Dispute Resolution
From the Inside Out

May 11, 2012
Hilton Burlington

Faculty:
Emily J. Gould, Esq.
J. Patton Hyman, Esq.
As attorneys we’re trained to think of dispute resolution as a series of moves, tactics and persuasive argument but experience suggests that true effectiveness requires something more. Whether you are a mediator or negotiator, attentiveness to inner processes brings better results at the table. This program will explore the application of mindfulness, contemplation and empathy to the dispute resolution process and its inherent ethical tensions. Mindfulness meditation and related contemplative techniques will be introduced, training the mind’s natural alertness and presence, helping negotiators cultivate mental and emotional stability, and creating open mental space for creative solutions. The benefits of these processes will be explored in communication, negotiation and decision-making, including enhancing effectiveness, stress reduction, and ethical practice.

**Ethics Portion:** The ethics portion of the presentation will focus on the tension between the decision making role of the client and the lawyer’s obligation to exercise independent judgment, under rules Rule 1.4: (a) and Rule 2:1. Participants will have the opportunity to explore the role of mindfulness, contemplation and empathy in supporting the exercise of independent judgment and in communicating with clients in a way that facilitates the examination of the full range of their interests and create goals and objectives.

**Faculty Bios:**

*Emily Gould* brings several decades of combined experience as an attorney, mediator, facilitator and coach to her presentations dispute resolution and ethics. A former criminal prosecutor and general counsel, she is a principal in Empatia Resolutions, offering mediation, and conflict coaching services based on Empathic Communication™, a skill set she developed based on the most recent theory in psychology, neuroscience and contemporary dispute resolution theory. Gould chairs the Alternative Dispute Resolution section of the Vermont Bar Association, and serves as an Assistant Panel member of the Vermont Board of Professional Responsibility. She authored “The Empathy Debate: The role of Empathy in Law, Mediation, and the New Professionalism,” 36 Vermont Bar Journal, 23 (Fall, 2010).

*Patton Hyman* is President and Executive Director of Tail of the Tiger, Inc., a 501(c)(3) nonprofit corporation, which presents retreats and programs applying mindfulness meditation and related contemplative disciplines in the professions, business, and the arts. He has taught meditation, including teacher trainings, for over 30 years and is the author of “The Mindful Lawyer: Mindfulness Meditation and Law Practice,” 33 Vermont Bar Journal 40 (Summer 2007). He has presented numerous professionally-oriented mindfulness meditation programs accredited for continuing education for lawyers, judges, psychotherapists, nurses, palliative caregivers and others. Patton is a practicing attorney, having practiced in a large Atlanta firm and as a solo practitioner in Barne, Vermont, where he now specializes in estate planning and property and business transactions.
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Dispute Resolution from the Inside Out
May 11, 2012
Hilton Burlington
REGISTRATION: 9:00AM - 9:30AM
SEMINAR: 9:30AM - 5:00PM (LUNCH ON YOUR OWN!)
MCLE CREDITS: 6.0 (INCL. 2.0 ETHICS CREDITS)

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Date: May 11, 2012
Seminar Title: Dispute Resolution from the Inside Out
Location: Hilton Hotel, Burlington, VT
Credits: 6.0 MCLE (includes 2.0 Ethics)

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DISPUTE RESOLUTION FROM THE INSIDE OUT

Presented by

Emily J. Gould
And
Patton Hyman

Cosponsored by the Vermont Bar Association and Tail of the Tiger
May 11, 2012, Burlington, VT
“The challenge for future generations will be to define what is most essentially human. [T]o acknowledge plaintiffs...is simply, when all is said and done, a recognition of our common humanity.”


This workshop will explore the role of empathy, the “recognition of our common humanity” in both dispute resolution and ethical law practice. The workshop will also explore the degree to which mindfulness meditation and contemplation support empathy whether we are practicing as neutrals or in conventional practice. Much of the workshop will be experiential so that practitioners in differing subject areas can adapt the material to the nuances of their professional life.

Empathy as Experience

Empathy is both the emotional and intellectual process in which we become attuned to the emotional resonance of another person and also see and understand from their perspective. “It is the ability to stand in others’ shoes, to see with their eyes, and to feel with their hearts.” We sense another person’s intentions and motivation as well as their feelings and thoughts. In this sense, empathy is a state of consciousness. But unlike sympathy, empathy does not shift our emotional state or make us lose our own perspective. Sympathizing involves feeling bad for another, and often involves adopting the tunnel vision of helplessness. We know from our own experience that sympathy, though a precious part of life, is not a support to law practice. Empathy, by contrast, increases our personal power and allows us to maintain independent judgment.

Empathy as a Form of Communication in Mediation and Law Practice

In this workshop we’ll explore empathy also as a form of communication – with ourselves and with other people. Akin to “active” or “reflective” listening, empathy hears and articulates both what is said, and what is not said. It is a way of articulating what is underneath the narrative or positions of what people say, to hear the emotions, values, needs and motivations that underlie it. In dispute resolution, empathy is a process that takes parties from positions, to interests, to motivation and values, the fertile territory in which problems are solved and agreements are made. Whether an attorney is serving as the mediator or motivating movement across the table, empathy is a key skill for success in dispute resolution. In law practice, empathy is the process in which attorneys can support clients in forming the objectives of the representation in a thorough, holistic way and support the creation of wise strategies for negotiation and getting the job done.

Reflective Communication

We often think of the act of speaking, writing or demonstrating as communication, and in fact these activities often do involve communication, but not always. Communication involves an exchange of meaning which these activities do not always accomplish. In order to know whether these activities have actually resulted in communication, i.e. a genuinely shared understanding, one has to check. This process of checking, known as ‘reflection,’ involves saying what was heard, in order to find out whether that was what was meant.

