

What is Mindfulness, and What Does it Have to do with Lawyering?

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Let's begin by defining our terms. By mindfulness I mean simply taking a mental step back and observing in a nonjudgmental way what is happening in our inner and outer experience. There's nothing mystical or weird or woo-woo about it. It's simply the noticing of our experience while we're engaged in our experience. You may object: *aren't I always aware of my experience? If I weren't aware of my experience, I'd be either asleep or unconscious. Or dead.* Yes, we're always aware of our experience. But we are rarely aware that we're aware. We're usually so caught up in our experience, so embedded in it or identified with the content of it, that we are on a kind of auto-pilot. So mindfulness isn't just awareness. It also implies intentionally witnessing our experience as we're engaging in it.

A brief experiment may help in this attempt at a definition. Try this: Feel your feet. Feel your shoes, feel the floor or carpet under your feet. How did your experience of your feet change when you followed the instruction to "feel your feet," as compared with your immediately prior experience of your feet? How did your experience of things *other* than your feet change? Are there things you started to notice that you didn't notice before? As you continue to feel your feet, do something else, like looking at the things on your desk, or walking over to the xerox machine. Notice how your experience of doing these things is different while you're keeping some portion of your awareness on your feet. You'll probably notice that your actions seem to become much more deliberate. Things slow down. Your mind may get quieter. This is mindfulness in action.

Again, you may object: *okay, things got quieter and slowed down. So what? I can't go around feeling my feet the whole time. That would just make me self-conscious. Besides, why would I want to take the trouble to practice mindfulness, and add one more thing to my endless to-do list, when I have three briefs due, two depositions to prepare for, a meeting with the city council, and a site inspection, all by 5:00?* First of all, mindfulness doesn't have to involve your feet. One can be mindful of anything: your breath, your arms, the sounds you're hearing, whatever. These things just serve as an anchor, something you can return to when you forget and which, as we saw in the preceding experiment, leads to a general mindfulness of your overall experience. The point is this: mindfulness is worth practicing because it leads to a dramatic improvement in the quality of our lives. In summarizing the research on mindfulness, one psychologist states that "it appears that the practice of mindfulness can help us to modulate difficult feelings, diminish self-imposed suffering, adapt to life's challenges more skillfully, and experience more deeply the joys that life affords us. . . . It seems to facilitate calmness, self-knowledge, and self-acceptance, as well as the deautomatization of habitual patterns of thinking and feeling."

How on earth does mindfulness do all that? When we dedicate a certain percentage of our awareness to observing what we're doing, we start to savor life by being more *present* to it,

moment by moment. We start to notice the many little things we'd been overlooking: the beauty of a sunset, a small kindness on the road, the broach on opposing counsel's collar. If we practice mindfulness, we also tend to notice *in the moment* the specific ways we are getting stressed out. Because mindfulness slows things down, we discover we have the choice to continue doing things in our habitual way, or trying something different. This slowing down allows us to see that whatever's been weighing on us—a deadline, irritation, resentment, whatever—is, after all, just a creation of our mind. And we can realize that we actually have the option to believe or not to believe what our mind is telling us, rather than taking our thoughts at face value and acting impulsively on them. Just being mindful gives us what I'd call psychic space, or more mental breathing room. And this added space leads to peace of mind.

I can see how it might relax me, but peace of mind? Come on. It's like this: when we step back slightly and begin to pay more attention, one of the things we inevitably notice is the degree to which we are constantly *doing*—planning, fixing, analyzing, judging, evaluating, thinking. When we're not evaluating our experience we're usually trying to control or manipulate it. Either way, we find ourselves all too frequently in conflict with and dissatisfied with our experience—which results in stress and tension. Rather than trying to stop that (which just becomes one more form of *doing*), when practicing mindfulness we just *notice* that, without judgment. And in that noticing we are no longer unconsciously on board with that program, we are no longer embedded in it. Just the noticing brings about a stopping, and if you stay with it, a sense of real relaxation, stillness and peace. I would add that it can also lead to greater creativity and productivity, and generally make us better lawyers.

