterans trained in mindfulness show a reduction in Post-Traumatic Stress Disorder symptoms.<sup>8</sup>

Meanwhile, in the classroom setting, it helps reduce aggression, increases happiness, and fosters a longer attention span.<sup>9</sup> In the workplace and boardroom, mindfulness is offered to all level of employees, starting with Chief Executive Officers.<sup>10</sup> Mindfulness is present in hospitals as a source of therapeutic relief to assist patients in their journey to wellbeing.<sup>11</sup> 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

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3. Abra Garfield, *The History of Mindfulness*, MINDFULNESS MEDITATION BRISBANE, <http://mindfulnessmeditationbrisbane.com/history-of-mindfulness/> (last visited May 22, 2015).

4. *Id.*; *Mindfulness*, GREATER GOOD: THE SCIENCE OF A MEANINGFUL LIFE, <http://greatergood.berkeley.edu/topic/mindfulness/definition> (last visited May 22, 2015).

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

6. MINDFUL LIVING PROGRAMS, *What is Mindfulness-Based Stress Reduction?*, <http://www.mindfullivingprograms.com/whatMBSR.php>.

7. Riskin, *supra* note 1, at 85.

8. *Mindfulness*, *supra* note 4.

9. Katherine Weare, *Evidence for Mindfulness: Impacts on the Wellbeing and Performance of School Staff*, MINDFULNESS IN SCHOOLS PROJECT 4-5, <https://mindfulnessinschools.org/wp-content/uploads/2014/10/Evidence-for-Mindfulness-Impact-on-school-staff.pdf>; Nirbhay Singh, et al., *A Mindfulness-Based Strategy for Self-Management of Aggressive Behavior in Adolescents with Autism*, 5 RESEARCH IN AUTISM SPECTRUM DISORDERS 1153, 1154 (2011), available at [http://s3.amazonaws.com/academia.edu.documents/3507054/Singh\\_et\\_al.\\_2011\\_.A\\_mindfulness-based\\_strategy\\_for\\_self-management\\_of\\_aggressive\\_behavior\\_...\\_Research\\_in\\_Autism\\_Spectrum\\_Disorders.pdf?AWSAccessKeyId=AKIAJ56TQJRTWSMTNPEA&Expires=1480366722&Signature=L7wTPnMSF11bBE4AFi1d7VNCrX4%3D&response-content-disposition=inline%3B%20filename%3DMindful\\_Parenting\\_Decreases\\_Aggression\\_a.pdf](http://s3.amazonaws.com/academia.edu.documents/3507054/Singh_et_al._2011_.A_mindfulness-based_strategy_for_self-management_of_aggressive_behavior_..._Research_in_Autism_Spectrum_Disorders.pdf?AWSAccessKeyId=AKIAJ56TQJRTWSMTNPEA&Expires=1480366722&Signature=L7wTPnMSF11bBE4AFi1d7VNCrX4%3D&response-content-disposition=inline%3B%20filename%3DMindful_Parenting_Decreases_Aggression_a.pdf).

10. *Applications and Uses of Mindfulness*, MINDFULNET.ORG: EVERYTHING YOU NEED TO KNOW ABOUT MINDFULNESS ON ONE WEBSITE, <http://www.mindfulnet.org/page3.htm> (last visited May 22, 2015).

11. *Id.*

skills and familial relationships.<sup>12</sup> It has had an impact on a wide array of law related functions.<sup>13</sup> 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.<sup>14</sup> This has been shown to lessen the ineffectiveness associated with worry and anxiety, permitting students to focus better on assigned tasks.<sup>15</sup> 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.<sup>16</sup> 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.”<sup>17</sup>

Although popular mindfulness currently is often taught in a more secular form, it draws its inspiration from meditation with both religious and philosophical roots.<sup>18</sup> 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.<sup>19</sup> Mindfulness—which is continuous awareness—is the opposite of multi-tasking or task switching.<sup>20</sup> When one is mindful, he or she can assess a situation from several perspectives, process the information received in

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12. *Mindfulness*, *supra* note 4.

13. Scott L. Rogers, *The Mindful Law School: An Integrative Approach to Transforming Legal Education*, 28 *TOURO L. REV.* 1189, 1190, 1192 (2012).

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

16. *Id.*

17. *Mindfulness*, *supra* note 4.

18. Shauna L. Shapiro et al., *Toward the Integration of Meditation into Higher Education: A Review of Research*, *CTR FOR CONTEMPLATIVE MIND IN SOCIETY* 1, 6 (Oct. 2008) available at <http://www.contemplativemind.org/files/MedandHigherEd.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, 83 (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.

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

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.”<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> For instance, a person who has more inherent trait mindfulness also has more brain activity associated with emotional regulation.<sup>26</sup> 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.<sup>27</sup>

It is deceptively 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.<sup>28</sup> You have now been mindful in that one moment for that one time. You could certainly 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

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21. ELLEN A. LANGER, *THE POWER OF MINDFUL LEARNING* 111 (2d ed. 1997).

22. Van M. Pounds, *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).

23. *See* CHARLOTTE JOKO BECK, *EVERYDAY ZEN: LOVE AND WORK* 50–52 (2007).

24. *Id.*

25. SUSAN L. SMALLEY & DIANA WINSTON, *FULLY PRESENT: THE SCIENCE, ART, AND PRACTICE OF MINDFULNESS* 5, 7-8 (2010).

26. Shian-Ling Keng, Moria J. Smoski, & Clive J. Robins, *Effects of Mindfulness on Psychological Health: A Review of Empirical Studies*, 31 CLIN. PSYCHOL. REV. 1041, 1045, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3679190/pdf/nihms463108.pdf>.

