“The quality of everything we do depends on the quality of thinking we do first.”
— Nancy Kline

Harness the Power of Mindfulness in...

By Selina J. Shultz and Robert A. Creo
With the strength of groundbreaking neuroscience research behind it, “mindfulness” has been lifted up from its place in alternative, hippie culture to a place of reverence in unlikely conservative cultures such as Fortune 500 corporations. Basketball coach Phil Jackson introduced mindfulness years ago to both the Chicago Bulls and Los Angeles Lakers as an integral aspect of his training practices. He asked his players to meditate, do tai chi and yoga and play in the dark! Coach Jackson is now utilizing mindfulness with the New York Knicks. Millions of people practice some form of what are known as “contemplative practices” on a regular basis.

More and more lawyers are recognizing the value of mindfulness in their daily work. Pittsburgh attorney Fred Egler, who recently participated in an eight-week mindfulness training session as part of a formal research study at Carnegie Mellon University, found it helpful and recommends it to other attorneys.

“Lawyers are bombarded with stimuli, much of it hostile, every day,” said Egler. “The training helped me to understand how our bodies process and react to this avalanche of information. It is a great aid in reducing stress and improving your state of mind.”
The mediator has a great deal of control of the mood of the room.

A 2015 Wall Street Journal article noted that approximately two dozen law schools now offer courses in mindfulness for their students.

What is mindfulness and why has it become so important? There are myriad definitions of mindfulness, which include present-moment awareness, bare attention, nonjudgmental observation and awareness of continual change. This kind of thinking or “being” is often derived from contemplative practices. These can include actual meditation, walking/running, yoga, gardening or other activities that cause a relaxed focus of the brain. The reason they have such importance is because contemplative practices actually strengthen the frontal lobe of the brain and increase cognitive functions.

Applications for Mediators

This has incredible application for mediators who are charged to facilitate the parties’ decision-making process in the middle of the chaos and stress of litigation. The Mindful Mediator website notes, “As the science underlying mindfulness practices and meditation continues to reveal robust and powerful effects on concentration, listening skills, empathy, and well-being, a growing number of mediators are finding meditative process to be helpful to their work as mediators, and beneficial to their lives in general.” The insight that mindfulness brings can help mediators be aware of their own biases and personal agendas that hinder their effectiveness.

Here, we discuss the use of mindfulness in the mediation practice.

RAC: Tell us about your mindfulness practice.

SJS: I have been meditating off and on for the last 20 years. My serious daily meditation practice began six years ago. After studying mindfulness, I realized I had actually begun a contemplative practice many years before when I started running long distances. I completed my first marathon when I was 16. I didn’t run because I was a competitor. I am not fast. I ran and continue to run because I realized how long, hard runs changed the way I approached problems, reacted to stress and related to others. As a young lawyer, I recognized that on the morning of a trial or presentation, taking a run had a more significant effect on my performance than spending extra time preparing for the case.

Managing Personalities

RAC: How and when were you introduced to the idea of using mindfulness in mediation?

SJS: Although I would use the contemplative practices of running and meditating in the morning prior to a day of mediation, I began thinking about it more as an integral
part of mediation when I was exposed to Leonard Riskin’s work on the subject in a course taught by Rachel Wohl at Pepperdine University School of Law’s Straus Institute for Dispute Resolution. Riskin and Wohl encourage mediators to develop a contemplative practice through meditation and to use mindfulness more strategically in their practice by setting an intention for their mediations and using breath during mediations to re-center themselves back on that intention. In addition, they teach mediators to harness their awareness of themselves in this hyper-concentrated state to better manage their own personalities.

Mediators can begin to recognize that they use different subparts of their personalities during the mediation. If the parties are at an impasse, the mediators can make conscious decisions about what subparts of their personalities could be more useful in helping the parties move out of it.

RAC: I think you and I agree that the mastery of mediation is the pacing. Mindfulness is so important in order to be present and slow things down so you can be purposeful about your next move. Unlike being in a courtroom where you are expected to respond immediately, a mediator
How does mindfulness help a mediator manage the high emotions in the mediation room?

has the luxury of slowing things down to foster the mindfulness of him- or herself and the parties, making sure everyone is present. You want to be in the zone of concentration, “the flow,” where nothing else exists. It is a different way of being with people.

**Mindful Breathing**

**RAC:** Tell me about the breathing aspect of mindfulness? I read the following on the Mindful Mediator website:

When a person becomes trapped in past and future their breathing changes. This happens in mediations and negotiations when, for example, someone can’t get past a personal at-tack or event that “isn’t fair.” It can also materialize when one is overly anxious about what [he or she fears] the future may hold. Breathing becomes shallow — caught in the upper chest. The belly becomes rigid. It is as if the body is readying for a fight, and indeed the flight or fight response of the sympathetic nervous system is engaged.

**SJS:** Because of what scientists call “emotional contagion,” this agitated state can spread to other people, including the lawyers. Thankfully a peaceful state is also contagious. People are hardwired to imitate others, especially others they perceive to have higher authority. Despite his or her
lack of decision-making power, the mediator is often viewed, especially by lay people and particularly when appointed by the court, as a higher authority. Therefore, the mediator has a great deal of control over the mood of the room. A mindful mediator can be a positive emotional anchor in the room and actually slow down others’ breathing.

