

3-2004

# Mindfulness: Foundational Training for Dispute Resolution

Leonard L. Riskin

*University of Florida Levin College of Law*, [RiskinL@law.ufl.edu](mailto:RiskinL@law.ufl.edu)

Follow this and additional works at: <http://scholarship.law.ufl.edu/facultypub>

 Part of the [Dispute Resolution and Arbitration Commons](#), and the [Legal Education Commons](#)

---

## Recommended Citation

Leonard L. Riskin, *Mindfulness: Foundational Training for Dispute Resolution*, 54 J. Legal Educ. 79 (2004), available at <http://scholarship.law.ufl.edu/facultypub/636>

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in UF Law Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact [outler@law.ufl.edu](mailto:outler@law.ufl.edu).

# Mindfulness: Foundational Training for Dispute Resolution

Leonard L. Riskin

I want to begin with a profound problem that afflicts all of us as teachers, students, and practitioners of dispute resolution. It was brought home to me about two weeks after the attacks of September 11, 2001, in an e-mail message I received from a friend who lives in Washington, D.C., not far from the Pentagon. My friend told me that he had been abroad on September 11, and on his return he found an e-mail message that included the following reading:

If you can start the day without caffeine or pep pills,  
 If you can be cheerful, ignoring aches and pains,  
 If you can resist complaining and boring people with your troubles,  
 If you can eat the same food every day and be grateful for it,  
 If you can understand when loved ones are too busy to give you time,  
 If you can overlook when people take things out on you when, through no fault of yours, something goes wrong,  
 If you can take criticism and blame without resentment,  
 If you can face the world without lies and deceit,  
 If you can conquer tension without medical help,  
 If you can relax without liquor,  
 If you can sleep without the aid of drugs,  
 Then you are probably a dog.<sup>1</sup>

## **A Problem: Mindlessness in Counseling, Negotiating, and Mediating**

It is a fact of the human condition that we are suffused with fears, insecurities, passions, impulses, judgments, rationalizations, assumptions, biases, and the mental shortcuts that some academics call “heuristics.”<sup>2</sup> These can be more or less available to our conscious awareness, and we can be more or less able to resist them.

Such mental and emotional influences, of course, help guide us through life and through professional activities, including teaching, resolving disputes,

Leonard L. Riskin is the C. A. Leedy professor of law and the Isidor Loeb professor of law at the University of Missouri—Columbia.

1. Robert D. Hutchison, *Untitled*, on Web site of Lion Country Supply <<http://www.lcsupply.com/jokearch.htm>> (last visited Jan. 13, 2004).
2. For a discussion of heuristics, see Chris Guthrie, *Insights from Cognitive Psychology*, 54 *J. Legal Educ.* 42 (2004).

and lawyering. The problem is that they also can interfere with our ability to do these activities well. They can, for instance, draw our attention away from where we want it to be. When we want to listen to a client or read a document, we may be distracted by worries about whether the client likes us, or by thoughts (or chains of thoughts) about almost anything—the laundry, whether we made the right career choice, or why we didn't schedule that trip to Hawaii. The less conscious awareness we have of these impulses, fears, passions, thoughts, and habitual assumptions and behaviors, the more likely we are to succumb to them.

The mind tends to wander, and very often we do not realize where it has gone. Usually it is dwelling in the past or future, keeping us from paying attention to the present moment.<sup>3</sup> Understood in this way, intermittent mindlessness can affect and afflict just about everyone in conducting virtually any activity.

Mindlessness impairs our work as practitioners of dispute resolution in several ways. For example, it could mean that a mediator or negotiator is not very “present” with the other participants or with himself, i.e., not fully aware of what is going on.<sup>4</sup> This diminishes the professional's ability to gather information and to listen to, and understand, others and himself, and even to achieve satisfaction from his work.<sup>5</sup> The second problem is that, in the grip of mindlessness, we sometimes rely on old habits and assumptions, rather than deciding what behavior is most suitable in the precise circumstances we are encountering.<sup>6</sup> To Harvard psychology professor Ellen Langer, mindlessness means “the light's on but nobody's at home.”<sup>7</sup> Manifestations include being “trapped by categories,”<sup>8</sup> “automatic behavior,”<sup>9</sup> and “acting from a single perspective.”<sup>10</sup> As mediators, for instance, we might routinely impose the same rules of procedure (e.g., that we caucus immediately after the first joint session—or that we never caucus), case after case, irrespective of the differences in issues and parties.