1 DANIEL H PINK, A WHOLE NEW MIND: WHY RIGHT-BRAINERS WILL RULE THE FUTURE, 153 (Riverhead Books 2005).
2 DANIEL J. SIEGEL, MINDSIGHT: THE NEW SCIENCE OF PERSONAL TRANSFORMATION 28 (Bantam 2010).
Dimensions of Human Experience

Most of the time, in spoken conversation, people express what they are thinking. However, our meaning, objectives and decisions are rarely the product of our thoughts, alone. Our experience has several other dimensions, including physical sensation, emotion and other motivators, such as values and needs. Despite the universality of the multi-dimensional aspect of human experience, much of the time these dimensions lie just beyond our awareness. Cultural expectations and personal style may also prevent us from speaking of our emotions or the things that really matter to us. Empathy is a reflective communication technique that brings to the surface [just clearer IMHO] and articulates the totality of experience, including the dimensions of thinking emotion and motivation.

Analogy to the Triune Brain

The different dimensions of experience correspond to different parts of the brain. These three portions of the brain evolved sequentially but work in an integrated way when we are functioning at our best. When signals from the brain stem trigger emotional flooding in the limbic system, access to the functions of the prefrontal cortex becomes limited. The mental processes required of attorneys, their clients and neutrals working with them require integrated brain functioning. Empathy is a function of the pre-frontal cortex that integrates brain function and creates higher level functioning.
Interests, Values, and Needs

Beyond the complaints and underneath the positions presented by parties lies a field of possibility that is as vast as the range of human potential. In the groundbreaking book on dispute resolution theory, *Getting to Yes*, this field of possibility was defined as the interests on all sides of the table. In a subsequent book, *Power of a Positive No, Getting to Yes* author Bill Ury posits that interests are composed of a common set of human motivations which he calls ‘needs’, and the strategies that we hope will satisfy them. For example, a contract is a strategy that could meet a variety of different needs, such as clarity, relationship or accountability. Depending on the needs that the contract is designed to meet, the contract and the process for negotiating it will be different. Knowing the underlying need helps the attorney operate appropriately for this client.

Like needs, values are intangible qualities that are realized through actions, words and things. Needs and values are motivational qualities, waiting to be manifested by what we say and do. They are what we will say yes to. Values and needs are the ‘yes point’ in each party at the table and successful negotiation requires that we be able to see them and draw on their power. Whether we call these ‘yes points’ drivers, motivations, needs, or values, we know that these qualities are the keys to good outcomes. Recognizing this common humanity in ourselves and others is what empathy is all about and the capacity to do it involves both choosing where to place one’s attention and using intuition to grasp what is not said.

Interplay of the Dimensions

According to the international mediator Marshall Rosenberg, Ph.D., emotions are generated in our bodies as a reaction to whether needs are or are not met.

EXAMPLE: A colleague has said he’ll call Robert at the office at one o’clock and it is one thirty and he has not called:

1. If Robert needs assurance that he is valued as a colleague, he may feel hurt or angry.
2. If Robert needs forward motion on a project with a deadline, he may feel frustrated.
3. If Robert needs some time to catch up on email, he may feel relieved.

By this example, we can see that it is as valid to say that Robert’s emotions are caused by his need as it is to say the emotions were caused by the colleague. Our emotions tend to shape our opinions (thoughts). For example, in the first example, Robert may think that his colleague is inconsiderate or arrogant. In the second, he may think of him as irresponsible, or unreliable. In the last instance, he may think of him as busy, in sync, or successful. In any case, this example illustrates the connection between needs, emotions and the judgments that we have about others.

Often our language confuses feelings and thoughts. Here are some examples of how thoughts are sometimes expressed as feelings:

Words like “I feel that, like, as if”

Pronouns: “I feel I, you, he, she, they, it”

Sometimes we express as feelings our thoughts about what others think about us.
“I feel unimportant to the people with whom I work.”

“I feel misunderstood.”

It is not uncommon to conflate what we feel and what we think we are. “I feel sad, hungry, happy, or angry” expresses a genuine experience of emotion. On the other hand, “I feel ignored” expresses a thought about whether or not others are thinking about us.

Barriers to Empathy

One of the barriers to developing empathic skills may be simply the belief that it is a skill that cannot be learned, or that it is just not for us. We also tend to associate empathy with weakness, or giving up ground, and so we resist it. Like any new skill, empathy can take time to develop, and as an under-valued practice, many of us lack motivation to make the effort to learn how to do this well. Because empathy involves present moment awareness, we may find that empathy involves new experiences which we may find uncomfortable or unpleasant. We may find ourselves slipping into sympathy until we become more proficient at empathy. It can be challenging at first to maintain a dual awareness of the experience of others while maintaining a solid sense of self.

One of the chief obstacles to empathy is our own reactivity—irritation, disdain, outrage or distraction—for example. It is difficult to empathize with another person when one is experiencing strong emotion or is caught in a habitual pattern of thinking. Empathy can both disrupt our patterns and is supported by our own capacity to calm and liberate ourselves from habitual thinking. Self-empathy is both a predicate for the capacity to empathize with others and is also an antidote to reactivity.

Self-Empathy

Empathy as an unspoken consciousness or experience can be directed towards self as well as toward another. When directed towards self, it involves awareness of our thoughts as well as the emotions and drivers that underlie the discourse in our heads. The process of self-empathy involves both acknowledging our thoughts with mindful awareness and also surfacing what lies beneath them through contemplation. We can think of this as a series of questions posed to ourselves:

1. What just happened, or what is happening?
2. What thoughts, opinions, and critical judgments am I having?
3. What do I feel emotionally/physically?
4. What’s important to me, what’s at stake, what do I value, what do I need?

