Session 11

Mindfulness in Professional Responsibility Training
The Benefits of Mindfulness for Litigators

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

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

Mindfulness is an awareness of life in the present moment: Simple to state, but not necessarily so easy to accomplish. Our minds are often cluttered with ruminations about the past and concerns about the future. We are so busy living in the past or projecting onto the future that often we are not acutely attuned to what is happening in the present moment. The clutter inhibits clarity of thought and increases stress and anxiety.

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

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

When attorneys practice mindfulness, the experience they gain by noticing their minds moving off into distraction, and returning their attention to their breath, makes them better equipped to deal with the unexpected—because they catch the thoughts and feelings that are resisting the moment, and are better equipped to stay on task and respond in proportion to the
challenge. For the same reasons, they enhance their capacity to be more genuine and present for what arises in their interactions with their clients, their colleagues, witnesses and adversaries. They are better able to focus on and enjoy their work.

A Growing Idea

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

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

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

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

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

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

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

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

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

Achieving Mindfulness

How does one achieve a state of mindfulness?

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

You may want to visit the website of The Mindful Lawyer (www.themindfullawyer.com) for additional information and suggestions.

So, if mindfulness is a tool for lowering stress, enhancing performance, and bringing about greater civility, what role might it play in the area of professional responsibility and ethics? Civility and ethics are no doubt linked; however, one may politely fail to turn over discovery or charmingly fail at candor to the tribunal.

On the other hand, in the heat of a litigation battle, incivility may fuel impulsive reactivity that causes a lawyer to cross into unethical territory without immediately recognizing it. Regardless of the level of civility, the opportunity for impulsive action and ethical missteps has been increased dramatically by the challenging economic climate, radical changes to the business of law, and the advent of technology and social media.
In fact, there are a growing number of ethics advisory opinions and disciplinary actions stemming from the ability to express instantaneously an emotionally charged reaction in a blog post or the ease with which evidence found on Facebook may be improperly gathered or destroyed. Smartphones and the Internet have changed the way people communicate and have severely quickened the pace of our daily lives. Litigation has always been a pressure-packed environment. Today’s climate compels a lawyer to pause and consider the challenges of the practice through the lens of technology and its effect on professionalism and ethics. The integration of mindfulness and professional responsibility may play an important role in sharpening that view.

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

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

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

A teaching tool known as “The Spiral,” used in the Mindful Ethics workshops I codeveloped, illustrates this process. Think of a particularly stressful event from your practice, and try to identify the resulting thoughts, feelings, and sensations that may have created a confused state of mind in which it became difficult to think clearly. The key is to recognize the event and observe the spiral it is causing so you are not caught up in the swirling of thoughts, emotions, and sensations that can occur during a stressful event.

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

Thoughts, Feelings, and Sensations

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

A litigator who practices law in a fast-paced and high-stakes environment may find that a workshop, classroom, or firm retreat provides a safe space in which to explore mindfulness meditation and learn about its potential to enhance decision making and provide a greater sense of inner peace. However, the essence and beauty of mindfulness is that although it does require patience and practice, it can be practiced almost anywhere at any time by a solitary individual. We are all constantly living in the midst of spirals. The key is that with awareness in the moment, the spirals reveal themselves and mindfulness provides us with the opportunity to pause, disconnect, and choose another path. Perhaps a revolutionary path... on which the chime of incoming emails is modulated by the sound of a Tibetan bell. ■
I. Introduction
Some lawyers believe that their duties to clients require an absolutely no-holds-barred approach meant to make life as unpleasant as possible for the clients’ legal adversaries. Truth be told, some clients want this kind of lawyer. Whether described as Rambo lawyers, pit bulls, avenging angels, or an opponent’s worst nightmare, these lawyers seem to believe that anything less will fail to maximize client objectives.

In this chapter, we do not assert that such an approach, whether within or outside of ethical bounds, can never, in fact, serve a client’s interest. The argument is simpler: regardless of how often this may be true, client interests are far more often better served when lawyers behave civilly.

The focus here is not manners or social etiquette as ends in and of themselves, or virtue as its own reward. Nor is it the general moral or philosophical benefits of harmony over disharmony. What we mean to say is that very often the best way forward for even the most egotistical,
self-interested, and self-absorbed lawyers and their egotistical, self-inter-
ested, and self-absorbed clients is through, rather than around, civility. Stated another way, this chapter makes the practical case for civility on its objective merits.