3. Can you think of a time when you read a few pages of a book, then realized you didn't remember anything? Where was your mind? Or try this: close your eyes and focus on the sensation of the breath as it enters and leaves the nostrils. To help yourself stay focused, count each exhalation up to ten. When you reach ten, or when you realize you have lost track, begin again at one. All the while, notice what's on your mind, in addition to—or instead of—the breath and the counting.
4. See Daniel Bowling & David Hoffman, *Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation*, in *Bringing Peace into the Room*, eds. Daniel Bowling & David Hoffman, 13 (San Francisco, 2003).
5. See Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Benefits of Mindfulness Meditation to Law Students, Lawyers and Their Clients*, 7 *Harv. Negot. L. Rev.* 1, 23 n.108 (2002).
6. See *id.* at 13.
7. Ellen J. Langer, *Mindfulness* 9 (Reading, 1989). Langer's idea of mindfulness is based on a Western, thinking-oriented conception, whereas the Eastern idea of mindfulness, on which most of this article is based, is grounded on a nonjudgmental observation. Nonetheless, there is substantial overlap between the two ideas. See Riskin, *supra* note 5.
8. See Langer, *supra* note 7, at 11–12.
9. *Id.* at 12–16.
10. *Id.* at 16–18.

A great deal of what we teach about negotiation, mediation, and choosing or building dispute resolution processes (which often involves client interviewing and counseling) requires functioning in fresh ways. To take a familiar example, in teaching negotiation and mediation most of us encourage students to engage in “value-creating”<sup>11</sup> or “value-distributing”<sup>12</sup> forms of negotiation instead of relying exclusively on the “value-claiming” approaches that dominate much of legal education and lawyering. We also try to teach them about the tension between value-distributing and value-creating approaches, and we encourage them to pay attention to this tension, moment to moment, in negotiation.<sup>13</sup> Most of us have experienced at least three kinds of problems with such teaching and its outcomes. First, some students—in both law school and CLE classes—cannot relate to value-creating approaches. This is due at least partially to the fact that they are so strongly attached to value-distributing assumptions that they do not recognize them as assumptions, instead believing that they represent a kind of self-evident truth about appropriate negotiation behavior.

Second, some students learn too much of a lesson from their introduction to value-creating approaches, almost blindly embracing and identifying with them. As a result, they ignore the tension between value creating and value claiming, and thereby become vulnerable to exploitation by a negotiation counterpart who emphasizes value claiming.

Third, many students who do comprehend the philosophy, strategies, and risks of value-creating approaches, and even take command of them in an academic setting, have trouble implementing them in practice. In the fire of actual negotiations and mediations, they fall back on habitual value-claiming perspectives, strategies, and tactics, which are supported by an extensive—and sometimes subconscious—network of assumptions and emotions, many of which may be closely connected to their sense of identity.<sup>14</sup>

Similar kinds of failures hobble efforts to teach other new approaches to dispute resolution and lawyering that rely on mindsets that differ dramatically from the traditional, narrow, adversarial perspective, which I have elsewhere called the lawyer’s standard philosophical map.<sup>15</sup> Examples include transfor-

11. David A. Lax & James K. Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain* (New York, 1986).

12. See Robert H. Mnookin et al., *Beyond Winning: Negotiating to Create Value in Deals and Disputes* 11–43 (Cambridge, Mass., 2000).

13. *Id.*

14. Some might disagree with this analysis. They would argue that the “value-creating” approach is naive; that is, it can work well in role-play settings but in real negotiations is often inappropriate.

15. See Leonard L. Riskin, *Mediation and Lawyers*, 43 Ohio St. L.J. 29, 43 (1982).

mative mediation,<sup>16</sup> narrative mediation,<sup>17</sup> understanding-based mediation,<sup>18</sup> as well as problem solving,<sup>19</sup> collaborative law,<sup>20</sup> preventive law,<sup>21</sup> and holistic lawyering.<sup>22</sup>

Teachers and trainers commonly employ a range of instructional methods to teach perspectives and skills necessary to appropriately implement the new approaches to negotiation, mediation, and lawyering described above. In addition to readings, lectures, and demonstrations, these include role-play simulations dealing with such activities as listening and brainstorming, as well as practice in specific processes such as interviewing and counseling, negotiation, mediation, and journaling and other reflective practices, including intensive "processing" of exercises and other forms of supervision.

16. Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco, 1994); Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 *Mediation Q.* 263 (1996).
17. John Winslade & Gerald Monk, *Narrative Mediation: A New Approach to Conflict Resolution* (San Francisco, 2000).
18. For a look at this approach, developed by Jack Himmelstein, Gary Friedman, and Robert Mnookin, see the videotape, *Program on Negotiation at Harvard Law School & Center for Mediation in Law, Saving the Last Dance* (Cambridge, Mass., 2001).
19. Paul Brest & Linda Hamilton Krieger, *Lawyers as Problem-Solvers*, 72 *Temp. L. Rev.* 811 (1999); Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 *Temp. L. Rev.* 785 (1999). In 1997 California Western School of Law established the William J. McGill Center for Creative Problem-Solving, "an interdisciplinary think tank and training institute." See <<http://www.cwsl.edu/main/home.asp>> then click link for Creative Problem Solving (last visited Mar. 11, 2002).
20. Collaborative law is grounded on the agreement that the lawyer will represent the client only in negotiations (generally conducted through meetings that include lawyers and clients) that seek a fair and comprehensive settlement; if the client decides to litigate, the collaborative lawyer facilitates the transition to adversarial counsel. See Pauline H. Tesler, *Collaborative Law: What It Is and Why Lawyers Need to Know About It*, in *Practicing Therapeutic Jurisprudence*, eds. Dennis P. Stolle et al., 187 (Durham, N.C., 2000); William F. Coyne Jr., *The Case for Settlement Counsel*, 14 *Ohio St. J. on Disp. Resol.* 367 (1999); David A. Hoffman & Rita S. Pollak, 'Collaborative Law' Looks to Avoid Litigation, 28 *Mass. L. Wkly.* 1989 (2000).
21. See Robert M. Hardaway, *Preventive Law: Materials on a Non Adversarial Legal Process* (Cincinnati, 1997).
22. William van Zyverden, president of the International Alliance of Holistic Lawyers, says that "Holistic Law" . . . is concerned with the 'whole' client: past, present, future, body, mind, spirit, and unified field connection to each other and all that is. Our role becomes a sharing of our own humanity as equals, as Spiritual Companions." *Expressing Holistic Law, The Whole Lawyer* (Middlebury, Vt.), Spring 2000, at 1, 6. The organization's Web site is <<http://www.iah1.org>>. For an example of a holistic approach to public defender work, see David E. Rovella, *The Best Defense*, *Nat'l L.J.*, Jan. 31, 2000, at 1.

Susan Daicoff considers many of these approaches, and a few others, "vectors" in a "comprehensive law movement," which share a "common goal of a more comprehensive, humane and psychologically optimal way of handling legal matters." *The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*, in *Practicing Therapeutic Jurisprudence*, *supra* note 20, at 465-66.

I do not mean to argue here that any of these approaches are inherently or always superior to traditional approaches. They are, however, the frames that many of us mediation and negotiation teachers and trainers use to affect mindsets and practices of our students, hoping thereby to improve decision making in and about dispute resolution, to promote better outcomes to disputants and society, and to offer practitioners more satisfaction in their work. The reality that our teachings often fail to have the effects we intended is a source of great concern to many of us.

Students learn from each of these activities, of course. They do so partly in the same way that football players learn from practice drills in blocking and tackling, followed by critiques of their performance. But football players cannot execute blocks and tackles well unless they have, among other things, a certain minimal amount of strength. For that reason, football training routinely includes weight lifting and other methods of building muscles.

Similarly, for a person to appropriately implement the strategies associated with the new approaches to mediation and negotiation and lawyering, she must have a set of foundational capacities including awareness, emotional sophistication, and understanding. But negotiation and mediation instruction—especially that provided to law students and lawyers—does not ordinarily provide such foundational training. Instead, teachers and trainers tend to assume that lawyers and law students already have capabilities of attention and awareness that will enable them not only to understand new approaches but also to implement them, when and as appropriate, in professional practice. Obviously, this assumption often is invalid.<sup>23</sup>

The next section explains a premier method for developing the necessary foundational capacities.

### **A Potential Solution: Mindfulness in Practice and Mindfulness Meditation**

Mindfulness, as I use the term, means being aware, moment to moment, without judgment, of one's bodily sensations, thoughts, emotions, and consciousness.<sup>24</sup> It is a systematic strategy for paying attention and for investigating one's own mind that one cultivates through meditation and then deploys in daily life. The meditation practice begins with developing concentration, usually by focusing on the breath. Next the meditator directs his attention to bodily sensations, emotions, and thoughts, then works toward "bare attention," a nonjudgmental moment-to-moment awareness of bodily sensations, sounds, thoughts, and emotions as they arise and fall out of consciousness. Mindfulness meditation (also known as insight meditation and vipassana meditation) both requires and produces a measure of equanimity, which reinforces the ability to fix attention where we want it to be.<sup>25</sup>