This type of self-inquiry may feel awkward at first; however, it is a productive practice for a variety of reasons. When practiced regularly, it contributes substantially to self-awareness, a key function for ethical practice. But it also serves as a good way to build the capacity to sense the emotions and needs of other people.
SAMPLE LIST OF NEEDS AND VALUES

**Truth**
- Honesty
- Clarity
- Learning
- Understanding
- Integrity
- To know and be known
- Visibility
- To hear and be heard

**Freedom**
- Independence
- Choice
- Spontaneity
- Autonomy

**Expression**
- Efficacy
- Challenge
- Contribution
- Competence
- Creativity
- Participation
- Profitability
- Create value
- Legacy

**Physical**
- Rest
- Space
- Movement
- Sexual expression
- Safety
- Touch
- Nourishment
- Ease
- Comfort
- Health
- Nature

**Celebration**
- Play
- Humor
- Joy

**Connection**
- Affection
- Appreciation
- Closeness
- Empathy
- Passion
- Intimacy
- Love
- Communion
- Mutuality
- Nurture
- Community
- Communication
- Loyalty
- Commitment

**Order**
- Predictability
- Accountability
- Responsibility
- Efficiency
- Punctuality
- Harmony
- Consistency
- Cooperation
- Support
- Stability
- Trust
- Fairness

**Existential**
- Peace
- Acceptance
- Beauty
- Meaning
- Mourning
- Hope
- Faith
- Purpose
- To matter
- To be of value
- Dignity
# FEELINGS WHEN NEEDS ARE NOT MET

## ANGER
- Aggravated
- Dismayed
- Disgruntled
- Displeased
- Exasperated
- Frustrated
- Impatient
- Irritated
- Irked

## ANGRY
- Enraged
- Furious
- Incensed
- Indignant
- Irate
- Livid
- Outraged
- Resentful

## FEAR
- AFRAID
  - Apprehensive
  - Dread
  - Foreboding
  - Frightened
  - Mistrustful
  - Panicked
  - Petrified
  - Scared
  - Suspicious
  - Terrified
  - Wary
  - Worried
- DISQUIET
  - Agitated
  - Alarmed
  - Discombobulated
  - Disconcerted
  - Disturbed
  - Perturbed
  - Rattled
  - Restless
  - Shocked
  - Startled
  - Surprised
  - Troubled
  - Turbulent
  - Turmoil
  - Uncomfortable
  - Uneasy
  - Unnerved
  - Unsettled
  - Upset

## FEAR cont.
- EMBARRASSED
  - Ashamed
  - Chagrined
  - Flustered
  - Guilty
  - Mortified
  - Self-conscious
- VULNERABLE
  - Fragile
  - Guarded
  - Helpless
  - Insecure
  - Leery
  - Reserved
  - Sensitive
  - Shaky

## GRIEF
- SAD
  - Depressed
  - Dejected
  - Despair
  - Despondent
  - Disappointed
  - Discouraged
  - Disheartened
  - Forlorn
  - Gloomy
  - Heavy hearted
  - Hopeless
  - Melancholy
  - Unhappy
  - Wretched
- PAIN
  - Agony
  - Anguished
  - Bereaved
  - Devastated
  - Grief
  - Heartbroken
  - Hurt
  - Lonely
  - Miserable
  - Regretful
  - Remorseful
- YEARNING
  - Envious
  - Jealous
  - Longing
  - Nostalgic
  - Pining
  - Wistful

## TENSE
- Anxious
- Cranky
- Distressed
- Distraught
- Edgy
- Fidgety
- Frazzled
- Irritable
- Jittery
- Nervous
- Overwhelmed
- Restless
- Stressed out

## FATIGUE
- Beat
- Burnt out
- Depleted
- Exhausted
- Lethargic
- Listless
- Sleepy
- Tired
- Weary
- Worn out
### Feelings When Needs Are Being Met

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<tr>
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<th>DELIGHTED</th>
<th>JUBILANT</th>
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<td>Friendly</td>
<td>Adventurous</td>
<td>Ecstatic</td>
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<td>Elated</td>
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<td>Tender</td>
<td>Mirth</td>
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<td>ALERT</td>
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<td>Rapturous</td>
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<tr>
<td>Happy</td>
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**Words to Avoid**
- Abandoned
- Abused
- Attacked
- Betrayed
- Boxed-In
- Bullied
- Cheated
- Coerced
- Co-Opted
- Cornered
- Diminished
- Distrusted
- Ignored
- Interrupted
- Let Down
- Manipulated
- Misunderstood
- Neglected
- Overworked
- Patronized
- Pressured
- Provoked
- Put Down
- Rejected
- Taken For
- Granted
- Threatened
- Unappreciated
- Unheard
- Unseen
- Unsupported
- Unwanted
- Used
Empathy and Mindfulness

Although they are separate and distinct processes, there are ways in which empathy and mindfulness interact and overlap. Both involve an attitude that is open, present, observant, and non-reactive. Mindfulness has been described as “being friendly” to whatever thoughts or feelings arise in consciousness, and empathy has a similar quality of welcome to whatever is true in the present moment. Mindfulness meditation has been shown to have concrete benefits to law students, lawyers, and their clients and has also been shown to increase the capacity for empathy. Mindful meditation strengthens our capacity to choose where we put our attention. This capacity for intentionality about attention is key to empathic ability.

Empathy and Contemplation

Contemplation is a silent experience of allowing the arising of insights. There are an infinite amount of objects for contemplation, but in this course we’ll speak of contemplation as sitting quietly with a question, and waiting for the answer rather than trying to find the answer through mental activity. We’ll use mindful meditation to quiet the mind and let answers come. This practice develops the capacity for insight and intuition. Empathy involves both insight and intuition and therefore contemplation is a foundational practice.

Rules of Professional Conduct

The Rules of Professional Conduct create a map of the attorney–client relationship in which empathy has a place. In this relationship, there are two decision makers. Under Rules 1.2 and 1.4, the client is the decision maker about the objectives of representation and the course of representation. Under rule 1.2 and 2.1, however, the attorney has a separate sphere of decision making, some of which requires consultation with the client, and some of which does not. Rule 2.1 articulates that the attorney maintains independent judgment and is not a robot of the client.