In this chapter, we will first define what we mean by “civility,” then turn to what we see as the principal benefits of civility in a lawyer-client context, and finally examine specific uses of civility in potentially difficult circumstances.

II. Defining Civility
For our purposes, “civility” includes but is not limited to treating others with courtesy and respect. It also extends to the avoidance of unnecessary rhetorical excesses, gratuitous insults, quarrels for the sake of quarrels, creating additional work for an adversary just because it is possible to do so, and intimidation for the sake of intimidation. Civility requires self-restraint and, at times, a willingness to make an extra effort to address or even calm the concerns of others who may be behaving uncivilly. On many occasions, the cause of civility compels a search for common interests with an adversary rather than an emphasis on the usually more evident areas of disagreement. And civility often requires clear, active reflection on one’s own contributions to difficult situations, rather than just those of others, and the capacity to find humor rather than outrage when a problem arises.

Importantly, to act civilly is not to abandon key client objectives or to give in to bullies. Civility is focused not so much on the “what,” or objectives, of lawyering as on the “how.” One can be civil or uncivil in any line of practice. As the Supreme Court noted many years ago, civility allows the striking of hard blows, but not the striking of foul ones. Berger v. United States, 295 U.S. 78, 88 (1935).

III. The Benefits of Civility
Civility has at least six practical benefits.

First, most lawyers—and, we submit, most human beings—do not do their best work when they are angry or irate. Even if one leaves aside the personal health benefits of limiting or avoiding prolonged and extreme emotional states, a lawyer consumed with ostensibly righteous zeal may
consequently fail to see one or more better ways to pursue client or lawyer objectives. Most of us have experienced personal situations outside of the practice of law in which our anger toward a friend, relative, or situation has caused us to say things we later regret and has at least temporarily blinded us to better problem-solving. It is so in the practice of law as well.

Second, most lawyers—again like most human beings—don’t do their best listening when they are angry or irate. Thus, the opportunity for successful resolution of a matter may be lost if counsel for the parties are not listening to each other or if, in a fit of pique, they intentionally or unintentionally fail to suggest potential resolutions.

Third, while uncivil behavior sometimes is the squeaky wheel that gets the grease, what goes around generally does come around. Experience teaches us that if it has any effects at all, uncivil behavior is likely to backfire and invite an equal or greater measure of uncivil behavior in return. For every cowardly lawyer who will turn tail and run at the first sign of trouble, there are far more who will dig in their heels and push back as hard or harder. It is very easy to sin in haste by dashing off an offensive email, only to repent in the fullness of time when the other side replies in kind or ups the ante. Moreover, although a client’s appetite for litigation or for protracted business negotiations may decrease over time, the resolution of such matters on favorable and acceptable terms may be far more difficult to achieve with an opponent who feels disrespect.

A fourth and no less significant benefit concerns respect for client resources. Clients are the entities and individuals whom we expect to pay our bills and who, in turn, expect us to serve their interests rather than the other way around. Being in “confrontation mode” all the time is not just wearing upon the confronters and the confronted; it also takes a lot of time and costs a lot of money. Consider, for example, the time that can be spent in an email or letter-writing campaign or on a series of sanctions motions detailing every conceivable misstep an opponent may have made. Many lawyers charge for their time in six-minute increments, and the increments add up. In depositions, clients not only pay the attorney for asking or listening to questions and answers but also for counsel quarrels and for each page or electronic recording of the transcript. A fifteen-minute argument between counsel costs as much as fifteen minutes
of probing testimony and likely does nothing to advance client objectives. Few clients will care even a fraction as much about wounded legal egos as their lawyers do, and clients can and will refuse to pay legal bills that reflect unnecessary diatribes and wasted time and effort. Bickering over items that, in the grand scheme of things, should have been resolved between lawyers may even lead clients to choose new counsel altogether.

A fifth benefit of civility has to do with the effects that uncivil behavior may have on third parties—including judges. On the whole, judges do not appreciate having to spend time refereeing what they see as personality spats or minor issues that counsel could have worked out for themselves. Adding to a judge’s workload is a good way to alienate a judge, and sufficiently uncivil behavior can even lead to sanctions. But behaving badly before a judge poses an even greater danger. Imagine two cases raising the same legal issue before two different judges at the same time. In one case, counsel for both parties have engaged in extreme rhetorical excesses, misstatements of the opposing party’s position, etc. In the other case, one side has engaged in such behavior, but every word from the other side, while firm, is also calm and rational. Other things equal, the lawyer who appears to have kept his or her head is more likely to emerge the winner. As one judge stated, “You spent two pages telling me you don’t like this guy? Get to what you want me to do.” Newhouse, Lawyers Learn How Not To Behave, Brooklyn Daily Bulletin (Mar. 10, 2011).

