Seminar #11

The Barristers/Young Lawyers Section and West County Section of the Contra Costa County Bar Association presents

MINDFULNESS AS THE CORNERSTONE FOR EFFECTIVE AND ETHICAL LAWYERING

Speaker:

Dan Carlin
Warrior One Program Director,
Attorney and Mediator
Mindfulness For Effective and Ethical Lawyering

I. Competence Defined and the Connection with Mindfulness
   a. Competence entails both wellbeing and effectiveness, and mindfulness supports both by strengthening focus, clarity, and creativity, as well as mental and physical wellbeing.

II. Defining the Problem: The Difficulties of a Life in the Law
   a. Legal training and law practice reward pessimism and perfectionism, which can take a toll on our happiness, mental, and physical wellbeing. In many cases, they can also compromise our effectiveness by leading to anxiety, depression, and substance abuse.
   b. Mindfulness helps by tempering these mental patterns, and giving us the ability to leave them at work, rather than taking them home where they can damage our personal lives.

III. What is Mindfulness and How Does It Work?
   a. Mindfulness is the awareness that arises from paying attention on purpose, nonjudgmentally, in the present moment.
   b. Mindfulness practice (e.g. meditation) helps us to develop beneficial qualities through repetition, much like learning to play a musical instrument.

IV. Mindfulness Supports Ethical Conduct and Civility
   a. Among its benefits, mindfulness increases empathy and encourages ethical decision-making, which is important for lawyers, both in adhering to ethical rules and behaving with civility.

V. Mindful Lawyering Supports Effective and Ethical Lawyering
   a. Mindfulness’ effects on focus, clarity, and creativity, as well as its tendency to foster ethical, emotionally-intelligent conduct make it a powerful skill for lawyers in developing an effective and ethical law practice.
Dan Carlin is an attorney and meditation teacher who is passionate about helping lawyers find greater effectiveness and wellbeing in work and life. He has taught mindfulness to lawyers and law students since 2011, including on retreats for lawyers at Spirit Rock Meditation Center in California and the Garrison Institute in New York. He recently co-taught an innovative mindfulness program for the District Attorney’s Office in San Jose, California, as part of a project to bring mindfulness training throughout the Santa Clara County criminal justice system. From 2013-15, Dan was Associate Director of the Berkeley Initiative for Mindfulness in Law (UC Berkeley School of Law), an organization that pioneered the use of mindfulness in law school classrooms and clinics. He is a graduate of Washington University in St. Louis, and UC Berkeley (Boalt Hall) School of Law. He can be reached at dan@warriorone.com.
Mindfulness For Effective and Ethical Lawyering

I. Competence Defined

A. ABA Model Rules of Professional Conduct, and California Rules of Professional Conduct, address distinct but overlapping dimensions of competence for attorneys.

1. Model Rules of Professional Conduct 1.1 (Lawyer-Client Relationship): “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

2. California Rules of Professional Conduct Rule 3-110 (Failing to Act Competently):
   
   (A) “A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.”

   (B) For purposes of this rule, “competence” in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.”

3. Further, California MCLE Rule 2.72 requires that all attorneys include “at least one hour of education addressing substance abuse or other mental or physical issues that impair a member’s ability to perform legal services with competence.”

Contra Costa County Bar Association MCLE Spectacular
Nov. 18, 2016
B. Taken together, these rules reflect the fact that competent lawyering entails developing a range of emotional and cognitive skills, in order to insure both effectiveness and wellbeing.

C. Mindfulness develops both dimensions of competence:

1. Mindfulness increases mental clarity, focus, and mental stability, which many mindfulness-trained lawyers report leads to greater effectiveness in problem-solving, handling complex tasks, and delivering excellent representation in high value and high-stakes situations.

2. Mindfulness also increases the capacity for self-regulation, boosts positive emotions, develops emotional intelligence, and strengthens resilience, all of which enhances wellbeing by protecting lawyers against anxiety, depression, and a higher-than-average tendency to default to unhealthy coping mechanisms like alcohol and substance abuse.¹

II. Defining the Problem: The Difficulties of a Life in the Law

A. Working in law demands and rewards four key capacities²:

1. The ability to manage enormous volumes of work
2. Continual analytical and critical thinking, i.e. pessimism
3. Competitive drive, towards both colleagues and opposing counsel
4. Being correct all (or almost all) of the time, i.e. perfectionism

B. When taken to an extreme, strengthening these capacities can negatively impact effectiveness and wellbeing. Being in a constant state of conflict and competition with others, while driven by a need for perfection, and carrying heavy workloads, can over-activate the flight/fight/ freeze/collapse region of the brain.