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

28. JON KABAT-ZINN, *MINDFULNESS FOR BEGINNERS* 11 (2012).

your mind becomes scattered, use your breath as the means to take hold of your mind again.”<sup>29</sup>

Generally, meditation is classified into two major types: focused attention and open monitoring.<sup>30</sup> There is a difference between focused attention, also known as concentration meditation, and open monitoring.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> Such mental clutter, or distractions, are indeed normal and usually need not be suppressed but rather recognized for what they are.<sup>34</sup> 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 pay attention just to the present moment.<sup>35</sup>

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.<sup>36</sup> A typical day includes many

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29. THICH NHAT HANH, *THE MIRACLE OF MINDFULNESS: AN INTRODUCTION TO THE PRACTICE OF MEDITATION* 15 (Mobi Ho trans., 1987).

30. Casey Helber et al., *Meditation in Higher Education: Does it Enhance Cognition?*, 37 *INNOV. HIGH. EDUC.* 349, 350 (2012). Although meditation is classified into two major categories, it is part of “a family of complex emotional and attentional regulatory training regimes developed for various ends.” *Id.*; see also Slagter A. Lutz et al., *Attention Regulation and Monitoring in Meditation*, 12 *TRENDS IN COGNITIVE SCI.* 163, 163 (2008).

31. Helber, *supra* note 30, at 350.

32. Baker & Brown, *supra* note 20, at 357–60.

33. Ruth A. Baer, *Mindfulness Training as a Clinical Intervention: A Conceptual and Empirical Review*, *CLINICAL PSYCHOL.: SCIENCE & PRACTICE* 125, 125 (2003) (explaining that such awareness can include a careful observation of “perceptions, cognitions, emotions, or sensations”).

34. *The Monkey Mind*, A GUIDE TO BUDDHISM A TO Z, <http://www.buddhisma2z.com/content.php?id=274> (last visited May 22, 2015). “When we label thoughts precisely and carefully, what happens to them? They begin to quiet down. We [do not] have to force ourselves to get rid of them. When they quiet down, we return to the experience of the body and the breath, over and over.” BECK, *supra* note 23, at 56.

35. See generally, HAMMERNES & MOORE, *ORGANIZE YOUR MIND, ORGANIZE YOUR LIFE, TRAIN YOUR BRAIN TO GET MORE DONE IN LESS TIME* 94 (2012).

36. Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 *UMKC L. REV.* 239, 270–73 (2000). The irony is that for those who do not fit into this model of the practicing lawyer, they are thought to be “less” than their colleagues who are distressed because of a popular misconception that this model is the occupational culture. Peter G. Glenn, *Some Thoughts About Developing*

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demands, and with the technological advances of the modern era, these demands begin long before a practicing lawyer makes it to the law office.<sup>37</sup> She or he must screen and respond to emails, voice and text messages, which do not stop for holidays, weekends, or nighttime.<sup>38</sup> 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, responses to requests from demanding partners and judges, as well as countless other tasks.<sup>39</sup> As the workday ends, the typical lawyer heads home, exhausted and knowing a similar schedule awaits him or her the next day.<sup>40</sup> 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.<sup>41</sup>

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.<sup>42</sup> Mindfulness, on the other hand, is an effective technique to improve cognitive function with a wide range of benefits including increased work productivity,<sup>43</sup> higher test scores,<sup>44</sup> improved health,<sup>45</sup> and enhanced physical

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*Constructive Approaches to Lawyer and Law Student Distress*, 10 J.L. & HEALTH 69, 69 (1995-1996).

37. See *Why are Lawyers Unhappy with Their Jobs*, BUSINESS INSIDER, <http://www.businessinsider.com/why-are-lawyers-unhappy-with-their-jobs-2013-11> (last visited May 23, 2015).

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.*

41. NALP FOUND., UPDATE ON ASSOCIATE ATTRITION: FINDINGS FROM A NATIONAL STUDY OF LAW FIRM ASSOCIATE HIRING AND DEPARTURES—CALENDAR YEAR 2007, at 25 tbl.24 (2008). What makes them stay? Some common factors include: Positive working environment, great supervisory, mentoring, compensation, assignments, and feedback. See generally, NALP FOUND., UPDATE ON ASSOCIATE ATTRITION: FINDINGS FROM A NATIONAL STUDY OF LAW FIRM ASSOCIATE HIRING AND DEPARTURES—CALENDAR YEAR 2013 (2014).

42. Baker & Brown, *supra* note 20 at 355 n.83; see also René Marois & Jason Ivanoff, *Capacity Limits of Information Processing in the Brain*, 9 TRENDS COGNITIVE SCI. 296, 296 (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).

43. See Tony Schwartz, *More Mindfulness, Less Meditation*, N.Y. TIMES (Jan. 31, 2014, 1:28 PM), [http://dealbook.nytimes.com/2014/01/31/more-mindfulness-less-meditation/?\\_r=0](http://dealbook.nytimes.com/2014/01/31/more-mindfulness-less-meditation/?_r=0).

performance.<sup>46</sup> 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.<sup>47</sup> Far from being time-consuming, it is actually time enhancing and can be quickly practiced anywhere at any time.<sup>48</sup>

One suggested exercise is to take “STOCK” as developed by Riskin and Wohl.<sup>49</sup> 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.<sup>50</sup> 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,

44. See, e.g., Michael D. Mrazek et al., *Mindfulness Training Improves Working Memory Capacity and GRE Performance While Reducing Mind Wandering*, 24 PSYCHOL. SCI. 776, 776 (2013).