In short, conducting oneself civilly is, entirely as a matter of lawyer and client self-interest, an excellent way to build a positive record that will improve the odds of winning over judges, juries, and others who may subsequently review the lawyer’s conduct (including disciplinarians and plaintiff-side legal malpractice lawyers). One also cannot assume that ostensibly private but hostile and intemperate communications will remain private. A string of civil emails, letters, or moving papers can go a long way toward getting the judge and others on a lawyer’s side. Tone, as well as content, matters. “Facts – not adjectives – will get you where you want to go.” Ponsor, Effective Oral Argument, I Fed. Civil Litig. In the First Circuit § 4.3.1, FCLI MA-CLE 4–1 (2011).

The first five benefits of civility all speak to situations in which lawyers must deal with adversaries. A sixth and final benefit concerns the
relationships between attorneys and clients. A surprisingly large number of bar complaints and legal malpractice claims can be traced to lawyers’ failing to exhibit the common courtesy of returning client phone calls or responding to emails or letters on a timely basis. Some lawyers may attribute their non-responsiveness to benign forgetfulness, disorganization, or preoccupation with other matters. But to clients, such inattention is often seen as rude, insulting, unethical, and uncivil in the extreme. Ignoring one’s clients is asking for trouble.

Formal complaints against lawyers also often arise from intemperate responses to clients. Even where a sharp response to an out-of-line client seems justified at the time, be assured there is no better way to turn a salvageable relationship or a friendly parting of the ways into a donnybrook. In one case, an entire law firm was publicly censured in part for “rude and uncivil conduct to a client.” In re Law Firm of Wilens and Baker, 9 A.D.3d 213, 214, 777 N.Y.S.2d 116 (1st Dep’t 2004). And at the risk of repetition, bar disciplinarians and plaintiffs’ legal malpractice lawyers may attach great significance not only to what the lawyer said but also how the lawyer said it.

IV. Civility as a Strategy
Experience suggests that most lawyers recognize the practical benefits of civility and do act civilly most of the time. Yet all of us could benefit from thinking harder, and more strategically, about how and when specific civil conduct can advance the clients’ interests, and our own. This section presents three not-so-hypothetical situations where a civil approach best serves the interest of client and lawyer. As the reader will note, these examples relate directly back to the benefits of civil conduct discussed above.

A. Lawyer receives what Lawyer perceives as an intemperate letter or email from Opposing Counsel that threatens motions for sanctions and other harms if Opposing Counsel’s demands are not fully met by a date that Lawyer perceives to be unreasonable.
We start our analysis with the reminder that civility principles do not require Lawyer to sacrifice substantive client rights or objectives when efforts in support of the client may be unpleasant. If, in fact, Lawyer is
not willing to serve client objectives because of a distaste either for the objectives of the representation or for the situations in which the lawyer may be placed, Lawyer should consider resignation (or, where appropriate, rejecting the matter in the first place). But suppose that none of these problems exists. In that case, a lawyer acting with civility in mind should ask herself at least the following questions before responding, because her answers to these questions may affect the tone and substance of any response:

1. Is it completely clear what Opposing Counsel is saying and why Opposing Counsel is saying it? For example, is it at least possible that Opposing Counsel may be operating on the basis of different factual or legal assumptions than Lawyer as a result of prior misunderstandings or miscommunications between the two? Alternatively, is Opposing Counsel’s communication really as threatening as it first seemed or can it also be interpreted in a less threatening manner? And has Opposing Counsel been told why the proposed deadline or timeline is unworkable?

2. Is it at least possible that a face-to-face meeting with Opposing Counsel, rather than a written or telephonic shouting match, will enable the lawyers to understand each other and find common ground?

3. Is there someone else in Opposing Counsel’s or Lawyer’s firm whom Lawyer might consult in an attempt to lower rhetorical levels and move things forward?

4. To the extent that a written response must be sent, is it in the client’s best interest (i) to respond with the same or even more strident tone and approach, or (ii) to at least appear to be rational, thoughtful and considerate?