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4 SIEGEL, supra at 62.
5 Rule 1.2 (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
6 Rule 1.4 (a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
7 Rule 2.1: In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.
The connection and relationship between attorney and client as separate decision-makers is maintained by communication and consultation, according to Rule 1.4. Without communication, the attorney–client relationship falls apart.

Within the map of the attorney-client relationship outlined by the rules, there is room for a variety of kinds of communication, consultation, advice and decision-making. Under Rule 2.1 considerations of non-legal matters is expressly authorized. Empathy and the emotional and aspirational concerns that it embraces are expressly within the purview of good law practice.

In fact, the spectrum of practice suggested by the rules creates a natural home for empathy in the center of ethical law practice. At one end of the spectrum is the attorney too concerned with the mechanics of day to day practice that she ignores her client as prohibited by Rule 1.4. At the other end of the spectrum is the attorney who becomes over-identified with the client, losing perspective and independent judgment as prohibited by rule 2.1. Between these two poles, lies ethical practice, in which the attorney is able to remain connected to himself but also in tune and in touch with the client. This is the dynamic tension that empathic capacity can navigate effectively and professionally.

**Mechanics of Empathy, Guessing and the Form of the Question**

Despite the fact that our needs and values are driving the narrative of our lives, to some extent this may be happening outside of our awareness. Likewise, we can expect our clients or prospective clients to be unprepared to articulate to us fully what their needs and values are, just as we may be unaware of this in ourselves. So we have to ask, but it turns out that the form of the question for which we have been trained as attorneys, is fairly ineffective at revealing the true source of motivation within. As attorneys we have been trained to ask open ended questions. In fact, a closed question has a pejorative connotation in law, is considered ‘leading’, and we are trained to use those kinds of kinds in the limited circumstances of cross-examination. However, empathy involves the skill of making an intuitive and leading guess as to what is going on. Empathic guessing initiates a process of self-reflection and discovery in another - an incomparable gift that we can offer on another has human beings. Who we are is not a fixed reality. It is an ever changing reality that is the product of relationship—one in which we are encouraged to contemplate ourselves through the process of empathic guesses.

**Adjusting for Type**

Despite the presence of universal needs and values within us, human experience is always unique and ever changing. Yet there are patterns that we can recognize in ourselves and others that support our ability to connect empathically with one another. These patterns have been described in contemporary brain dominance theory. According to this theory, each quadrant of the brain is responsible for a different type or style of thinking, and all of us are hardwired for dominance or preference in one or more quadrants of the brain. Part of the way we think is predetermined by genetic predisposition.
and while a much larger part is based on experience, including pressures of culture and conditioning. Becoming aware of our own preferences and thinking style, we can play on our strengths and become more skillful at avoiding our weaknesses. By clarifying the four thinking styles as they may apply to others, it becomes possible to understand their needs, their priorities and to communicate in the individual style that resonates most successfully with them.

**Understanding the Four Thinking Styles and the Preferred Needs and Values of Each:**

The brain can be conceptualized as having four quadrants. The frontal or upper portion of the brain is the locus of abstract thinking, whereas the basal or lower portion is where concrete thinking occurs. The left side sees pieces and thinks sequentially. The right side sees the whole and timeless reality.

Although we all use our whole brains, we are predisposed to favor or prefer certain quadrants. As a result, there are some needs or values we tend to address first – those which tend to dominate our personal value system. This doesn’t mean that there are not universal human values and needs; it just means that we each tend to prioritize them differently. In fact we tend to use different values strategically to meet the deeper needs underlying those that appear more frequently on the surface of our awareness.

The four quadrants are depicted below. The list below correlates the different thinking styles with the dominant preferences or values associated with those thinking styles. Understanding brain dominance gives us only a starting point for empathy. This may help us to get to the needs at the surface of awareness. This has value as a point of departure for revealing the commonality of needs, including the deeper needs and values that lie at the center of what it means to be human.

<table>
<thead>
<tr>
<th>FRONTAL (UPPER) LEFT BRAIN</th>
<th>FRONTAL (UPPER) RIGHT BRAIN</th>
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<tbody>
<tr>
<td><strong>A. Rational (Asks What?)</strong></td>
<td><strong>D. Experimental (Asks Why?)</strong></td>
</tr>
<tr>
<td>Questions to clarify facts</td>
<td>Withdraws to see big picture</td>
</tr>
<tr>
<td>Needs and Values ideas, information</td>
<td>Needs and Values peace, freedom</td>
</tr>
<tr>
<td>Clarity, logic, challenge</td>
<td>Autonomy, adventure, growth</td>
</tr>
<tr>
<td>Detail, excellence, value,</td>
<td>Creativity, spontaneity, spirit, nature</td>
</tr>
<tr>
<td>Strategy, analysis, science</td>
<td>Independence, imagery, beauty</td>
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<th>BASAL (LOWER) LEFT BRAIN</th>
<th>BASAL (LOWER) RIGHT BRAIN</th>
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<tbody>
<tr>
<td><strong>B. Safekeeping (Asks How?)</strong></td>
<td><strong>C. Feeling (Asks Who?)</strong></td>
</tr>
<tr>
<td>Defends to create safety</td>
<td>Expresses to relieve emotions</td>
</tr>
<tr>
<td>Needs and Values safety, order,</td>
<td>Needs and Values passion,</td>
</tr>
<tr>
<td>Actions, punctuality</td>
<td>Connection, nurturing, touch</td>
</tr>
<tr>
<td>Monogamy, predictability</td>
<td>Religion, harmony, music</td>
</tr>
<tr>
<td>Structure, routine, efficiency</td>
<td>Community, intimacy, belonging</td>
</tr>
</tbody>
</table>
ABSTRACT

upper left thinking

What?
- data
- dollars
- logic
- clarity
- understanding

Why?
- metaphor
- intuition
- beauty
- spontaneity
- creativity

CENTER
- being
- balance
- wholeness
- integration
- love
- peace

How?
- sequence
- safety
- order
- punctuality
- productivity

Who?
- connection
- community
- belonging
- passion
- intimacy

lower left doing

lower right feeling

CONCRETE
**BASIC STRUCTURE OF EMPATHIC CONVERSATION**

Empathic conversation is a framework or structure for discourse designed to generate synergy and collaboration. On the macro level, it has two parts – that which is *unspoken* and that which is *spoken*. The unspoken part of the conversation prepares us for speaking. It occurs in our imaginations and is connects with our intentions and guesses as to what others are experiencing. In silence, we begin with self-empathy and then empathize with the other. When speaking, *this order is reversed*. We first empathize with the other before we self-express:

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<tr>
<th>SILENT EMPATHY</th>
<th>SELF</th>
<th>OTHER</th>
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<tbody>
<tr>
<td>SPOKEN EMPATHY</td>
<td>OTHER</td>
<td>SELF</td>
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The purpose of empathic dialogue is to surface the needs that are at issue, and then find a strategy that meets everyone’s needs. So the next steps involve requests, both procedural and substantive, toward a collaborative solution. The procedural requests for reflections and clarification refine the expression of needs. The substantive requests test for mutually satisfactory solutions.

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<th>SILENT EMPATHY</th>
<th>FOR SELF</th>
<th>FOR OTHER</th>
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<tbody>
<tr>
<td>SPOKEN EMPATHY</td>
<td>FOR OTHER</td>
<td>SELF EXPRESSION</td>
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<tr>
<td>REQUESTS</td>
<td>PROCESS</td>
<td>SUBSTANTIVE</td>
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1. **Silent Empathy for Self** – Setting your intention by naming your needs and values: What need or value is at stake? Consider your thinking style to support your guess as to what you may need. Focus your attention on your emotion, what you value.

2. **Silent Empathy for the Other** – Consider the thinking style of the other. Guess at their emotions; see if you can feel underneath their thoughts and feelings to what they need.

3. **Spoken Empathy for the Other** – Guessing what’s at stake for them: Focus your attention on what the other person is needing or valuing and offer a guess. “I imagine that what’s important for you is x, yes? Is there more?”

4. **Spoken Self-Expression** – Getting all the needs out on the table, including yours: Ask if the other is ready to hear you, and then state what you value in this situation. E.g., “What’s important for me is y.”

5. **Reflection/Clarification**: Ask for a reflection of what you’ve said to see how your message has been received. Offer thanks for the reflection and offer clarification. “Would you be willing to let me know how you hear me coming across?” “Thanks for letting me know I didn’t make myself clear.”

6. **Co-Creating the Solution**: “What can we do that meets the needs for x, y AND z?”
The Mindful Lawyer: Mindfulness Meditation and Law Practice

What is an article on meditation doing in a bar journal? Why are mainstream firms and law schools offering classes in meditation? What is meditation anyway, and what could it possibly have to do with practicing law? This article will offer answers to these questions—and if you wonder whether meditation might enhance your legal practice, read on.

We will first look at the “remedial” aspect of meditation, the aspect most familiar to the public at large: meditation as stress-buster or as a way of managing the pressures of life. But beyond the salutary effect of “fixing what ails us,” meditation offers other benefits. We will explore how becoming familiar with one’s mental patterns undermines ingrained habits and strengthens our awareness. We will learn how recognizing our own patterns can help us deal with others and examine how the abilities cultivated by meditation can benefit us—and our clients—in real-life situations.

Stress in Law Practice

It is common knowledge within the bar: the practice of law is stressful. Anecdotal evidence of this has been confirmed by empirical studies in which depression, substance abuse, domestic difficulties, and other stress-related syndromes are shown to be significantly more common among lawyers than in the population at large. We lawyers also know—although we may not express it as frequently—that the practice of law can be rewarding as well, professionally and personally. But the pervasiveness of stress in law practice is probably underestimated, especially when it is associated only with “negative” situations. Losing a client is obviously stressful, but getting a new one introduces its own constellation of pressures: Will I please the client? Do I have the staff to handle the volume of work? Will staff balk at the increased workload? Will the client complain about our billings? Will we win the case? These are all connected with issues of professional success, and living up to success is also stressful.

Outside the specific details and issues of law practice itself, employee relations within law firms are often contentious, as may be the periodic negotiations with our partners over the division of firm income, not to mention balancing the demands of a personal life with those of our profession. In short, we will never be free of stress; the question is how we manage to live with it.

Responding to the pressures and opportunities of practice, for some time professional organizations such as the Vermont Bar Association have offered counseling programs for attorneys. A more recent development in addressing these issues is the use of mindfulness meditation, which, in addition to being introduced to lawyers and law students, has also been applied in a variety of other activities, from medicine to golf to the Green Berets.

What is Meditation and Does It Matter?

Meditation has a fairly recent history in the Americas and Europe. What are its nature and purpose? “Meditation” itself is a word with many meanings. In conventional usage it simply means contemplating a particular topic, considering it thoroughly. But meditation, as introduced into Western societies during the past several decades, refers to a practice of mind training that is new to contemporary secular culture.

Although religious contemplatives, often in monastic settings, have long practiced meditation, mindfulness meditation is essentially a non-religious (or religion-neutral) practice, in that it is a way of cultivating innate human qualities. And even when we limit its meaning to mind training, the term still covers a lot of different approaches, somewhat like the many different kinds of “contracts” or “pleadings.”

Mindfulness meditation has been described as “a friendly gesture toward ourselves in which we take time simply to be.” It is a way of learning how to be present as a person, finding a ground of “being” from which “doing” may arise more clearly and effectively. The point is not to cultivate a particular state of mind believed to be desirable, such as happiness or contentment, although they may be byproducts; rather, the mindfulness practitioner simply sits with whatever arises in his or her mind. (As mindfulness is most often practiced seated, it is often referred to as “sitting meditation” or simply as “sitting.”)