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. *Id.*

46. See Leonard L. Riskin, *Mindfulness in the Law and ADR: The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 7 HARV. NEGOTIATION L. REV. 1, (2002); see also PHIL JACKSON & HUGH DELEHANTY, SACRED HOOPS: SPIRITUAL LESSONS OF A HARDWOOD WARRIOR 67, 118-20 (1995).

47. See Shauna Shapiro, et. al., *Mindfulness-based Stress Reduction for Health Care Professionals: Results from a Randomized Trial*, 12 INTERNATIONAL J. OF STRESS MANAGEMENT 164, 166 (2005), available at <https://www.upaya.org/uploads/pdfs/shapiro.study.pdf>; See also KABAT-ZINN, *supra* note 22, at 11.

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?

*Id.*

48. 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 a Saturday or Sunday—to cultivate the habit of practicing mindfulness. CHRISTINE DUNKLEY & MAGGIE STANTON, *TEACHING CLIENTS TO USE MINDFULNESS SKILLS: A PRACTICAL GUIDE* 21–22 (2013); HANH, *supra* note 29, at 27; Douglas A. Codiga, *Reflections on the Potential Growth of Mindfulness Meditation in the Law*, 7 HARV. NEGOT. L. REV. 109, 110 (2002).

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

50. 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 while doing it the STOCK method can be applied. *Id.*



intermittently followed, can yield some positive results.<sup>51</sup> In the *Contemplation of Thought* from Siksasamuccaya, 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.<sup>52</sup> Thought is considered a magical illusion subject to mistaken perception “[f]or thought is immaterial, invisible, non-resisting, inconceivable, unsupported, and homeless.”<sup>53</sup> Lawyers function in a profession that reveres 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.<sup>54</sup> Media portrayals of lawyers engaged in dramatic courtroom duels give non-lawyers the impression that all lawyers ever do is litigate.<sup>55</sup> However, negotiations and resolutions are far more prevalent than arguments at trial.<sup>56</sup> Approximately ninety-seven percent of all civil litigation cases filed in the United States end either in settlement or dismissal.<sup>57</sup> Even within each civil litigation case, there are often many micro-transactions occurring between the parties that require negotiation.<sup>58</sup> 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;<sup>59</sup> an opposing party may file a motion for summary judgment.<sup>60</sup> Further, the parties may need to negotiate even earlier conflicts such as venue<sup>61</sup> or disputed discovery issues.<sup>62</sup> Even beyond litigation, lawyers often engage in negotiation to handle matters merely related to their legal

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51. Tim Iglesias, *Offering and Teaching Mindfulness in Law Schools*, 49 USF L. REV. F. 24, 30 (2015) (noting that practice is foreign to the model individual, whom typically become adept to new skills with little to no practice).

52. Hanh, *supra* note 29, at 135.

53. *Id.*

54. *E.g.*, Fred C. Zacharias, *The Images of Lawyers*, 20 GEO. J. LEGAL ETHICS 73 (2007).

55. *E.g.*, *Id.*

56. Phx. Bus. Journal, *Government Survey Shows 97% of Civil Cases Settled*, bizjournals.com, (May 30, 2004, 9:00 pm), <http://www.bizjournals.com/phoenix/stories/2004/05/31/newscolumn5.html>.

57. *Id.*

58. *See generally* Donald R. Philbin, Jr., *The One Minute Manager Prepares for Mediation: A Multidisciplinary Approach to Negotiation Preparation*, 13 HARV. NEGOT. L. REV. 249, 252-54 (2008).

59. *Id.* at 254.

60. *Id.* at 253 n.16.

61. *Id.* at 254.

62. *Id.* at 284.

work, such as negotiating their own salary,<sup>63</sup> negotiations in the boardroom or business meeting context,<sup>64</sup> and negotiation in real estate transactions,<sup>65</sup> 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.<sup>66</sup>

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.<sup>67</sup> Most negotiators associate a more adversarial methodology with the competitive/positional approach, while associating a more cooperative methodology with the problem solving/interest approach.<sup>68</sup>

In a positional negotiation, each side takes a position, argues in its favor, and reaches a compromise making a series of concessions.<sup>69</sup> 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.<sup>70</sup> Closed and untrusting, these negotiators frequently use threats and rarely disclose information, but instead attempt to manipulate adversaries.<sup>71</sup>

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

63. Pam Occhipinti, *Proving Your Worth: Compensation Negotiation Tips For New Law School Graduates*, 69 TEX. B.J. 1052, 1052 (2006).

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).

65. See Daniel B. Bogart, *The Right Way to Teach Transactional Lawyers: Commercial Leasing and the Forgotten "Dirt Lawyer,"* 62 U. PITT. L. REV. 335, 363-64 (2000).

66. *Id.* at 365-66.

67. John Lande, *A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation*, 16 CARDOZO J. CONFLICT RESOL. 1, 16-17 (2014); Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 46 (1985).

68. CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* 11 (7th ed. 2012); Gifford, *supra* note 67, at 46-47.

69. ROGER FISHER & WILLIAM URY, *GETTING TO YES NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 3d ed. 2011); Jonathan M. Hyman, *Four Ways of Looking at a Lawsuit: How Lawyers can use the Cognitive Frameworks of Mediation*, 34 WASH. U. J.L. & POL'Y 11, 19 (2010); Gifford, *supra* note 67, at 47-48.