As noted, a judge or others who may view both the rational and the irrational lawyer at a later time are more likely to be favorably inclined toward the rational. Moreover, alternative 4(ii) above is more likely to induce more civil behavior going forward by Opposing Counsel, who presumably also knows how judges tend to respond to strident lawyers. Upon reading Lawyer’s civilized response and sensing a trap, Opposing
Counsel may well decide that it is best not to continue stridently but instead to try to work through problems on a constructive and less acrimonious basis. This result goes just as much into the “win” column as a successful judicial decision on the issue. Moreover, the expense to the client is likely to be far less.

B. Lawyer receives an intemperate and overbroad demand from Opposing Counsel for discovery to which Lawyer believes Opposing Counsel is probably not entitled. Lawyer is inclined to want to force Opposing Counsel to file a motion to compel in part in order to “educate the judge” about what lousy human beings Opposing Counsel and his client truly are. Lawyer takes an extremely aggressive position in response.

Like the prior example, this one implicates the benefits of better communication between counsel as a means to avoid costly and needless misunderstandings. And it introduces additional permutations to the civility analysis. Before deciding to act, Lawyer might ask the following:

1. To what extent, if any, are the issues raised in Opposing Counsel’s communication truly material and worth fighting over?
2. By her willingness to take an extremely aggressive stance, is Lawyer testing the boundaries of civility herself, while creating a risk that her client will be cast in a negative light and needlessly inviting additional client expense related to the anticipated motion that would follow her contemplated aggressive stance?
3. To what extent is there a possibility of win-win alternatives that would leave all parties and counsel just as well off or better off and at lower cost?
4. Even if Lawyer is absolutely morally convinced that the judge should see things her way, isn’t there also a risk that the judge may not do so?
5. Alternatively, how sure is Lawyer that the parties (or counsel) will not encounter future situations in which their roles may be reversed?
C. Lawyer begins case with Opposing Counsel on a cordial basis. Early in the proceedings, however, Client tells Lawyer that Client does not want Lawyer extending any courtesies or making life any easier for Opposing Counsel or Adverse Party on any issues—large or small, material or immaterial—than is absolutely necessary.

This example raises questions both about the lawyer-client relationship and about relationships between counsel. At a minimum, we believe a civil approach would suggest the following:

1. Particularly if Lawyer has not already done so, this would be a good time for Lawyer to explain to Client how cooperation can be a two-way street, how non-cooperation can make things more expensive and take them longer to resolve, and how it is difficult to predict at that time which side may need additional “slack” in the future. Even if Client is not persuaded, Lawyer can at least document this advice as protection against future assertions by Client that Lawyer unnecessarily ran up the bills.

2. Lawyer may consider whether it is in Client’s interest for Lawyer to explain to Opposing Counsel at the time that Lawyer will be proceeding in this manner rather than leaving Opposing Counsel to conclude over time that Lawyer is just an incompetent jerk.

One of the authors of this chapter faced such a situation and chose to inform Opposing Counsel of the constraints under which that lawyer was operating. The result was that when the client finally decided to consider settlement negotiations, the relationship between counsel was positive and constructive, allowing a mutually favorable settlement to be reached in a fairly short time. Even if the case had not settled well or quickly, however, the author’s client would have been no worse off as a result of the early communications with Opposing Counsel.

V. Conclusion

Although this article contains only three examples, many more can easily be imagined. Our hope is that this discussion of the practical benefits of civility will encourage lawyers facing currently or potentially uncivil
situations to consider all options before heading down what may, with the benefit of 20/20 hindsight, prove to be an unnecessarily difficult path.

Before the age of comparative fault, there was a tort doctrine called “last clear chance” that sometimes placed responsibility on a party who was not initially at fault but who nonetheless had the last opportunity to avoid the harm that ultimately occurred. This chapter suggests a kind of “last clear chance” approach to lawyer-lawyer and lawyer-client relationships—not just because of whatever moral benefits civility may bring but also because of its often high potential for effectiveness. While fighting fire with fire is dramatic, fighting fire with a fire extinguisher may do more to save the lawyer’s (and his client’s) property. And avoiding fire altogether through the use of fire prevention techniques will most often, if not always, be better still.

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“You are a cheat!” shouted the attorney to his opponent.

“And you are a liar!” bellowed the opposition.

Banging his gavel loudly, the judge interjected, “Now that both attorneys have been identified for the record, let’s get on with the case.”