By sitting in this way and observing mental events arising—whether as thoughts, emotions, bodily sensations, sense perceptions, or daydreams—the mindfulness practitioner becomes familiar with the contents of mind and their patterns. Deliberately boycotting the impulse to evaluate, change, or reject these contents, the practitioner learns to see them merely as phenomena that arise, dwell, and then pass away, much like scenery passing by.

Observing these mental contents, meditators frequently report a repetitive quality to their thoughts, sometimes called habitual patterns, like a tape loop or broken record; they also notice the inconsistent, helter-skelter character of the mental contents, often described as discursiveness. Somewhat to their surprise, meditators at times find themselves indifferent to what was previously compelling, while on other occasions being agitated by a thought that was previously reassuring. Noticing all this more clearly using mindfulness practice, we can begin to become familiar with the lay of our mental and emotional landscape.

Meditation and Stress

Mindfulness provides a perspective that undermines the tendency to identify with the contents of mind, to see the contents as oneself or an integral part of oneself. Such identification is a source of much of what we experience as stress, anxiety, fear, or other irritating or painful states.

Let’s pause here to consider why identifying with one’s thoughts might be stress-generating. In the simplest terms, seeing thoughts as a part of “myself” creates, almost as a reflex, a need to defend or justify the thought. After all, if the thought is “me” (or a valued part of “me”) and the thought is flawed, conflicted, or incoherent, then ... well, you can see where the logic leads. In addition, continually having to defend, justify, rationalize, or otherwise make sense of these mental contents requires continual effort, which is stressful.
But don't take my word for it. Having made this assertion about identifying with thoughts, I would add that the traditional attitude to working with all such statements is inquisitiveness. In other words, such assertions are viewed, not as truths to be accepted and believed, but as hypotheses to be tested empirically against one's experience. And that is where mindfulness meditation comes in.

In sitting we see not only the thoughts, feelings, and other experiences that arise, but also their implications: how one thought or feeling tends to lead to another, and how some thoughts lead to bodily tension and discomfort. Seeing that process motivates us to let go of the sense of identification and relax with our experience (also known as life). This perspective allows us to shift from identifying with the content of our mental patterns to identifying with awareness itself, although not in the sense of believing "I am my awareness"—which could set up the same success/failure dynamic—but more like knowing when we have made it home.

This perspective inevitably begins to carry over into everyday life. After all, the mind we become familiar with while sitting is the same mind we live with in our law practice, family situations, civic and charitable activities, and life in general. There, as in formal meditation, thoughts and emotions appear, remain for a while, and then dissolve (even if we try valiantly to hold on to them!). It becomes clear that mindfulness is not an otherworldly attempt to escape from the vicissitudes of life but is directly relevant to working with the events that occur there.

It's not that mindfulness is a panacea, that once we've done it, all of the challenges of life resolve into a blissful state; rather, it is analogous to working out at the gym. Nobody goes to the gym believing that one session on the exercise machines will convert one's physique into magazine-quality form. We get in shape through diligent application, and this is no less true with mindfulness meditation.

**Beyond Stress Management**

So far this article has described the remedial effects of meditation: the clearing or ameliorating of stress and other obstacles to effective and satisfying functioning. But an even more significant consequence of sitting still with oneself is recognizing a simple sense of presence, of just being here with whatever is going on (or not going on). In fact, this state is so simple, so subtle, that we may not ever have noticed it, or may have sensed it only rarely. But in contrast to our jumble of thoughts and emotions, simple presence is consistent and reliable.

Mindfulness practitioners are advised to look at that presence, to notice it and see how it is always there, beneath all the mental activities with which we identify. By cutting through or letting go of our thoughts, opinions, and emotional baggage, we cultivate the ability to relax into that presence.

Two caveats. One is that meditation does not cause this sense of presence; instead, it is part of our equipment as human beings, innate rather than acquired, and meditation is simply a tool for uncovering it. The other was raised earlier: such statements as these are hypotheses for exploration, not articles of belief.

Just as seeing the fickleness of our mind is useful in everyday life, presence is also relevant to our life and our professional activities. Bringing presence to our activities, we can see situations and people more clearly, without the distortions and preconceptions of our habitual mental contents. We hear more
accurately what people say to us, pick up subtle clues, space out less, and notice more, all while remaining present with the task at hand. Such clarity enhances our effectiveness as lawyers because we are seeing more and ignoring—consciously or unconsciously—less.

Other People

So far this article has addressed how mindfulness meditation cultivates awareness of one’s inner experience. But an obvious fact about law practice is that it involves interaction with others. (Even Snoopy, in his attorney manifestation, occasionally had to take calls from clients, although he definitely preferred the company of his law books.) Whether they are clients, opposing counsel, judges, office staff, court reporters, court clerks, legal beat reporters, employees, or colleagues, the lawyer is constantly relating with other people.

Although dealing with others can be thought of as an outer experience, even there our inner experience is critical. We may have difficulty containing our irritation with a particular individual who “pushes our buttons.” One person may arouse our suspicion, while another elicits our credibility. In such cases, the habitual tendency of mind is to construct a story line about the other individual (“She enjoys trying to make it difficult for me” or “He’s trying to make me look bad” or “He’s such a jerk”) and our relationship with that person.

Normally, as we go about our business, our mind maintains a continuous commentary about whatever we encounter, its implications for our cases or careers, its significance for our personal happiness, a virtual soundtrack for our life. Writing this article I remembered a conversation I had while practicing law in Atlanta. Stan, a lawyer from another firm, having heard that I was a meditator, asked about meditation as we waited in a conference room. I mentioned learning to notice this “soundtrack” of thoughts. The next day Stan phoned to say that driving home from my office had been a thoroughly frightening experience: he hadn’t realized how little he was actually present, how unaware he was of his surroundings while navigating rush hour traffic.