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.

each side.<sup>72</sup> Remaining courteous and sincere, this negotiator will focus on the interests of both sides.<sup>73</sup> 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.<sup>74</sup> Using this information and relying on objective standards to guide the discussion, he or she looks to creatively satisfy the interests of both sides.<sup>75</sup>

One study found only twenty-four percent of lawyer negotiators to be competitive and adversarial, while sixty-five percent were problem solving and cooperative.<sup>76</sup> At first blush, these figures may be surprising given the reputation most attorneys have for preferring to engage in gladiator type arguments.<sup>77</sup> 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.<sup>78</sup> On the other hand, cooperative negotiators more frequently reach agreement with their

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.

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

74. ROBERT H. MNOOKIN ET AL., BEYOND WINNING NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 28-29 (2000); PUNNETT, *supra* note 70, at 410-11; Gifford, *supra* note 67, at 46; CRAVER, *supra* note 68, at 11-12.

75. PUNNETT, *supra* note 70, at 412; Gifford, *supra* note 67, at 46; CRAVER, *supra* note 68, at 11-12. One often used example involves an orange. PAUL J. ZWIER & THOMAS F. GUERNSEY, ADVANCED NEGOTIATION AND MEDIATION THEORY AND PRACTICE 4-5 (1st ed. 2005).

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 the 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 one peels it and each takes the part they need.

*Id.* at 4-5.

76. CRAVER, *supra* note 68, at 12. The remaining 11% were considered "unclassifiable." *Id.* The data comes from a study by Professor Gerald Williams study of attorneys in Denver and Phoenix. *Id.*

77. Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 54-55 (1999).

78. Kathleen O. Connor & Peter Carnevale, *A Nasty But Effective Negotiation Strategy: Misrepresentation of a Common-Value Issue*, 25 PERSONALITY & SOC. PSY. BULL. 504, 512 (1997); PUNNETT, *supra* note 70, at 399, 417.

opponents.<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup> Naturally, this calls for more extensive preparation, focus, and perceptive reading of one's opponent.<sup>82</sup> This highly successful negotiator will be a forceful yet realistic advocate who is ethical and polite at all times.<sup>83</sup> The goal is to maximize the client's position while always moving toward settlement.<sup>84</sup> 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.<sup>85</sup> Ultimate success calls for a negotiator to carefully plan his or her methodology from the initial icebreaking moments<sup>86</sup> through the desired final agreement stages.<sup>87</sup> 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.<sup>88</sup> 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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79. Trey Bergman, *Negotiating to Win?*, 45 HOUS. LAW. 30, 31 (2007).

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. GUERNSEY, *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 rapport 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. 1, 10 (2012) (citing BOB WOOLF, *FRIENDLY PERSUASION* 34-35 (1990)).

87. PUNNETT, *supra* note 70, at 391, 393, 441.

88. *Id.* at 391, 393; Gifford, *supra* note 67, at 57-58.

information in order to create value.<sup>89</sup> Needs, desires, and interests of both sides must be ascertained so one can creatively design (often on the spot) options attractive to each side.<sup>90</sup> This negotiator seeks as much information as possible while carefully not inadvertently disclosing any information he or she wants to keep confidential.<sup>91</sup> This requires one to observe carefully and probe the opponent to ascertain his or her perception of the situation.<sup>92</sup> 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.<sup>93</sup> 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.<sup>94</sup>

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.<sup>95</sup> Experts agree reading nonverbal cues can be an "effective way to expose the competitive negotiator who seeks to mislead with a friendly style."<sup>96</sup> Nonverbal communication includes the concepts of chronemics,<sup>97</sup> kinesics,<sup>98</sup> proxemics,<sup>99</sup> and paralinguistic<sup>100</sup> and, while readings its signs may not be as

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89. Jennifer W. Reynolds, *Breaking BATNAS: Negotiation Lessons from Walter White*, 45 N.M.L. REV. 611, 612 (2015); Gifford, *supra* note 67, at 60-62; *see generally*, DAVID LAX AND JAMES SEBENIUS, *THE MANAGER AS NEGOTIATOR* (1986).

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." STEFAN 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 NEV. 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.

97. Chronemics is the use of time in communication. Michael J. Higdon, *Oral Argument and Impression Management: Harnessing the Power of Persuasion for a Judicial Audience*, 57 U. KAN. L. REV. 631, 650 (2009).

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/kinesic.htm](http://changingminds.org/explanations/behaviors/body_language/kinesic.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.<sup>101</sup> 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.<sup>102</sup> The skilled negotiator must observe multiple nonverbal cues to judge the accuracy of any single other nonverbal cue.<sup>103</sup> So while seeing the contrived expression, the skilled negotiator is also taking in any other body movements, positioning, sounds or timing.<sup>104</sup> 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.<sup>105</sup> Reading nonverbal communication is, of course, the backdrop to the exchange of verbal information in the foreground.<sup>106</sup> In gathering information, the negotiator should carefully consider questions as part of his or her planning for the negotiation.<sup>107</sup> 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.<sup>108</sup> Using a variety of questions, both closed-ended and open-ended, will assist the negotiator in maximizing his or her information gathering techniques.<sup>109</sup>

Most negotiators also employ active listening techniques to enhance communication.<sup>110</sup> Neutral statements, particularly those followed by

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*Forces in Legal Communication, Pedagogy, and Discourse*, 5 MICH. J. RACE & LAW 847, 877 (2000).

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).

101. Jeffrey Krivis & Mariam Zadeh, *Back to Deception: 'Winning' Mediation Cases by Understanding Body Language*, 24 ALTERNATIVES TO HIGH COST LITIG. 113, 122-23 (2006); see also Freshman, *supra* note 92, at 376-79.