Okay, I can see how being more relaxed would make me feel more peaceful. But how would that make me a better lawyer? For example, when viewed through the lens of mindfulness, our understanding of what it means to zealously advocate for our clients can change. Instead of doggedly pursuing the greatest dollar recovery, or avoidance of liability, or whatever we have predetermined through years of practice is in our clients' best interest, we can allow ourselves momentarily to stop. To be still. And in that pause, if we stay with it for even a few moments, we might start to notice things we didn't see before. Details we'd missed. Possibilities or other dimensions of the case that hadn't occurred to us. The psychic space we create by means of mindfulness is the birthplace of creativity and inspiration. A personal example from my own mediation practice may illustrate this:

In one case, plaintiff, widower of deceased insured, sued defendant life insurance company alleging bad faith denial of death benefits. The company contended that decedent had failed to reveal a preexisting lung condition. There were references in decedent's doctor's notes to COPD, chronic obstructive pulmonary disease. However, in their denial letter the company said that they were basing their denial/rescission not only on COPD, but also on hypertension, which their own medical review indicated was *not* a basis for denial. Plaintiff's lawyer argued that the inclusion of an invalid ground for denial constituted bad faith, while the insurance company's lawyer argued that the inclusion of the invalid basis was irrelevant given that there was also a valid basis for the denial. Neither lawyer could find any case law to back up his

contention.

As the lawyers argued back and forth that they were clearly right and the other clearly wrong, I realized that I had no idea what to do next. So I simply sat there, being mindful of my breath, my body, my feet, even my confusion. At one point I found myself noticing the plaintiff, the only party in the room. I found myself wondering what he was feeling, how all this was affecting him. During a pause in the lawyers' arguing, I turned to him and asked him what this case was really about for him. "Justice," he said. I asked him to elaborate. The lawyers began to listen. He told us how he had been jerked around by defendant's claims department. How they had taken almost a year to reach a decision. How the woman he dealt with was rude and yelled at him. I then asked him, "what do you think you would have done if the claims rep had said to you, 'Sir, I'm so sorry about your wife's death. And I'm afraid I have some bad news for you: the company has denied your claim. It seems they feel that your wife should have checked the box indicating that she had a lung disorder. I am sorry to have to tell you that. I can give you the information you'll need to appeal the decision, if you like.'" He said, "I probably would have just walked away." It became apparent that, for him, the case was about remedying the rudeness, the lack of humanity and the absence of sensitivity on the part of the claims rep, not about what the law says about valid and invalid reasons for rescission.

On my suggestion we broke into separate caucus, and the insurance company's lawyer called the vice president for legal. It turned out that the VP had had problems with this particular adjuster before. I asked whether this was how the company wanted its employees to deal with its insured and beneficiaries. Most assuredly not, he stated. The case settled with an apology on behalf of the company, a representation that the adjuster would be re-trained, and payment of 80% of the face value of the policy.

By disengaging from my habitual way of thinking and doing things, and simply sitting there for a few moments in a state of not-knowing, I stumbled on the key to resolving the case. The solution lay not in deciding who had the better odds of prevailing at trial or finding a compromise between the parties' numbers. It turned out to lay in being authentic, genuine, and *real*—exactly the opposite of what plaintiff felt he had received from the insurance company. By pursuing the line of inquiry that this approach revealed, the lawyers found themselves communicating in a more genuine and real way about the human needs that lay underneath the parties' legal positions, which were in harmony: plaintiff wanted to be treated humanely, and defendant wanted to act humanely. The mediation then became a joint effort to "do justice," which led to a highly satisfactory outcome for everyone. It's hard for me to imagine how this might have been possible without the mindfulness that changed the direction of the mediation.

Practice Pointers

1. Try feeling your feet, and see how long you can maintain that awareness as you do your work at your desk. Try that as you're driving, walking, sitting in court, during a meeting. Notice what happens, how the quality of your day changes when you do this.

2. For 30 seconds, just be still and notice whatever enters your field of awareness: your breathing, the sounds in the room, the sensations in your body, whatever. The point isn't to quiet the mind. Trying to quiet the mind becomes one more point of struggle. The point is to *stop doing*—stop planning, fixing, controlling, evaluating, etc. It might help to ask, “what would it be like if I let everything be exactly the way it is for 30 seconds, even my thoughts?” Notice what happens.

3. Set an intention to remind yourself to become mindful when things get really stressful. When you succeed in remembering to be mindful at some stressful point in your day, start by feeling your feet on the ground, and then try telling yourself that this is the last day of your life. Really force yourself to believe this and play it out. Notice how this changes your experience and your relationship to your experience.