One congenial byproduct of sitting alone in meditation is the way it begins to inform the parts of our life involving others. We recognize mental chatter for what it is and let go of it. Letting go automatically brings us back to the simple presence we have been cultivating in mindfulness practice, allowing our intelligence to function in our dealings with others, but without the distortions of habitual mental patterns.

Another is that as we practice mindfulness and see how our own mind works, we begin to perceive other people differently. Because of experiencing our own minds, when we observe others—their speediness, distractedness, and tense demeanor—we can see that they are subject to the same kind of habitual patterns we are, even though the content is different. We see the abrasive person in the office or across the bargaining table, the person who won’t look us in the eye, the habitual schmoozer, in a new light. Realizing that on this basic level we are all quite alike, we may even feel natural sympathy for our adversaries. In this sense, compassion is a natural outgrowth of mindfulness.

Applying Mindfulness in Law Practice

As lawyers we take on many roles: advocate, negotiator, counselor, employer, public servant, legal analyst, transactional structurer, and others. Mindfulness meditation, while sharpening our intelligence and instincts and broadening our perspective, does not prescribe particular behavior in any given role or function. Mindful lawyering is rather a matter of waking ourselves up to the situations we encounter.

A few examples illustrate the application of mindfulness to law practice. This is not an exhaustive examination, and the examples come mostly from the areas with which I am familiar, namely, transactional and estate planning practices. But even if your practice is oriented differently from mine, these examples may spark some insights about how mindfulness might apply to your situation.

Legal Analysis

Legal analysis is common to all kinds of practice. When drafting a contract or a brief, we have to know not only the legal rules but also their subtleties and lacunae. But a lawyer who is uncomfortable (or worse) with the absence of clear legal rules may “find” clarity (perhaps as a result of wishful thinking or an excess of speediness) where there is none. Or the lawyer, attempting to ingratiate himself with a client or acting in haste, may lead the client to believe that the case is stronger than the law supports.

In retrospect these are somewhat obvious errors in judgment or analytical ability, and the reader may be thinking, “You don’t have to be a mediator to avoid such pitfalls.” And that is true. But the mindfulness practitioner has the advantage of tools that may not be available to the untrained person. In particular, practitioners of mindfulness often develop a knack or feel for noticing when mental patterns have taken on a momentum of their own. When that happens, the lawyer has received a clue to pause, slow down, and take another look.

Mental momentum may result from pride (the notion that a good lawyer is going to know the answer), fear (that the client won’t respect—or pay—you if you have to go to the books—again!), or some other impulse. But whatever the motivation, the meditation practitioner has enhanced the potential for cutting that speed and doing better analysis.

Factfinder

The lawyer is sometimes required to be a factfinder, because devising a legal strategy depends on having a clear knowledge of what the facts are, or can be proved to be. The mindfulness practitioner, knowing how to see through his or her own habitual patterns, hopes and fears—and the distortions they introduce—has a more sophisticated view of how to relate with information provided by a client or others.

A client can be confused and distort the “story” in a way that seems to be advantageous. If a client is mistaken or even dishonest, the attorney who brings a clear, empirical attitude to investigating the facts has a better chance of not being misled, intentionally or negligently. (I understand that there may be situations in which a lawyer does not want to know the facts, but that is a different issue.) A lawyer with less mental static is also more likely to develop a sensitive “humblebug detector.”

Unconscious preconceptions about our role as lawyers can also undermine our effectiveness. A sense of guilt or hesitation about being intimidating can lead the lawyer to fail to dig deeply enough into the client’s story, potentially missing a key point in the client’s case; likewise, an overly aggressive stance can squelch the disclosure of facts. The task for the mindful attorney is to drop the limiting roles that arise from a preconception (or identity) of either being the “tough-minded lawyer” or having a more “therapeutic” or “caring”
relationship to the client. Mindfulness practice does not dictate the lawyer’s behavior but helps clarify the pushes and pulls of the situation by heightening the lawyer’s awareness. It is more of an art than a science.

Counselor
Helping clients make decisions is one of the most challenging and rewarding functions of the lawyer. Sometimes the course to be taken by the client is unclear, and a judgment call is required. At other times, the relative merits of alternative approaches need to be sorted out and understood, so that the client may make an informed choice.

Counseling usually occurs in a situation of uncertainty (otherwise it would hardly be needed), and uncertainty makes most people uneasy. Uneasiness or anxiety about a situation can unleash a storm of habitual mental patterns (sometimes called panic), but the mindfulness practitioner has, at least, the tools to see—and then cut through—those thoughts and emotions, and simply be present. In this situation, presence is synonymous with detachment, disinterestedness.

It is one of the apparent contradictions facing lawyers that we are bound to represent our client zealously and at the same time bring professional detachment to any situation. As we most often get caught, or “attached,” by our habitual thought patterns, cultivating the ability to let go of them creates a basis for a “de-tached” view of the client’s situation. This also creates the psychological space that allows the insights of one’s life and professional experience to inform the advice.

For a lawyer buffeted by habitual and discursive thoughts, the task will be more difficult. As one lawyer/meditator told me:

One area in which I have noticed a change is in my capacity to listen to clients and hear their needs with less interference from “my stuff.” This plays out in two ways. First, mindfulness meditation practice provides me with a means of staying “present” and focused with a client when my mind might otherwise wander … Second, my practice makes me more aware of my habitual responses to fear, insecurity, anger, pride, and other feelings that inevitably arise in different client situations. The more I practice mindfulness meditation, the more often there is a conscious moment between a feeling (e.g., subtle fear, anger, or eagerness to please) and my reaction to that feeling (e.g., defensiveness or undue deference). That moment is an opportunity for me to choose how to react rather than reacting unconsciously and realizing five minutes later (or days later) that my advice and actions were skewed by, for example, anger at opposing counsel or my fear of disappointing a client.