—Anonymous

Perhaps it’s the grain of truth and the ring of familiarity that make this dusty old chestnut timelessly entertaining. The two lawyers share an acute professionalism problem, and the judge seems to be affirming that, in the case of these two, being unprofessional is part of their professional identity. At the end of the day, behaving unprofessionally is just what they do and who they are.
I. The True Professional: Passion and Reflection in Balance

Many thoughtful scholars, jurists, and lawyers have puzzled over the precise constituent elements of legal professionalism, with much good accomplished through the journey but no consensus reached—or perhaps even possible—on a comprehensive definition of professionalism. It seems fair to suggest, though, that we can all agree on a few foundational elements, such as honesty, civility, loyalty, and a service orientation. Other concise formulations of professionalism seem incontrovertible. For example, Neil Hamilton and Verna Monson have offered this definition, a distillation of extensive research:

Professionalism is an internalized moral core characterized by a deep responsibility or devotion to others—particularly the client—and some restraint of self-interest in carrying out this responsibility. . . . Professionalism [may also include] these elements: ongoing solicitation of feedback and self-reflection, an internalized standard of excellence at lawyering skills, integrity, honesty, adherence to the ethical codes, public service (especially for the disadvantaged), and independent professional judgment and honest counsel.

However we come to view the pieces of professionalism, it is plain that the words of the two lawyers in the opening dialogue above, and the intemperate and uncivil impulses necessarily underlying them, fall on the opposite end of the spectrum from the acts of a truly professional lawyer. In order to internalize both the reflective and passionate traits of the true professional, lawyers and judges must develop dependable habits that keep them from acting on impulse, out of anger, without careful reflection, or in other ways that undermine and defeat a commitment to civil and professional conduct.

What emerges from the components of professionalism is recognition of an overarching need for ongoing thoughtful discourse, decision-making, and reflection by lawyers and judges on their professional conduct. Whether an individual is confronted with an ethical dilemma, a hostile opposing counsel, a challenging client, or an injustice in the legal system, the individual’s response to the situation is governed by his or her unique
combination of emotional experience and logical thought process, which yields a final decision as to how to respond. Intense emotions may cause a person to impulsively make a decision that unwisely focuses on the immediate circumstances rather than the impact of the decision on the long-term goal. In fact, an impulsive first reaction tends to be evidence of the individual’s failure to effectively collect and process the information necessary to consider the long-term goal before deciding to take action. In other words, a failure to recognize and manage emotions may lead to less than optimal decision-making—the type of decision-making that in turn lacks professionalism.

The lawyers who chose to yell “cheat” and “liar” in the opening dialogue arguably began their emotional outbursts as a consequence of a failure to recognize and modulate their emotions. Perhaps in the heat of battle, each of their focuses narrowed to a short-term goal of aggressively attacking opposing counsel and defending their own integrity rather than considering longer-term goals such as the impact of their conduct upon the judge, upon their likelihood of success in the case, and upon their overall reputations.

II. The Idea of Mindfulness
Presuming for this discussion that these attorneys’ reactions stemmed from a lack of mindfulness, let’s rewind the exchange to see how it might have differed had at least one of these lawyers engaged in mindful decision-making. It would be good to start the analysis with an explanation of “mindfulness.” Jon Kabat-Zinn, the founder of the Mindfulness Based Stress Reduction Program, which is taught throughout the country, defines mindfulness as “paying attention in a particular way, on purpose, in the present moment, and nonjudgmentally.”

In other words, the idea of the practice of mindfulness is that it provides a heightened awareness of whatever event is occurring in your life in the present moment, and how you are thinking, feeling and experiencing the event. For example, think about a recent experience that you may have had when a family member, friend, colleague, professor, or even a stranger engaged in behavior that disappointed or offended you. How did you react or overreact?
Perhaps you lashed out in anger, cried in disbelief, or internalized your emotions in a way that caused you to ruminate about the unfairness of the situation throughout the day, upset because that person “ruined your day.” Any of one of these reactions would certainly not be uncommon, but do you remember what you were thinking, what emotions you experienced, and how the event may have affected your body in that moment? Perhaps you remember thinking about the unfairness of the other person’s conduct and feeling so angry that your heart was racing. Maybe you wish you had not said what you did, or conversely that you had spoken rather than felt paralyzed by your emotions.

