Meant To Be

BY GISELA M. MUNOZ

I. Introduction

What is meant to be? You are probably thinking about this question in a particular way, and you may not be focusing on how you are interpreting it. I'd like to ask you to stop for a moment, take a few breaths, and re-read the question. First, place your full attention on your breathing. Feel your breaths entering and leaving your body a few times. Then place your attention on each word.

What is meant to be?

Here is one answer: humans are. We are meant to be and not just to do. In our increasingly busy lives and world, we are almost always doing and rarely being. The practice of mindfulness can help us be in the moment attentively, which can help us improve our personal and professional lives. You may have initially thought the question above was a philosophical question about destiny. When you re-read it, placing your attention on each word, you may have interpreted it differently, allowing for the answer above. If you didn't experience that shift in perspective until you read this paragraph, that's ok. But you may find that mindfulness can enhance your awareness of alternatives, possibilities, and opportunities that may otherwise be hidden from you, just as the alternative interpretation of the question above may have been hidden from you initially.

That said, the point of mindfulness is not to try to achieve that or any other consequential goals (although you may end up achieving them). Rather, the point is simply to be aware of the present moment without judgment. One helpful definition of mindfulness is "paying attention in a particular way: on purpose, in the present moment and non-judgmentally." Mary Elizabeth Williams, "Why Every Mind Needs Mindfulness," Time Magazine Special Edition: Mindfulness, The New Science of Health and Happiness 10 (2016) (quoting University of Massachusetts mindfulness pioneer, Jon Kabat-Zinn). As to the qualification "non-judgmentally," I suggest suspending both judgment and self-judgment, which may be difficult for lawyers but critical to mindfulness.

By now, some of you are wondering how to practice mindfulness. You're already on your way! When breathing and re-reading the question above, you were engaging in a mini-exercise of mindfulness. And at the end of this article, you will find a simple, sample exercise you can practice. Others of you are already thinking you don't have time to practice mindfulness – or even to read this article! First, as you'll see, mindfulness exercises can be very short. Moreover, consider that what you have time to do is your choice. We all engage in obligatory and non-obligatory activities that we prioritize. We choose to spend our time on certain matters before, or instead of, others. If you think about it, you may find that (a) you have time that is used for matters of lesser priority and (b) it is worthwhile to choose to devote some of that time to something as helpful and potentially transformative as mindfulness.

II. Benefits of Mindfulness: Health and Mind

On this note, one of the benefits of mindfulness is that it can empower you, by giving you more awareness of the choices and control you have that you may not otherwise notice while operating on auto-pilot. Also, as the mini-exercise above demonstrated, mindfulness may help you see other perspectives; recognize alternative solutions to your and your clients' problems and issues; and respond thoughtfully to events and communications, rather than succumbing to knee-jerk reactions. Furthermore, research has shown mindfulness can decrease stress and increase health and well-being, as well as improve concentration, decision-making, and communication.

One study showed that engaging in two hours of mindful meditation training per week for eight weeks improved the participants' ability to focus and stay on-task. Emory University researchers discovered that the positive impact of mindfulness on concentration and memory is not only the result of behavioral changes (i.e., practicing mindfulness), but also of physical changes. They found increased connectivity within the attention centers and memory centers in the brains of mindfulness practitioners. See Maria Konnikova, "The Power of Concentration," The New York Times (Dec. 15, 2012), available at http://www.nytimes.com/2012/12/16/opinion/sunday/the-power-of-concentration.html?smprod=nytcore-iphone&smid=nytcore-iphone-share.

In a Harvard study, MRI scans of people who practiced mindfulness for less than three months showed shrinkage of their amygdala, which is known as the stress center of the brain. See Alice G. Walton, "7 Ways Meditation Can Actually Change the Brain," Forbes (Feb. 9, 2015), available at http://www.forbes.com/sites/alicegwalton/2015/02/09/7-ways-meditation-can-actually-change-the-brain/#2c41fa2c7023.

Besides stress reduction, the effects of mindfulness on the amygdala may have other health benefits. For instance, a recent study found that people with high activity in the amygdala were at greater risk of heart disease and stroke. See Robert Preidt, "Here's How Stress in Your Brain May Cause Heart Troubles," Healthday (Jan. 12, 2017), available at http://www.cbsnews.com/news/heres-how-stress-in-your-brain-may-cause-heart-troubles/. In addition to the amygdala shrinking, its connection to other parts of the brain has also been found to weaken, which has been correlated with an increase in higher-order brain functions, such as focus and decision-making. See Tom Ireland, "What Does Mindfulness Meditation Do To Your Brain?," Scientific American (June 12, 2014), available at https://blogs.scientificamerican.com/guest-blog/what-does-mindfulness-meditation-do-to-your-brain/.