23. Recently commentators have called for more attention to the role of emotions in negotiation and mediation, or for training in emotional intelligence for mediators and lawyers. See Lori Schreier, *Emotional Intelligence and Mediation Training*, 20 *Conflict Resol. Q.* 99 (2002); Marjorie A. Silver, *Love, Hate and Other Emotional Interference in the Lawyer/Client Relationship*, 6 *Clinical L. Rev.* 259 (1999); Daniel L. Shapiro, *A Negotiator's Guide to Emotion: Four "Laws" to Effective Practice*, *Disp. Resol. Mag.*, Winter 2001, at 3, 4.
24. See Jon Kabat-Zinn, *Full Catastrophe Living* (New York, 1990); Joseph Goldstein, *Insight Meditation* (New York, 1993).
25. Two important distinctions are in order.

First, mindfulness, as I use the term, draws on ancient Buddhist practices based on a nonjudgmental moment-to-moment observation, which often is considered a nonthinking approach. It is frequently confused or conflated, however, with the Western idea of mindfulness as elaborated by Ellen Langer. See Langer, *supra* note 7; Ellen J. Langer, *The Power of Mindful Learning* (Reading, 1997). Although the two concepts have much in common, they also diverge significantly in that Langer's mindfulness is based on thinking.

Second, it is important to distinguish mindfulness from the other major form of meditation, known as "concentration." In concentration meditation, the meditator focuses attention exclusively on one object, such as a mantra or an image or a mental state. See Daniel

The practice has a number of other potential benefits that motivate people to participate. It commonly helps people deal better with stress, improve concentration, develop self-understanding (which helps them clarify their own goals and motivations) and understanding of others, and feel compassion and empathy.<sup>26</sup> Recently scientists have documented that mindfulness meditation also improves the functioning of the meditator's immune system and even produces "happiness," as measured by brainwave activity, actually shifting a person's disposition, not just her mood.<sup>27</sup> In Buddhist philosophy, meditation is an important part of the quest for freedom from the suffering caused by craving and aversion.<sup>28</sup>

It also seems likely to improve performance in virtually any kind of activity. The kinds of outcomes it fosters correlate with success in a variety of fields. Daniel Goleman—a psychologist, journalist, and authority on meditation—has articulated the concept of emotional intelligence, which he distinguishes from academic intelligence, the basis for the IQ and most other intelligence tests.<sup>29</sup> This idea of emotional intelligence entails five "basic emotional and social competencies": self-awareness, self-regulation, motivation, empathy, and social skills.<sup>30</sup> Goleman argues, marshaling a great deal of empirical evidence, that emotional intelligence is much more important than academic intelligence in predicting success at virtually any occupation or profession—assuming, of course, an adequate level of academic intelligence.<sup>31</sup>

As I have shown above, mindfulness meditation can help develop the first four of these emotional intelligence competencies—self-awareness, self-

Goleman, *The Varieties of the Meditative Experience* 7–20 (New York, 1977); Henepola Gunaratana, *Mindfulness in Plain English* 3 (Boston, 1992). In the West perhaps the most popularly-known examples of concentration meditation are transcendental meditation, see Charles N. Alexander et al., *Transcendental Meditation, Self-Actualization, and Psychological Health: A Conceptual Overview and Statistical Meta-Analysis*, 6 *J. Soc. Behav. & Personality* 189 (1991), and the method known as the relaxation response, developed by Herbert Benson of Harvard Medical School. See Herbert Benson, *Beyond the Relaxation Response* (New York, 1984).

26. See Riskin, *supra* note 5, at 8.

27. Richard J. Davidson et al., *Alterations in Brain and Immune Function Produced by Mindfulness Meditation*, 65 *Psychosomatic Med.* 564 (2003). Davidson and his colleagues found that meditators had increased levels of brainwave activity in the left prefrontal cortex (which is known to correlate with the experience of happiness) and decreased activity in the right prefrontal cortex. High activity in the right prefrontal cortex is associated with the experiences of stress and anger. See also Daniel Goleman, *Finding Happiness: Cajole Your Brain to Lean to the Left*, *N.Y. Times*, Feb. 4, 2003, at 5. For extensive discussions of the relationships between Buddhist psychology and the Western neuro-psychological research, see Daniel Goleman, *Destructive Emotions: A Scientific Dialogue with the Dalai Lama* (New York, 2003) [hereinafter *Destructive Emotions*].

28. See Matthew Flickstein, *Swallowing the River Ganges: A Practice Guide to the Path of Purification* 7–10 (Boston, 2001); Joseph Goldstein, *Experience of Insight: A Simple and Direct Guide to Buddhist Meditation* 7 (Boston, 1976); U. Silananda, *The Four Foundations of Mindfulness* 159–66 (Boston, 1990).