1. At a biological level, this releases the stress hormones cortisol and adrenaline, keeping our bodies and minds on high alert (with harmful impacts on our immune system).³

2. At a neurological level, it impedes the function of the prefrontal cortex, the seat of reason and wisdom, which we need to be effective lawyers.  
3. When this occurs, lawyers may approach all situations from an adversarial posture, even when the situation calls for a calm, dispassionate attitude. Perfectionism may also translate into constant self-criticism and anxiety.  
4. Pessimism at work can translate into doubt and worry about family, friends, finances,

C. In terms of effectiveness, Professor Len Riskin writes in the Harvard Negotiation Law Review that over-developing these mental qualities, while under-developing qualities such as empathy, curiosity, and emotional intelligence, “may contribute to many problems in law practice and in the legal system - such as excessive adversarialism, inadequate solutions, high costs, delays, and dissatisfaction among both lawyers and clients....”

D. In terms of wellbeing, a study published in 2016 by the Journal of Addiction Medicine found that among a sample of approximately 12,000 lawyers across the U.S., 28% experienced symptoms of depression, 19% experienced symptoms of anxiety, and 23% experienced symptoms of stress, while approximately 20% screened positive for hazardous, harmful, and potentially alcohol-dependent drinking, almost twice the level in the general population.

1. Addiction and substance abuse issues may arise much more frequently in lawyers because of the over-activation of the fight/flight/freeze/collapse region of the brain caused by hyper-alertness, intense competition, and living surrounded by conflict.
2. Likewise, mental health problems including anxiety, depression, and burnout, may also arise when lawyers are not given the tools to manage or mitigate these difficult states of mind.

E. Mindfulness offers a powerful set of tools for addressing these situations and for increasing effectiveness and wellbeing.

---

III. What is Mindfulness and How Does It Work?

A. Defining mindfulness: “The awareness that emerges through paying attention on purpose, in the present moment, and nonjudgmentally to the unfolding of experience moment by moment.”

1. Mindfulness can also be understood as living in the present with grace and resilience, even when the present situation is very difficult.
2. It is also a practice of closely observing and understanding the mind, in order to develop greater self-mastery over thoughts and behaviors, including addictive impulses.

B. There is a vast body of scientific literature, relevant to attorneys, that documents a range of biological, neurological, and psychological benefits of meditation. These benefits include:

1. A calming effect on heart rate and breathing, and lowered blood pressure
2. An increased ability to focus and redirect attention
3. Strengthening in areas of the brain associated with learning and memory
4. Improved performance on standardized tests (e.g. GRE)
5. Greater emotional wellbeing and resilience
6. Improved sleep and reduced addictive behavior

C. These benefits develop through mindfulness practice, and actually lead to changes in the structure and function of the brain through a process called neuroplasticity. The brain literally rewires over sustained periods of practice.

---

IV. Mindfulness Support Ethical Conduct and Civility

A. Lawyers are expected to model not only ethical conduct, but also basic civility in their dealings with others.

B. Attorney Guidelines of Civility and Professional Conduct (California Civility Toolbox)

Section 3:
RESPONSIBILITIES TO THE CLIENT AND CLIENT REPRESENTATION

An attorney should treat clients with courtesy and respect, and represent them in a civil and professional manner. An attorney should advise current and potential clients that it is not acceptable for an attorney to engage in abusive behavior or other conduct unbecoming a member of the bar and an officer of the court. As an officer of the court, an attorney should not allow clients to prevail upon the attorney to engage in uncivil behavior. An attorney should not compromise the guidelines of civility and professionalism to achieve an advantage.

SECTION 4: COMMUNICATIONS

An attorney's communications about the legal system should at all times reflect civility, professional integrity, personal dignity, and respect for the legal system. An attorney should not engage in conduct that is unbecoming a member of the Bar and an officer of the court.