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.

107. RONALD M. SHAPIRO, DARE TO PREPARE: HOW TO WIN BEFORE YOU BEGIN 113-19 (2008); see Hal Movius, *The Effectiveness of Negotiation Training*, 24 NEGOT. J. 509, 512-14 (2008).

108. See CRAVER, *supra* note 68, at 89-91.

109. *Id.* at 89.

110. CRAVER, *supra* note 68, at 92; Jonathan R. Cohen, *When People are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739, 748-49 (2001); Joe Epstein & Susan Epstein, *Negotiating with Native American Wisdom*, 29-DEC WYO. LAW. 18, 18-19, 38 (2006).

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

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.<sup>115</sup> This forces the opponent to reconsider his or her perception of the matter at issue and respond to it based upon this provided framework.<sup>116</sup> 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.<sup>117</sup> The most skilled negotiators are often the most patient.<sup>118</sup>

Indeed, patience becomes even more important the deeper one gets into the negotiation.<sup>119</sup> 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.<sup>120</sup> When the negotiator begins to realize an agreement is close at hand, he or she is likely to become unconsciously and psychologically committed to settlement.<sup>121</sup> If the negotiator is impatient and ignorant in that respect, she will become over-anxious and will frequently rush to closing, abandoning

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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, 38.

112. Cohen, *supra* note 110, at 748-49

113. *See* CRAVER, *supra* note 68, at 92; Cohen, *supra* note 110, at 748-49; Epstein & Epstein, *supra* note 110, at 18-19, 38.

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.*

caution and his or her deliberative plan of carefully thought-out strategies and step by step concessions that moved the negotiator to this point.<sup>122</sup>

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."<sup>123</sup> 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.<sup>124</sup> 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.<sup>125</sup> Mindfulness increases concentration and focus, which, in turn, assists one in processing information and becoming more knowledgeable.<sup>126</sup> Negotiators can further increase their capacity to remain vigilant to the task at hand by engaging in focus attention exercises.<sup>127</sup>

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

122. *Id.* at 123-24.

123. THE COUNSELING GROUP, <https://counselingandmindfulness.com/you-cant-stop-the-waves-but-you-can-learn-to-surf-jon-kabat-zinn/> (last visited Oct. 24, 2016).

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](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.*

125. Mrazek et al., *supra* note 44, at 776-77; *ex.*, Katherine Larkin-Wong, *A Newbie's Impression: One Student's Mindfulness Lessons*, 61 J. LEGAL EDUC. 665, 669 (2012); *see* Anthony Bastardi & Eldar Shafir, *On the Pursuit and Misuse of Useless Information*, 75 J. OF PERSONALITY & SOC. PSYCHOL. 19, 28 (1998).

126. *See generally* Paul Steven Singerman, *The Return on Investment from My Study and Practice of Mindfulness*, 90-APR FLA. B.J. 26, 26 (2016).

127. Matthieu Ricard, Antoine Lutz & Richard J. Davidson, *Mind of the Meditator*, SCI. AM. 39, 42 (Nov. 2014) <https://www.law.upenn.edu/live/files/3918-mind-of-the-mediatorpdf>.

128. Katerina P. Lewinbuk, *Mindfulness Matters in Law School*, ST. B. OF TEX. (Feb. 23, 2015) <http://blog.texasbar.com/2015/02/articles/news/mindfulness-matters-in-law-school/>.



time.<sup>129</sup> 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.<sup>130</sup> 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.<sup>131</sup> Mindful awareness appears to promote psychological flexibility.<sup>132</sup> Mindfulness training has been associated with cognitive flexibility as well, including unstructured creative mental tasks and structured word-production tasks.<sup>133</sup> 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.<sup>134</sup> Remaining flexible will prevent negotiators from becoming entrenched in preselected assumptions or being risk averse.<sup>135</sup> Flexibility increases a negotiator's ability to use leverage.<sup>136</sup> Leverage is typically seen as a concept connected with an adversarial or win/lose negotiator, but an

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129. Ivan Staroversky, *Mindfulness Exercise – Eating a Raisin*, STAROVERSKY COUNSELING & PSYCHOTHERAPY (June 22, 2012) <http://staroversky.com/blog/mindfulness-exercise-eating-a-raisin-mindfully> (citing Spiegler, M. D. & Guevremont, 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 raising carefully, taking in every part of the raisin and noting what you 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, note the feeling and sensation of swallowing; and (7) try to feel the raisin moving down your stomach and note how your body feels. See also Jon Kabat-Zinn, *Mindfulness-Based Interventions in Context: Past, Present, and Future*, STA. UNIV.: DEP'T OF PSYCHOL. 148 (1990), [http://www-psych.stanford.edu/~pgoldin/Buddhism/MBSR2003\\_Kabat-Zinn.pdf](http://www-psych.stanford.edu/~pgoldin/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).

131. Andrea Kupfer Schneider, *Teaching a New Negotiation Skills Paradigm*, 39 WASH. U. J.L. & POL'Y 13, 25 (2012).

132. See R. Chambers et al., *The Impact of Intensive Mindfulness Training on Attentional Control, Cognitive Style, and Affect*, 32 COGNITIVE THERAPY RESOL. 303, 305 (2008).

133. Clark Freshman et al., *Adapting Meditation to Promote Negotiation Success: A Guide to Varieties and Scientific Support*, 7 HARV. NEGOT. L. REV. 67, 74 (2002) (citing Charles N. Alexander et al., *Transcendental Meditation, Mindfulness, and Longevity: An Experimental Study with the Elderly*, 57 PERSONALITY & SOC. PSYCHOL. 950 (1989)).