29. Daniel Goleman, *Emotional Intelligence: Why It Can Matter More than IQ* (1995); Daniel Goleman, *Working with Emotional Intelligence* (New York, 1998) [hereinafter *Working*].

30. Goleman, *Working*, *supra* note 29, at 318.

31. See *id.* at 5, 6. For a recommendation that law firms screen prospective associates for emotional intelligence or try to help lawyers develop it, see Lawrence R. Richard, *The Importance of Hiring "Emotionally Intelligent" Associates*, *Pa. Law.*, Jan.-Feb. 2000, at 18.

regulation, motivation, and empathy. These, in turn, are likely to help produce the fifth emotional intelligence competency—social skills.<sup>32</sup>

Although mindfulness meditation derives from ancient practices taught by the Buddha, in recent years it has found employment in a variety of secular settings. In the U.S., for instance, specialized programs have appeared for medical patients in chronic pain; professional basketball players; journalists; undergraduate, nursing, and medical students; corporate and foundation executives; and Green Berets.<sup>33</sup> Most important for our purposes, extensive meditation instruction has been offered to lawyers in at least three large law firms (the Boston offices of Hale and Dorr<sup>34</sup> and Nutter, McClennan & Fish<sup>35</sup> and the Minneapolis office of Leonard, Street & Deinard<sup>36</sup>) and to persons who work in the criminal justice system.<sup>37</sup> A variety of programs—ranging widely in length, intensity, and scope—have been offered to law students at Cardozo, Columbia, Denver, Hamline, Harvard, Hastings, Miami, Missouri—Columbia, North Carolina, Stanford, Suffolk, and Yale.<sup>38</sup> Mindfulness meditation also has been a central focus of many programs for lawyers across the U.S., ranging from five-day retreats to brief introductory sessions, some of which have carried CLE credit.<sup>39</sup> Some of the law school and post-law school efforts have had a range of focuses, including managing stress, developing spiritually, clarifying motivations, or enhancing skills in law school, law practice, or law teaching.

In recent years mindfulness meditation has appeared in a variety of programs in connection with teaching negotiation or mediation. Mindfulness can

32. These emotional intelligence elements provide the foundation for, but do not guarantee, the development of certain practical skills, or emotional *competencies*. As Goleman explains, “[B]eing good at serving customers is an emotional competence based on empathy. Likewise, trustworthiness is a competence based on self-regulation, or handling impulses and emotions well.” Goleman, Working, *supra* note 29, at 25.
33. See Riskin, *supra* note 5, at 3–8.
34. See *id.* at 3, 33.
35. E-mail messages from Geoffrey Hargraves-Heald to Leonard L. Riskin (May 3–June 6, 2002) (on file with author).
36. See Steven Keeva, A Mindful Law Practice, A.B.A. J., Mar. 2004, at 78.
37. Protecting and Serving Without Stress or Fear: A Mindfulness Retreat for Those Working in the Fields of Law Enforcement and Criminal Justice (Green Lake, Wis., Aug. 24–29, 2003) (brochure).
38. The programs at Cardozo, Denver, Hastings, Miami, Missouri—Columbia, and Suffolk were part of for-credit courses. The others were not. See Riskin, *supra* note 5, at 38–40. For information on the Hamline program I am indebted to Robert Zeglovitch of Leonard, Street & Deinard (e-mail message to Leonard L. Riskin (Feb. 24, 2004) (on file with author)).
39. See Riskin, *supra* note 5, at 33–38. The law program of the Center for Contemplative Mind in Society has been an important force in promoting this work. For a comprehensive listing of recent and forthcoming events dealing with contemplative practices and law, see its Web site <<http://www.contemplativemind.org>> (last visited Jan. 16, 2004); for other such listings, see the Web page I recently established for the Initiative on Mindfulness in Law and Dispute Resolution <<http://www.law.missouri.edu/csdr/mindfulness.htm>> (last visited Jan. 16, 2004). See also the Web site of the Spirit Rock Meditation Center in Northern California for information about meditation retreats for lawyers conducted by James Baraz and Dennis Warren <<http://www.spiritrock.org>> (last visited Jan. 16, 2004); Dennis M. Warren, Using Meditation Processes to Enhance the Practice of Law, N.J. Law., Aug. 2002, at 32.