C. Mindfulness practice helps us to develop the qualities necessary for this kind of conduct. By increasing our self-awareness and self-regulation (core elements of emotional intelligence), we are better able to pause before communicating or acting in a way that aggravates a situation, violates norms of civility, or crosses an ethical boundary.12

D. Scientific research indicates that practicing mindfulness increases our awareness of our own emotions, and the emotions of others, which enables us to choose

---

actions and words appropriate to a given situation.

E. As part of this, mindfulness practitioners hone the ability to identify ethical dilemmas, and to make ethical decisions.\textsuperscript{13} A study at the Wharton School of Business illustrated this by showing that mindfulness practitioners cheated less. In another study, participants in a meditation course were far more likely than non-meditators to yield their seat in a waiting room to someone on crutches—a powerful illustration of compassion and ethics at work.\textsuperscript{14}

F. Mindfulness practices for honing ethical conduct:

a. \textbf{Focused awareness meditation} increases our self-awareness and self-regulation, our ability to pause and choose our response, rather than react. It also strengthens the ability to perceive situations accurately, to collect all of the verbal and non-verbal information necessary to assess the emotional dynamics, the factual elements, and to choose accordingly.

   i. Mindfulness meditation develops greater clarity and stability in the mind. This enables us to see issues more clearly, to perceive solutions more easily, and to do our work with focus and precision. It helps us to avoid feeling overwhelmed, even when extremely busy; to reduce hyper-alertness when not needed; to connect with colleagues and clients with greater discernment: competitively when necessary and collaboratively when appropriate; and to live with grace and resilience while surrounded by conflict.

   ii. A regular mindfulness meditation practice lowers reactivity to internal and external stressors, increasing our resistance to stress, making us more physically and emotionally resilient, and helping us to avoid becoming hijacked by the external difficulties of practicing law as well as our own difficult emotions and the difficult emotions of others.

b. \textbf{Practices that develop compassion and self-compassion}, such as lovingkindness, tonglen, and self-compassion meditation, strengthen this


capacity as well. By developing a sense of interconnection with others, we are better able to take their perspective, to consider their needs when making a decision, and to act in a way that is respectful of others, even in situations of conflict. Many lawyers have found that once learned and employed, these techniques help them to better perceive and respond to interpersonal dynamics, communicate in ways that are more appropriate to the situation, more skillfully manage their own difficult emotions and the difficult emotions of others, and avoid compassion fatigue and burnout.

c. **Mindful listening** applies the qualities cultivated in meditation to an interpersonal setting that pervades the lawyer's work: client interviews, depositions, negotiations, oral argument, all call for effective and empathic listening in order to establish trust with the speaker, to pick up on verbal and non-verbal information, and to respond effectively to questions that arise in the interaction. Implementing this skill can be transformative in fostering both greater effectiveness and ethical behavior in these settings.

V. **Mindful Lawyering Supports Effective and Ethical Lawyering**

A. Mindfulness has been found, both through extensive scientific research, and by the many lawyers who have applied it to their lives and legal work, to develop important capacities for competent lawyering: focus, efficiency, clarity, discernment, wisdom, empathy, and compassion. These qualities are often neglected in traditional legal training, and are essential for success in the interpersonal dimensions of law practice, for creativity, and effective problem-solving.

B. Mindfulness also helps to reduce the negative effects of other capacities that are often *overdeveloped* among lawyers—competition, adversarialism, hypercriticism, hyper-vigilance. These mental qualities can lead to anxiety, depression, and substance abuse.

C. Developing a meditation practice, and learning to integrate mindfulness into legal work, yields important benefits, both for effectiveness as a lawyer, and for mental, physical, and emotional wellbeing. It also enhances our capacity to discern ethical courses of action, and to behave with civility, by applying greater focus, self-awareness, and ability to control our responses, even in contentious situations.
D. In light of the significant mental and physical health challenges facing so many in the legal profession, adopting and modeling the mindful approach to law practice can help lawyers create more rewarding, sustainable, competent, and ethical careers. This will, in turn, create a positive ripple effect throughout the greater legal community and the communities of individuals and institutions it serves.