The idea of mindfulness is to enable you to notice, in the moment, that you are experiencing these thoughts, feelings and bodily sensations so that you may place a pause between the event that is occurring and your response to the event. It is important to be conscious of the difference between the words react and response in this context. Reactivity is what may occur when a person instantaneously lashes out in anger even though that is not the optimal response to a situation. A person’s awareness of the fact that he is experiencing anger may provide the pause necessary to modulate the anger and respond in a more productive manner. The non-judgmental aspect of mindfulness suggests that a person should not judge his anger in the moment—just noticing that he is experiencing anger is often enough to positively influence his response.

Now, let’s turn back to the attorneys who yelled “cheat” and “liar.” What prompted the first attorney to shout “cheat” is unknown, but having been called a cheat in open court in front of a judge, the second attorney, no doubt, experienced a number of thoughts, feelings, and bodily sensations. In mindfulness terms, the shouting of “cheat” is referred to as an “event”—because life, whether in the legal profession or in our personal lives, may be viewed as a series of ongoing events. Imagine that this event—the yelling of the word cheat—has put a spiral in motion. Place on the spiral the likely thoughts, feelings and bodily sensations of the second attorney. He may be thinking, “What a jerk!” “How dare he embarrass me in front of the judge!” Or just, “that’s not true!” The accused cheat may be feeling anger, disgust, and humiliation. He may also be experiencing an increased pulse, stomach disturbance, or shaking inside.
As the second attorney’s thoughts, feelings, and bodily sensations travel around the spiral, they cause the type of instantaneous reactivity that in turn results in his bellowing the accusation “liar” to the first attorney. Of course the bellowing of “liar” has, no doubt, become an event for which the first attorney now has his own reactive spiral spinning with thoughts, feelings, and bodily sensations. And so, if the judge were not there to bang the gavel, one destructive spiral might continue to lead to another until some other intervening event occurred or one of the attorneys, whether in a belated moment of insight or perhaps mere exhaustion, jumps off of the spiral of reactivity.

III. The Importance of “The Pause”
How might mindfulness make a difference not only in this exchange, but also generally to stem the tide of reactivity that often occurs in interpersonal exchanges? The practice of mindfulness provides a pause between the event and an individual’s response. The pause may seem subtle, but it is nonetheless dramatic.

Had the second attorney in our example “paused,” he may have been able to abandon or rise above the spiral and avoid overreacting before the judge. The second attorney might have noticed that the first attorney was being highly unprofessional, that being called a cheat in front of judge was causing the second attorney to think that the first attorney is a liar, to feel extremely angry and to notice that his heart is racing. Having had this heightened awareness in the moment, the second attorney might have chosen to respond by simply stating his name for the record and calmly indicating that he was not in agreement with the first attorney’s characterization of his character. That response would have likely created quite a different impression before the judge and perhaps diffused or altered the first attorney’s state of mind.

The legal profession is replete with adversarial moments—it is the nature of our legal system. Lawyers are expected to zealously advocate for a client whether it is in a courtroom setting, a mediation, or a transactional negotiation. Often emotions run high as a client urges his lawyer to win “at all costs” or demands a “scorched earth” strategy. Opposing counsel may employ unfair tactics or a trial judge may not rule in
accordance with the current state of the law. In other words, the practice of law has no shortage of challenging situations in which lawyers may employ mindfulness to engage in professionalism by electing to thoughtfully respond. Alternatively, a lawyer may fall prey to the reactivity that often fuels unproductive and unprofessional behavior by overreacting rather than thoughtfully responding.

The question remains: how does one develop a mindful approach to life’s events, and is there any “evidence” that mindfulness really makes a difference? Perhaps, for the mind engaged in legal training, the evidence should be provided before the methodology. Although the contemporary application of mindfulness in the legal profession is often traced to a law and meditation retreat at Yale Law School in 1998, and mindfulness itself stems from teachings that are thousands of years old, the recent popularity of mindfulness in legal communities across the country may partially be the result of research being conducted by neuroscientists on the neurological effects of mindfulness.

In his book, *The Mindful Brain*, Dr. Daniel J. Siegel acknowledges the anecdotal evidence of the effectiveness of mindfulness but moves beyond it to discuss the relevant brain science. In chapter one, *A Mindful Awareness*, Dr. Siegel explains:

Preliminary research involving brain function hints at the view that mindfulness changes the brain. Why would the way you pay attention in the present moment change your brain? How we pay attention promotes neural plasticity, the change of neural connections in response to experience. What we’ll examine [in the book] are the possible mechanisms of how the various dimensions of mindful awareness emerge within the activity of the brain and stimulate the growth of connections in those areas. By diving deeply into direct experience, we will be able to shed some light on why research might reveal left-sided changes, right-sided changes, and global impacts on integrative functioning in the brain as a whole.