RAC: Why does breathing matter?

SJS: When people are stuck in a state of lamenting (reliving) the past or “hoping it away,” then their breathing is shallow. When breathing slows, the mind opens up and people are more likely to listen and consider other ideas and viewpoints.

RAC: My understanding is that being present and in the moment allows you to be nimble. You can’t plan too far ahead. My view of mediation has been that the most effective mediators do not follow formulas, and it is not a predictable, mechanized process. I view there being four key tenets of best practices of mediation based upon engagement, authenticity, creativity and being open but not attached to outcome.

As we do our jobs as mediators, we see the tension in lawyers between the sense of urgency and efficiency to keep billable hours low and slowing down to have reflective thinking. Can contemplative practices ameliorate these tensions? Can you slow down lawyers?
Putting Pen to Paper

SJS: Only sometimes. The challenge is to move counsel from a legal-framework analysis, focusing on rights, to a problem-solving one that emphasizes satisfying their clients’ interests. This may involve a business approach of risk versus reward rather than the key goal being to win the case. The method can be as simple as having lawyers put pen to paper to calculate the difference in economics between potential outcomes. This is separate and apart from consideration of the costs of litigation and continued conflict.

RAC: In some of my cases, the economic difference between a full victory and defeat on a specific item is nominal when viewed in the context of the entire estate, portfolio or value of the business. For example, when there are multiple assets with the valuation of each being in dispute, once the total package is compiled, the dispute over one specific asset may become insignificant compared to the entire valuation of all assets.

SJS: By making the lawyers put pen to paper, it slows down their thinking and makes them focus on the realities of each total proposal. You are, in effect, making them more mindful by considering what is actually before them. They are present with the realities instead of spinning with the fear of losing or being exploited.

RAC: By focusing on both the micro and macro, it places the disputed terms in context.

RAC: Can mindfulness be acquired without a separate contemplative practice such as meditation or yoga? Isn’t it an action requiring you to do something, even if the something is just sitting and thinking?

SJS: Yes, but it is like training. The contemplative action is the practice that enhances the mental capabilities by repetition and improvement. You do not naturally breathe deeply in most situations, so it takes a conscious effort to decide to breathe deeply to center
Mindfulness provides the confidence and peace of mind needed to walk into the heat of the conflict to address it head-on.

RAC: Fascinating. The language and foundation of mediation is the concept of self-determination. Based on Kline’s theory, it can be said that mindful practices naturally build upon the self-determination bedrock.

How does mindfulness help a mediator manage the high emotions in the mediation room?

RAC: Is centering a preparation for peak performance? Let’s talk creativity. I am a disciple of the work of Mihaly Csikszentmihalyi. He proposes that anxiety is a lubricant or motivator for peak performance.

SJS: But there is also a great deal of research that people do their best thinking when their brain is relaxed. Author and educator Nancy Klein contends that people are hardwired to solve their own problems and that by encouraging mindfulness in the participants in the mediation sessions, the mediation process is tapping into that inherent ability.

SJS: Practicing mindfulness protects the mediator from the strong emotions. It takes mental strength to accept your own vulnerability and use it as a way to connect with people and earn their trust. As professor and author Brené Brown articulates in her seminal work, vulnerability drives connection. Professor Brown responded to the common question: Is vulnerability the same as weakness? “In our culture, we associate vulnerability with emotions we want to avoid such as fear, shame, and uncertainty,” she said. “Yet we too often lose sight of the fact that vulnerability is also the birthplace of joy, belonging, creativity, authenticity, and love.” As lawyers, we
naturally want to shy away from these unpredictable and messy emotions and dynamics. However, mediators are charged with wading into the morass of human dynamics since these problems cannot be solved until you engage with them.

**RAC:** So is mindfulness the willingness coupled with the ability to engage with disputants at any level?

**SJS:** Mindfulness provides the confidence and peace of mind needed to walk into the heat of the conflict to address it head-on. 🙌

Selma J. Shultz is a founder of the Pittsburgh firm Bunde, Gellott, Malloy & Shultz PC and practices through the firm’s subsidiary, The Alternative Group. She has spent the last 20 years working in the conflict management field, serving as a mediator, consulting and coaching individuals and organizations struggling with conflict, and as a mediation/conflict skills trainer. She was one of the first family-law mediators in Allegheny County and has extensive experience mediating high-level divorce, employment and personal-injury cases. She is currently on the adjunct faculty at the law schools of Pepperdine, UNLV, and Duquesne.

Pittsburgh lawyer Robert A. Creo has mediated and arbitrated thousands of cases since 1979, including serious-injury and death claims, complex business transactions and cases involving multimillion-dollar settlements. Among other things, he has served as a salary arbitrator for Major League Baseball and the Major League Baseball Players Association, as a grievance arbitrator for the National Football League and the National Football League Players Association and as a neutral for the U.S. Senate Select Committee on Ethics, Office of Fair Employment Practices. He is an adjunct professor at Duquesne University School of Law.

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