134. Schneider, *supra* note 131, at 31.

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

136. Schneider, *supra* note 131, at 30-31.

advanced negotiator realizes leverage is important even to a win/win negotiator in order to push an adversarial opponent to consider other, creative positions.<sup>137</sup> 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.<sup>138</sup>

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."<sup>139</sup> 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.<sup>140</sup> Time need not always be filled with activity, and silence can be an effective tool.<sup>141</sup> Reflection can improve overall communications and the entire decision-making process.<sup>142</sup> 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.<sup>143</sup> 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.<sup>144</sup>

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137. See WILLIAM URY, GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE 111-36 (1991); WILLIAM URY, THE POWER OF A POSITIVE NO (2007).

138. J. Patton Hyman, *The Mindful Lawyer: Mindfulness Mediation and Law Practice*, 33 VT. B.J. 40, 43-44 (2007).

139. CRAVER, *The Benefits To Be Derived from Post-Negotiation Assessments*, *supra* note 86, 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 "hum" as you inhale and "fa" as you exhale. Continue with this exercise until you return to present awareness. *Id.*

141. Stefan H. Krieger, *A Time to Keep Silent and a Time to Speak: The Functions of Silence in the Lawyering Process*, 80 OR. L. REV. 209-210 (2001).

142. DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011); see generally FRANK PARTNOY, WAIT: THE ART AND SCIENCE OF DELAY (2012).

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

144. See CRAVER, *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.<sup>145</sup> 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.<sup>146</sup> This type of creative approach to negotiation, as opposed to a strictly adversarial one, can enhance the outcome of the negotiation for both parties.<sup>147</sup> Mindfulness has increased creativity in a variety of contexts.<sup>148</sup> Researchers have found that individuals struggling with a creative problem-solving task benefitted by taking a break and engaging in mindfulness exercises.<sup>149</sup> Increased patience established by practicing mindfulness can reduce biases and default responses during negotiation.<sup>150</sup>

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.<sup>151</sup> “Effective negotiators are resourceful and imaginative, demonstrating creativity and a commitment to reflective learning.”<sup>152</sup> Although it is often neglected, creativity can boost a negotiator’s efficacy.<sup>153</sup> 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.”<sup>154</sup> Creativity is perhaps most effective when negotiators place different values

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145. *Id.*

146. See Michael Diehl & Wolfgang Stroebe, *Productivity Loss in Brainstorming Groups: Toward the Solution of a Riddle*, 53, J. PERSONALITY AND SOC. PSYCHOL. 497, 497 (1987).

147. *Id.* at 497.

148. Viviana Capurso, Franco Fabbro, & Cristiano Crescentini, *Mindful Creativity: The Influence of Mindfulness Meditation on Creativity*, 4 FRONTIERS IN PSYCHOL. 1020, 1020-21 (2014); Ravi S. Kudesia, *Mindfulness and Creativity in the Workplace*, in MINDFULNESS IN ORGANISATIONS 200, 200-301 (2014); Peggy Bochun, *Mindfulness and Creativity*, CAN. TCHR. MAG. 8, 8-9 (2011).

149. Kudesia, *supra* note 148, at 199-200.

150. Chambers, *supra* note 132, at 305.

151. Robert Zeglovitch, *The Mindful Lawyer*, 23 GPSOLO 56, 56-59 (2006).

152. Michelle LeBaron & Mario Patera, *Rethinking Negotiation Teaching Project: Reflective Practice in the New Millennium*, 31 HAMLIN J. PUB. L. & POL’Y 405, 408 (2010).

153. See Terri R. Kurtzberg, *Cognitive Thinking, Cognitive Aptitude, and Integrative Joint Gain: A Study of Negotiator Creativity*, 11 CREATIVITY RES. J. 283, 291 (1998).

154. *Id.* at 284.

on the items or variables to be negotiated.<sup>155</sup> 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.<sup>156</sup> This type of negotiation has been described as integrative negotiation.<sup>157</sup> This approach can be contrasted with distributive negotiation, which focuses on which party receives how much of a certain item.<sup>158</sup> 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.<sup>159</sup> 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.<sup>160</sup> This finding holds true even if one negotiator demonstrates above average creativity and the other negotiators involved do not.<sup>161</sup>

Fifth, mindfulness leads to greater awareness first of self, then of others, and provides an ability to focus on the totality of the situation.<sup>162</sup> In being more self-aware, the mindful negotiator is more equipped to control his or

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155. *Id.* at 284-85.

156. *Id.* at 284.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 290.

161. Kurtzberg, *supra* note 153, at 290.

162. Leonard L. Riskin, *Further Beyond Reason: Emotions, the Core Concerns, and Mindfulness in Negotiation*, 10 NEV. L.J. 289, 315-16 (2010). In his article, Riskin describes the effects that emotions can have on a negotiation. *Id.* Riskin uses the “core concerns” system, set forth by Fisher and Shapiro, which describes the five concerns every person has during a negotiation. *Id.* These concerns are: (1) appreciation; (2) affiliation; (3) autonomy; (4) status; and (5) role. *Id.* Riskin postulates that when any of these core concerns are not satisfied by a party to the negotiation, that party tends to experience negative emotions. *Id.* Riskin goes further to state that negative emotions impair the negotiator’s problem-solving capabilities, disrupting the negotiation process. *Id.* Conversely, Riskin argues that satisfaction of these core concerns tends to produce positive emotions in the negotiator, which enhances their problem-solving and negotiation capabilities. *Id.* Mindfulness can make a negotiator more aware of their environment and the other party to the negotiation. *Id.* The mindful negotiator can better focus the lens of the five concerns on themselves to directly address which of the five concerns are unsatisfied within themselves and control their own emotions. *Id.* The mindful negotiator could also focus the lens of the five concerns on the other negotiator to address which concerns are not satisfied within them and use that to their own advantage. *Id.* Mindfulness, therefore, can act as a shield to protect a negotiator from the dangers of their own emotions and as a sword to use the opposing negotiator’s emotions against them. *Id.*