help negotiators and mediators in several ways. It provides methods for calming the mind, concentrating, experiencing compassion and empathy, and achieving an awareness of, and “distance” from, thoughts, emotions, and habitual impulses that can interfere with making good judgments and with building rapport and motivating others. Thus, it can help us make appropriate strategic decisions, moment to moment. In a negotiation, for instance, when our counterpart issues a threat and we feel an impulse to retaliate, mindfulness helps us to “insert a wedge of awareness”<sup>40</sup> and to examine that impulse<sup>41</sup> and decide whether retaliation is more appropriate than another move that would more likely foster value creating, understanding, or healing. In addition, there is evidence that a positive mood enhances performance in problem-solving negotiation.<sup>42</sup> And it seems reasonable to suspect that mindfulness could help negotiators be more aware of certain deep assumptions, including those based on ethnicity or culture, and of psychological processes that can interfere with wise decision making, such as reactive devaluation, optimistic overconfidence, risk aversion, and anchoring.<sup>43</sup>

Mindfulness allows mediators to make better judgments about how the mediation process should work because it enables them to keep a focus on goals and to maintain a moment-to-moment awareness (to be “present” with themselves and others).<sup>44</sup> In addition, a mediator’s presence, especially her degree of calm, can dramatically affect the participants’ moods and conduct.<sup>45</sup>

Inspired in part by such goals, a significant number of programs that seek to integrate mindfulness into dispute resolution learning or practice have taken place since 1999.

- The Program on Negotiation (PON) at Harvard Law School and the *Harvard Negotiation Law Review* have sponsored live and print symposia on Mindfulness in Law and ADR.<sup>46</sup> The PON and the Harvard Negotiation Insight Initiative will sponsor an advanced mediation training program based on mindfulness in June and July 2004.<sup>47</sup>

40. See Flickstein, *supra* note 28, at 28.

41. See Pat K. Chew, The Pervasiveness of Culture in Conflict, 54 J. Legal Educ. 60 (2004).

42. See Riskin, *supra* note 5, at 57–58.

43. See Guthrie, *supra* note 2; Robert H. Mnookin, Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict, 8 Ohio St. J. on Disp. Resol. 235 (1993).

44. For a comprehensive discussion of mindfulness in mediation, see Tom Fisher, Who’s Mindful the Mediator? Mindfulness in Mediation, ADR Bull., Mar. 2003, at 1 (Australia). See also Schreier, *supra* note 23.

45. See Bowling & Hoffman, *supra* note 4, at 11.

46. See symposium, Mindfulness in Law and ADR, 7 Harv. Negot. L. Rev. 1 (2002). A Webcast of the live symposium is available at <[www.pon.harvard.edu/news/2002/riskin\\_mindfulness.php3](http://www.pon.harvard.edu/news/2002/riskin_mindfulness.php3)>.

47. This Workshop on Mindfulness and Mediation, the first Summer Learning Forum of the Harvard Negotiation Insight Initiative, will be taught by Leonard Riskin, Ferris Buck Urbanowski, and Erica Fox. See [www.pon.harvard.edu/hnii](http://www.pon.harvard.edu/hnii) (last visited Mar. 25, 2004).

- Workshops (from one to seven hours) on mindfulness for mediators have focused on developing mindfulness skills and applying them in negotiation and mediation settings.<sup>48</sup>
- Along with Ferris Buck Urbanowski, I have coconducted two-and-a-half-day advanced mediation training programs based on mindfulness in California, Iowa, and Texas.<sup>49</sup>
- Full-day programs have given equal emphasis to negotiation and mindfulness.<sup>50</sup>
- At the University of Miami, Clark Freshman and Adele Hayes have introduced mindfulness and other forms of meditation into a negotiation course and have tried to measure the effects on negotiation.<sup>51</sup> I have introduced mindfulness meditation into courses on mediation taught by Lela Love at Cardozo Law School.
- At the University of Missouri—Columbia, under a grant from the American Council of Learned Societies, I have thoroughly infused mindfulness meditation into a course called Understanding Conflict, part of the LL.M. in Dispute Resolution, which includes conflict theory and attention to the relationships between internal and external conflict.<sup>52</sup> I will offer a new course called Emotional Intelligence in Law, which will be organized around mindfulness, in the fall 2004 semester.
- I have offered mindfulness meditation instruction as an optional additional feature of dispute resolution courses I taught at the University of Michigan Law School and in numerous mediation training programs.