Negotiator
A valuable negotiating skill that mindfulness practice facilitates is avoiding unnecessary resistance. Because the practitioner knows how he or she has responded to stimuli (such as aggressive statements by opposing counsel) by becoming rigid and inflexible, the mindful lawyer has a better sense of how not to produce that reaction in the opposite counsel or client. When this competency is particularly refined, it can be successfully deployed, even in situations where stakes are high and emotions intense.

By contrast, a negotiator adopting a hyper-aggressive, bullying approach, may sometimes carry the day, but will frequently find that style counterproductive. It is also a high-maintenance strategy that often produces as much stress in the perpetrator as in the recipient.

The effective negotiator, not trapped in habitual thought patterns, is more open to possible solutions and is therefore more creative than one who has a fixed strategy. Seeing the potential to accommodate both sides can be the difference between being a “deal breaker” and a “deal maker.” Allowing space in one’s state of mind produces an opening for insights that could never have shown themselves in a mind constantly awash in a flood of thoughts. As a lawyer who practices in New York told me,

The legal profession generally promotes the idea of “winning at all costs,” and of course vigorous representation of a client is how we earn our living. On the other hand, my meditation practice has allowed me to expand my horizons beyond the narrow desires of my client, and I am able to better see what would satisfy the other party as well. With that insight, I’m often able to recommend to my client a way of solving a problem which allows both parties to leave the table with satisfaction. This is ultimately a much less costly and more efficient way to solve problems than winner-takes-all litigation.

Advocate
The advocate—one who speaks on behalf of a client’s interests in a court, agency, or other public setting—also benefits from learning how to ride his or her state of mind. Simply standing up to make an argument can breed nervousness, anxiety, or fear, not unlike the musical or theatrical performer’s stage fright. Because these states are so uncomfortable, we have a tendency to generate all kinds of thoughts (the habitual patterns spoken of earlier) to mask or pad the experience. (Again, don’t take my word for it.)

The ability to think on one’s feet requires equanimity and flexibility of mind; however, when challenged, this can be difficult. Some advocates, required to respond precisely and simply on the spot—but pinned down by a barrage of thinking—may fall back on “canned” arguments, which are often obvious and

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unconvincing. Others may just “freeze.” Whatever one’s typical response, the advocate who can recognize the fear/reaction dynamic and, in particular, learns effective strategies for working with fear, brings a powerful tool for effective law practice. Mindfulness teaches a specific approach to working with nervousness and fear, recognizing them before the “story” or other habitual response kicks in. The practitioner can also learn how not to shy away from the fear, but rather to appreciate the experience, turning it into a source of energy and alertness instead of an obstacle.

Dynamic Equanimity

In every situation, the conscientious lawyer strives for a high level of effectiveness. Some lawyers seem to have a natural genius for this, as did a senior partner who (whether he knew it or not) was my unofficial mentor in my Atlanta firm. He was cultured and sophisticated, soft spoken, and possessed of a whip-like business mind that could always recognize what was significant. He never talked about himself, always more interested in what he could learn about others, and was generous, cheerful, and charming. And I am confident that he never meditated a day in his life. Yet, in retrospect, I see that many of the qualities that I so admired in this gentleman are the qualities that mindfulness cultivates.

Cultivating detachment from one’s habitual mental “weather” not only helps to deal with stress, but also to maintain a balanced disposition or temperament. Not being undermined by buffeting thoughts and emotional patterns produces a more confident legal practitioner.

The ancient teachings about meditation speak of equanimity as a by-product of meditation. Although equanimity may seem more like a quality of a monk or hermit than people engaged in busy daily lives, by engaging in mindfulness meditation the lawyer can bring equanimity into the challenges of legal practice. With detachment from mental patterning, the lawyer can ride the energies of a situation, whether in negotiating a settlement, dealing with the pressure of deadlines, or responding to the arguments of adversaries.

Learning to Practice Mindfulness

Although practicing mindfulness is a method of learning to disengage from our personal preconceptions, opinions, and habits, it is also a completely personal experience. As a result, it is beneficial to learn it from someone who has a thorough background in the practice and is experienced talking about it with others. Learning mindfulness from a book, while better than not learning it at all, is a limited approach.

We often hear propositions and points of view praised as “scientific” or “objective” and others disparaged as “anecdotal” or “subjective.” While scientific studies of the brain activity of meditators may encourage us to explore mindfulness practice, it is ultimately our own subjective experience—at times perhaps supported by outside feedback—that is the ultimate test of its value. If mindfulness meditation enhances our ability to live and engage in law practice fully and effectively, please our clients, and enjoy a more cheerful relationship to the situations and people around us, that is the test of its ultimate worth in cultivating effective—and rewarding—lawyering.

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2 Id. at 3.
3 Id. at 3 – 7. See also, JOSEPH PARENT, ZEN GOLF: MASTERYING THE MENTAL GAME (2002) and RICHARD STRESSLI HECKER, IN SEARCH OF THE WARRIOR SPIRIT: TEACHING AWARENESS DISCIPLINES TO THE GREEN BERETS (1990).
4 See the Wikipedia entry for “Meditation,” http://en.wikipedia.org/wiki/Meditation, which describes numerous varieties of meditation, many associated with a particular religion and having a variety of objectives and techniques.
7 One of the Tibetan words for meditation is “gom,” which means “to become familiar with.” SAKYONG MIPHAM, TURNING THE MIND INTO AN ALAYA 40 (2003).
8 A classic example of the mechanism of cause and effect known in Eastern religions as karma. See SAKYONG MIPHAM, RUINING YOUR WORLD: ANCIENT STRATEGIES FOR MODERN LIFE 32 (2005).
9 The more familiar contemporary term has been translated into the Victorian argot, as this is a family magazine.
10 E-mail message from Andrew Garth, Esq. (April 6, 2007) (on file with author).  
11 E-mail message from Robert Chender, Esq. (April 7, 2007) (on file with author).
12 For a description of some of these studies, see RICARD, supra note 5, ch. 16.