her own emotions.<sup>163</sup> 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.<sup>164</sup> Mindfulness will help the practitioner have more options and avoid knee-jerk reactions.<sup>165</sup> Increased self-awareness enhances social skills and intuition.<sup>166</sup> It lessens the chance that one will be inadvertently misunderstood during the negotiation process.<sup>167</sup> Indeed, mindfulness is the foundation of emotional intelligence.<sup>168</sup> Mindfulness leads to awareness, which leads to empathy.<sup>169</sup> “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.”<sup>170</sup> All

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163. *Id.* at 315-16; ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* 5-8 (2005).

164. *Id.* at 294.

165. Jon KABAT-ZINN, *FULL CATASTROPHE LIVING: USING THE WISDOM OF YOUR BODY AND MIND TO FACE STRESS, PAIN, AND ILLNESS* at 49-50 (1990).

166. Riskin, *supra* note 162, at 323.

167. *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 affinity 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 habituated patterns.

*Id.* *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 Meditation: A Review and Meta-Analysis of 78 Functional Neuroimaging Investigations*, 65 NEUROSCIENCE & BEHAVIORAL REVIEWS 208 (2016); *see also* Kieran Fox, *Is Meditation Associated with Altered Brain Structure?: A Systematic Review and Meta-Analysis of Morphometric Neuroimaging in Meditation*, 43 NEUROSCIENCE & BEHAVIORAL REVIEWS 48 (2014).

168. Carolyn Gregoire, *Why Mindfulness is the Foundation of Emotional Intelligence*, HUFFINGTON POST (Oct. 21, 2014) [http://www.huffingtonpost.com/2014/10/31/search-inside-yourself\\_n\\_6061586.html](http://www.huffingtonpost.com/2014/10/31/search-inside-yourself_n_6061586.html); *see also* How Raising your Emotional Intelligence Can Help Your Career, Am. Bar Ass’n (Apr. 2015), <http://www.americanbar.org/publications/youraba/2015/april-2015/how-raising-your-emotional-intelligence-can-help-your-career.html>.

169. *See generally* Riskin, *supra* note 162.

170. Schneider, *supra* note 131, at 29 (citing DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* 96 (Chapter 7: The Roots of Empathy) (10th anniversary ed., 2006)); *see generally* Robert H. Mnookin, Scott R. Peppet & Andrew S. Tulumello, *The Tension Between Empathy and Assertiveness*, 12 NEGOT. J. 217 (1996).

of this must still be put into the context of the totality of the entire negotiation exchange.<sup>171</sup>

Negotiators need to listen carefully to what is said and what is left unsaid, looking for leaks or cues to discern an opponent's true interests and positions.<sup>172</sup> Not only will mindfulness help one to develop social skills and emotional intelligence, it will also raise a consciousness of bias and a recognition of the effects of implicit bias.<sup>173</sup> Practicing mindfulness can, over time, lead to a lessening of bias and a development of the capacity to work against the tendency to treat as less, those who appear different.<sup>174</sup> Unconscious cognitive biases can impede negotiators from recognizing mutually advantageous options.<sup>175</sup> The remedy for implicit bias is bias awareness.<sup>176</sup> Research supports that even a short mindfulness exercise may lead to less biased reactions.<sup>177</sup> Mindfulness will not only open the negotiator to recognize bias, but it will assist him or her in seeing difference perspectives resulting in the negotiator assessing the parties, their interests, and their needs, more effectively.<sup>178</sup> Mindfulness can even be beneficial in an email negotiation, which arguably is more straightforward and relies less on tactics, game playing, and nonverbal cues than a face-to-face negotiation.<sup>179</sup> The strategic planning which is so critical in email negotiation will still be enhanced by a negotiator's dedication to mindfulness.<sup>180</sup>

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171. Schneider, *supra* note 131, at 13.

172. *Id.* at 20.

173. Leonard L Riskin, *Awareness and the Legal Profession: An Introduction to the Mindful Lawyer Symposium*, 61 J. LEGAL EDUC. 634, 635 (2013); Leonard L. Riskin, *Mindfulness: Foundational Training for Dispute Resolution*, 54 J. LEGAL EDUC. 79, 84-86 (2004); Rhonda V. Magee, *The Way of ColorInsight* GEO. L.J. MOD. CRITICAL RACE PERSP. 1, 22 (forthcoming Spring 2016).

174. Rhonda V. Magee, *If You Plant Corn, You Get Corn: On Mindfulness and Racial Justice in Florida and Beyond*, 90 FLA. BAR J. 37, 38 (2016).

175. Robert Bordone, Tobias C. Berkman & Sara E. del Nido, *The Negotiation Within: The Impact of Internal Conflict over Identity and Role on Across-The-Table Negotiations*, 2014 J. DISP. RESOL. 175, 177 (2014).

176. Russell G. Pearce, Eli Wald, & Swethaa S. Ballakrishnen, *Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships*, 83 FORDHAM L. REV. 2407, 2435 (2015).