48. Since 1998 I have led roughly 25 such events at dispute resolution conferences and for dispute resolution organizations. Several times I have coconducted such sessions with Daniel Bowling. For partial listings, see <<http://www.law.missouri.edu/csdr/mindfulness.htm>>. Tom Fisher has presented similar workshops in Australia; for partial listings, see <<http://www.unisa.edu.au/emrg/apmf/2001/Presenters.htm>> (last visited Jan. 26, 2004). And Tuan Pham has presented similar workshops at dispute resolution conferences in Virginia (see <<http://www.med.8works.com/Professionals.htm>> (last visited Jan. 16, 2004)) and at the ABA Section of Dispute Resolution conference, Resolution and Resilience, in New York, April 15–17, 2004. Others have offered mindfulness workshops for lawyers, without an explicit connection to mediation or negotiation. Often these programs include listening exercises. See Riskin, *supra* note 5, at 33–45.

49. The most recent of these programs, held at Pepperdine University's Straus Institute for Dispute Resolution, was entitled Expanding Mediation: Mindfulness and the New Grid, and linked meditation instruction to a new system of understanding mediation that is elaborated in Leonard L. Riskin, Decision-Making in Mediation: The New Old Grid and the New New Grid System, 79 Notre Dame L. Rev. 1 (2003).

50. At the annual Michigan Dispute Resolution Conference, in November 2000, Scott Peppet of the University of Colorado Law School and I conducted a daylong workshop on Building Negotiation Awareness, which included mindfulness meditation, to help professionals carry out some of the ideas suggested in the book on which the program was based, Mnookin et al., *supra* note 12.

51. See Clark Freshman et al., Adapting Meditation to Promote Negotiation Success: A Guide to Varieties and Scientific Support, 7 Harv. Negot. L. Rev. 67 (2003).

52. A recent syllabus is available at <[http://www.law.missouri.edu/csdr/mindfulness\\_resources.htm](http://www.law.missouri.edu/csdr/mindfulness_resources.htm)> under Books and Resources link (last visited Jan. 16, 2004)

The education and training programs that deal with mindfulness and negotiation or mediation include mindfulness meditation instruction and practice as well as exercises and discussions on how to bring mindful awareness into professional practice and other aspects of daily life. They generally begin with the basics: meditating on the breath (in part to enhance the ability to concentrate) and on sound, bodily sensations, emotions, and thoughts. All of this helps prepare the student for what is called “bare attention,” an awareness of whatever passes through one’s consciousness. Most of these programs present a very brief introduction to a small range of meditative practices, sometimes including yoga. Although students typically learn some techniques they can employ immediately, the leaders of such programs also hope the students will be inspired to develop their mindfulness through continued meditation and study, alone and with groups.<sup>53</sup>

Exercises on listening (active or not) often form important parts of such programs. Students, already in a reasonably mindful state, are asked to engage in activities in which their ability to listen is challenged by emotional or other distractions, and they are asked to be aware of these distractions. The programs also include exercises on negotiation that encourage the students to notice and examine the assumptions about negotiation that they hold and implement. Similarly, in mediation training, exercises are intended to examine assumptions, strategies, and techniques, at many levels of the decision-making process. In addition, students notice the related bodily sensations and emotions.

### **Analysis and Recommendations**

The programs that combine mindfulness instruction with negotiation and mediation are exploratory and preliminary. I hope that they represent the beginning of a sustained effort to provide law students, lawyers, and mediators with foundational skills that will help them improve services to clients and society. As part of building such a larger effort, I think there are a number of issues to explore, including the following.

- What are appropriate goals for introducing mindfulness meditation into dispute resolution (or legal) education and training?
- What are the most appropriate formats for introducing mindfulness meditation into dispute resolution training and education?
- When and for what purposes is it most appropriate to teach mindfulness meditation as an integral part or major focus of a negotiation or mediation course or training? As an optional addition? To what extent is it important to explicitly link mindfulness to negotiation and mediation or other lawyering skills, as opposed to allowing mindfulness practices to influence our students as they will?

53. The semesterlong course on Understanding Conflict at the University of Missouri School of Law is long enough to allow students to develop a consistent meditation practice, and some have done so. The length also permits much more substantial attention to conflict theory and the relationships among internal conflict, perception, and external conflict than is possible in the short workshops.

- When and in what circumstances and for what purposes is it more appropriate or useful to introduce other meditative practices,<sup>54</sup> or practices from other wisdom traditions?<sup>55</sup>
- What are the advantages and disadvantages of separating these practices from the philosophical or religious thought structures from which they derive?<sup>56</sup>
- When and in what circumstances is it appropriate to link mindfulness with other practices for enhancing awareness?<sup>57</sup>
- What kinds of empirical research would help us document actual and potential benefits of mindfulness in the context of law school and dispute resolution education and training?<sup>58</sup>
- What are the potential risks of introducing mindfulness into negotiation training?<sup>59</sup>