Dr. Siegel’s book was first published in 2007, and since then additional scientific findings have been reported that further support the impact of
mindfulness on the brain. For example, in 2009, Amishi Jha, a neuroscientist conducting research at the University of Pennsylvania, demonstrated that mindfulness practices were associated with changes to working memory and the increased ability to minimize distraction. At UCLA’s Laboratory of Neuro Imaging, Eileen Luders and her colleagues have studied the impact of meditation on the brain. In 2009 and 2011, they published the results of studies finding, among people who meditate, increased grey matter, stronger connections between brain regions, and less age-related brain thinning. Then in 2012, the same lab reported findings that mindfulness meditation was associated with larger amounts of gyrification—folding of the cortex—which may allow the brain to process information faster.

While it certainly is not necessary to be a scientist to understand or engage in mindfulness, it may be compelling, for the skeptical mind, to know that early findings from a variety of credible labs and neuroscientists across the country lend themselves to the conclusion that a mindfulness practice may not only assist a person in achieving more effective decision-making—and for the purposes of our discussion, thereby enhance professionalism—but also that mindfulness may literally cause positive changes in a person’s brain.

So then how does one engage in a mindfulness practice? Fundamentally, spending a few minutes sitting quietly, lowering, or closing the eyes, and concentrating upon the breath may begin a mindfulness practice. When the mind begins to wander, which it will, just gently bring concentration back to the breath. The process is not about attempting to have the mind go “blank,” but rather about noticing thoughts, emotions and bodily sensations, without judgment, and sending them on their way, perhaps to be revisited at a later time, while returning the focus to the breath.

The process is easy to describe, but may be difficult to achieve, and obtaining ultimate benefits requires regular practice. The benefits of mindfulness have been described through its use in diverse contexts. In health care facilities, mindfulness has been employed to assist with managing chronic pain; in schools, mindfulness has helped children with concentration and impulse control; and in large corporations, the goal is to improve creativity and the work environment.
In the professionalism context, mindfulness may be a tool for improved decision-making, which goes hand in hand with becoming not just a lawyer, but also a professional. Being a part of the legal profession means striving to effectively make difficult decisions while maintaining one’s personal values and reputation. Mindfulness may provide enhanced clarity, especially in stressful situations, and allow for better decisions. As Phillip Moffitt explains in his book, *Emotional Chaos to Clarity*:

> When you are being mindful, you are better able to clearly see what is happening in each moment of your life. As a result you gain new insights into your experience, which greatly enhances your ability to tolerate difficult situations and to make wiser decisions.

The beauty of mindfulness, and the clarity that it may provide, is that developing a mindfulness practice may be done anywhere, by a single person or in a group, in silence, or with music and a guided meditation. There are many books, websites, recorded guided meditations, classes, workshops, retreats, and community groups available to assist anyone interested in learning more about mindfulness and how to develop a mindfulness practice.

Law schools and legal communities have begun to focus on mindfulness in the context of the legal profession. University of Miami School of Law has a Mindfulness in Law Program and University of California Berkeley School of Law has a Berkeley Initiative for Mindfulness in Law. There are many other schools where professors have integrated mindfulness into their curriculum or where the school has offered mindfulness as an extracurricular program. A number of legal communities have begun mindfulness programming, such as the Miami-Dade Mindfulness in Law Task Force, which is comprised of lawyers, judges, and law students who are interested in both engaging in a mindfulness practice and increasing awareness of mindfulness throughout the legal community.

### IV. Conclusion

Mindfulness and professionalism both have many dimensions, and people certainly may disagree about the significance of a particular brain.
imaging study or the exact definition of legal professionalism. It is difficult to dispute, however, that enhanced decision-making based upon greater mental clarity is a valuable tool for lawyers.

In sum, mindfulness may be a valuable tool to add to your professionalism toolbox. Building a career imbued with mindfulness may naturally lead you—and those who take your cue, to a state of professionalism, which may not only enhance your reputation and success, but also will assist in elevating the stature of the legal profession in our society.

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