177. Magee, *supra* note 173, at 13.

178. Jennifer Nedelsky, *Receptivity and Judgment*, 4 ETHICS & GLOBAL POL. 231, 233 (2011).

179. Lynn A. Epstein, *Cyber E-Mail Negotiation vs. Traditional Negotiation: Will Cyber Technology Supplant Traditional Means of Settling Litigation?*, 37 TULSA L. REV. 839, 842-43 (2001).

180. *Id.* at 842-43.

The sixth benefit for negotiators who practice mindfulness is increased awareness of ethical behavior.<sup>181</sup> 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.<sup>182</sup> Van Pounds makes the analogy that practicing mindfulness is like seeing the world astride a motorcycle instead of from inside a car.<sup>183</sup> 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.<sup>184</sup> Mindfulness is more like riding a motorcycle because it allows the practitioner to transcend traditional barriers and facilitates the recognition of more truthful behavior.<sup>185</sup> Incorporating mindful awareness into daily activity, increases opportunities to behave ethically because it encourages interconnectedness, awareness of others, and, emotional control.<sup>186</sup> 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.<sup>187</sup> Mindfulness also includes the ability to objectively analyze

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181. Peter H. Hung, *How Improved Decision Making and Mindfulness Can Improve Legal Ethics and Professionalism*, 21 J.L. BUS. & ETHICS 35, 71-73 (2015).

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.*

183. Van M. Pounds, *Promoting Truthfulness in Negotiation: A Mindful Approach*, 40 WILLAMETTE L. REV. 181, 200 (2004).

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 TITMUS, *AN AWAKENED LIFE: UNCOMMON WISDOM FROM EVERYDAY EXPERIENCE* 165 (2000). 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.*

186. Leonard L. Riskin, *Awareness and Ethics in Dispute Resolution and Law: Why Mindfulness Tends to Foster Ethical Behavior*, 50 S. TEX. L. REV. 493, 503 (2009).

187. Scott L. Rodgers & Jan L. Jacobowitz, *Mindful Ethics and the Cultivation of Concentration*, 15 NEV. L.J. 730, 731 (2015).

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.

when an opponent acts in bad faith, and respond with a more aggressive style prior to losing any advantage for his or her client.<sup>188</sup>

Mindful negotiators will experience a seventh benefit in quelling stress while remaining open to whatever might unfold.<sup>189</sup> In addition to lowering stress levels,<sup>190</sup> mindfulness can improve the quality of sleep, increase resilience when confronted with the unexpected, and lessen the connection to factors giving rise to anxiety.<sup>191</sup> 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.<sup>192</sup> 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.”<sup>193</sup> 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.<sup>194</sup> Mindfulness can assist one in moving from a reactive mode to a position of issuing careful responses in a stressful situation.<sup>195</sup> 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.<sup>196</sup> Professor

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*Id.* at 735. See also Riskin, *supra* note 173, at 735.

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).

189. Dyan Williams, *The Practice of Being: Mastering Stress & Finding Meaning as a Lawyer*, 67 MAR. BENCH & B. MINN. 26, 28 (2010).

190. Kathleen Miles, *Tim Ryan, Ohio Congressman, Shares His Mindfulness Vision for the Country*, THE HUFFINGTON POST (June 5, 2012), [http://www.huffingtonpost.com/2012/06/05/tim-ryan-ohio-congressman\\_n\\_1571489.html](http://www.huffingtonpost.com/2012/06/05/tim-ryan-ohio-congressman_n_1571489.html); see also, TIM RYAN, A MINDFUL NATION: HOW A SIMPLE PRACTICE CAN HELP US REDUCE STRESS, IMPROVE PERFORMANCE, AND RECAPTURE THE AMERICAN SPIRIT 46-48 (2012).

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 639.

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).

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

195. *Id.* at 30 (comments by Judge Colleen Brown).

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



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.”<sup>197</sup>

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”<sup>198</sup> 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.<sup>199</sup> Indeed, mindfulness training has not been found to lessen the effectiveness of combat troops.<sup>200</sup> 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.<sup>201</sup> 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.<sup>202</sup> Although some point out that too much information does not guarantee better decisions or results,<sup>203</sup> in most cases, the expenditure of time and the information gathering by a mindful negotiator will ultimately lead to better results for the client.<sup>204</sup>

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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).

197. Shari Motro, *Scholarship Against Desire*, 27 YALE J.L. & HUMAN. 115, 152 (2015).

198. Stempel, *supra* note 188, at 508.

199. Jeena Cho, *Don’t Worry, You can Practice Mindfulness and Still Be a Jerk*, ABOVE THE LAW (Jul 6, 2015), <http://abovethelaw.com/2015/07/dont-worry-you-can-practice-mindfulness-and-still-be-a-jerk/>.

200. See Amishi B. Jha et al., *Minds “At Attention”: Mindfulness Training Curbs Attentional Lapses in Military Cohorts*, PLOS ONE (Feb. 11, 2015), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0116889#sec011>.

201. Gary A. Hengstler, *Transforming Practices*, A.B.A. J. 59, 59 (1999).

202. Stempel, *supra* note 188, at 505.

203. BASTARDI & 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.<sup>205</sup> 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.<sup>206</sup> 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.<sup>207</sup> 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."<sup>208</sup>

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

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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] mindful negotiator may constrain himself, limiting his freedom of action in deference to his ethical commitments. And, this, particularly for lawyers, may chafe against the lawyer's understanding—or others' understanding—of the lawyer's role." *Id.* at 96.

206. Pounds, *supra* note 22, at 217-21.

207. Jacobowitz & Rogers, *supra* note 193, at 198.

208. *Id.* at 202.

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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.