\* \* \* \* \*

In this brief essay I meant to demonstrate the potential value of mindfulness meditation and to suggest questions to address as we move forward. The future of this work is not clear to me.<sup>60</sup> It seems counter to many established practices and perspectives in our field. But there is reason for optimism. The

54. See Freshman et al., *supra* note 51. For a discussion of the use of transcendental meditation (TM) in rehabilitation, see Michael S. King, Deterrence, Rehabilitation and Human Nature: The Need for a Holistic Approach to Offenders, 24 *Crim. L.J.* (Australia) 335 (2000). Studies have addressed a variety of other potential benefits of TM. See C. N. Alexander et al., Transcendental Meditation, Self-Actualization and Psychological Health, 6 *J. Soc. Behav. & Personality* 189–247 (1991); C. N. Alexander, Effects of the Transcendental Meditation Program on Stress Reduction, Health, and Employee Development: A Prospective Study in Two Occupational Settings, 6 *Anxiety, Stress and Coping* 245–62 (1993); E. N. Aron & A. Aron, Transcendental Meditation Program and Marital Adjustment, 51 *Psychol. Rep.* 887–90 (1982); R. W. Cranson et al., Transcendental Meditation and Improved Performance on Intelligence-Related Measures: A Longitudinal Study, 12 *Personality & Individual Differences* 1105–16 (1991); K. T. So & D. W. Orme-Johnson, Three Randomized Experiments on the Longitudinal Effects of the Transcendental Meditation Technique on Cognition, 29 *Intelligence* 419–40 (2001); F. Travis, The TM Technique and Creativity: A Longitudinal Study of Cornell University Undergraduates, 13 *J. Creative Behav.* 169–80 (1979).
55. The Harvard Negotiation Insight Initiative is devoted to exploring the potential contributions to negotiation that might be provided by contemplative practices from the wisdom traditions of various religions; see <[http://www.pon.harvard.edu/research/projects/b\\_drp2.php3](http://www.pon.harvard.edu/research/projects/b_drp2.php3)> (last visited Feb. 28, 2004). See generally the Web site of the Center for Contemplative Mind in Society <<http://www.contemplativemind.org>>.
56. For efforts to use contemplative practice in a variety of educational programs, see E. D. Sarath, *Contemplative Practices in Education: The Next Wave?* 27 *Innovative Higher Educ.* 215 (2003).
57. See Fisher, *supra* note 44; Shreier, *supra* note 23. Paul Ekman of the University of California—San Francisco Medical School is developing a program on Cultivating Emotional Balance that is built on a secular version of mindfulness as well as techniques from Western psychology. See Goleman, *Destructive Emotions*, *supra* note 27, at 362–64. Further information is available at <<http://www.MindandLife.org>>.
58. See Freshman et al., *supra* note 51.
59. See Scott R. Peppet, Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining, 7 *Harv. Negot. L. Rev.* 83 (2002); Riskin, *supra* note 5, at 63–66.
60. See Riskin, *supra* note 5, at 63–66.

use of mindfulness and other contemplative practices is growing rapidly in society and in the legal profession. Numerous organizations have supported programs in mindfulness for lawyers or mediators. These include established entities, such as the AALS Section on Dispute Resolution, the ABA Section of Dispute Resolution, the CPR Institute for Dispute Resolution, the Association for Conflict Resolution, and prominent law firms and law schools. In addition, many established meditation organizations and teachers are available to provide training and practice opportunities. Some of these—such as the Center for Mindfulness in Medicine, Health Care and Society; the Center for Contemplative Mind in Society; and the Spirit Rock Meditation Center—already provide meditation instruction to lawyers. And two newly created programs—the Harvard Negotiation Insight Initiative<sup>61</sup> and the Initiative on Mindfulness in Law and Dispute Resolution at the University of Missouri—Columbia School of Law<sup>62</sup>—will bring additional energy and people into this work.

In order to plan and implement programs in mindfulness and dispute resolution—or to decide not to do so—we must be clear about our intentions. Mindfulness meditation can serve a range of goals, from lightening up, to improving our professional practices and our lives, to a kind of spiritual freedom. And, of course, nothing is more helpful in understanding our goals and the mental and emotional obstacles to achieving them than the nonjudgmental awareness that is the essence of mindfulness.

61. This program is dedicated to studying contemplative practices from various religious wisdom traditions to see what light they can shed on negotiation theory and practice. Message from Frank Sander, Michael Wheeler, and Erica Fox. See <[http://www.pon.harvard.edu/research/projects/b\\_drp.php3](http://www.pon.harvard.edu/research/projects/b_drp.php3)>.

62. See <<http://www.law.missouri.edu/csdr/mindfulness.htm>> (last visited Mar. 21, 2004).