Finally, as lawyers, we have been trained to look for all possible problems and risks – in other words, to think negatively – in order to protect our clients. This approach sometimes seeps into other parts of our work and life, where it may be detrimental. Mindfulness (a) has been found to help lawyers identify when they are applying legal "negative thinking" inappropriately and (b) can include positive affirmations or other exercises that help lawyers to think positively.

III. Mindfulness and Civility, Professionalism, and the Florida Rules of Professional Conduct

The above benefits are likely to help lawyers in both life and work generally, but mindfulness may also help attorneys practice law with more civility and professionalism, while also improving compliance with the Florida Rules of Professional Conduct ("FRPC"). See Matthew Guarnaccia, "Legal Field Could Benefit From Mindfulness Training: Paper," Law360 (Feb. 1, 2017), available at https://www.law360.com/articles/887188/print?section=realestate.

A. Civility and Professionalism

The FRPC preamble provides that the principles underlying the FRPC must guide a lawyer's practice, and that those principles include "maintaining a civil attitude . . . ." Similarly, the oath of admission to The Florida Bar includes a pledge of "fairness, integrity, and civility" to opposing counsel in all communications.

Many in the legal community perceive an inverse relationship between stress and civility. Conversely, the practice of mindfulness, by decreasing stress, may increase civility. See The Honorable Alan S. Gold, "The Art of Being Mindful in a Legal World: A Challenge for Our Times," The Florida Bar Journal 17 (Apr. 2016).

However, it is also possible that by focusing on the present without judgment or self-judgment, we become freer to listen fully and respond with an open mind, rather than reacting (a) based on a pre-formulated assumption or judgment and/or (b) reflexively to (what might or might not be) unprofessional conduct by opposing counsel.

Aside from civility, professionalism includes minimizing bias, including unconscious bias, against those different from us, whether the difference is based on race, disability, or other protected classes, or based on hair color, sports team affiliation, or other non-protected classes. By releasing pre-conceived judgments, mindfulness can help lawyers achieve greater awareness of unconscious bias and hence greater professionalism. See Rhonda V. Magee, "Reacting to Racism: Mindfulness Has a Role in Educating Lawyers To Address Ongoing Issues," The ABA Journal 26 (Aug. 2016).

B. Florida Rules of Professional Conduct

In addition to civility and professionalism, the process of listening attentively, considering matters with an open mind, and responding thoughtfully can also improve adherence to the FRPC. FRPC 4-1.1, 4-1.4, and 4-2.1 require that lawyers serve their clients competently, communicate with them promptly about matters material to the representation, and give candid, independent advice.

FRPC 4-1.1 and its commentary state that part of competence is adequate preparation, including inquiry into and analysis of the factual and legal elements of the client's issue. In order to engage in that inquiry, we need to listen attentively to the client. Our analysis thereafter may be assisted by the positive effects of mindfulness on concentration and decision-making.

FRPC 4-1.4 requires attorneys to reasonably consult with their clients about how to achieve the clients' goals and to explain matters sufficiently to allow the clients to make informed decisions. In addition to involving clear communication with clients, the Rule also requires attentive communication with opposing counsel.

If we begin a discussion with our client or opposing counsel with a pre-conceived notion, we may miss something important. For example, we may approach opposing counsel with the following pre-judgment: "Whatever she says is going to be contrary to my client's interest." If that is our mind-set, we may hear her words (and sometimes we may not even do that much), but we may not truly understand the message opposing counsel is conveying. Hence, we may not realize that resolving her client's primary issue could be accomplished with a concession on an issue that is secondary to our client, and we may thus miss an opportunity for a favorable resolution.

Similarly, mindfulness practice may help us provide the candid advice required by FRPC 4-2.1, the comment to which states that a lawyer's advice should be straightforward. Sometimes lawyers convey advice using legalese or with a level of complexity that the client may not fully understand. By being present in the moment, a lawyer may hear herself, recognize this, and change her delivery of the message. Or she may mindfully listen to the client's feedback, realize there is a misunderstanding, and proceed to clarify.

IV. Mindfulness Practice: A Sample, Simple Exercise

If you would like to try mindfulness for yourself, I encourage you to find a mindfulness class or coach near you. In the meantime, here is a simple "Awareness of Breath" mindfulness exercise you can do on your own for as little as five minutes a day. Of course, please take into account any physical limitation that may affect you and adjust the exercise to accommodate that.

- Sit in an upright position that feels stable.
- Rest your hands somewhere comfortable.
- Close your eyes gently (or, if open, allow your gaze to relax so that you are not trying to look at anything).
- Notice the sensations of where your body connects with the chair, the floor, etc. If you detect physical tension somewhere in your body, notice that and perhaps try to release the tension so you feel comfortable.
- Begin focusing on your breathing.

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Simply notice your breath entering and leaving your body and follow its path through your body.

- If your mind wanders to other thoughts, simply return your attention gently (without self-judgment) to your breathing.

See Scott Rogers, "Mindfulness in Law and the Importance of Practice," The Florida Bar Journal 11 (Apr. 2016); Terry DeMeo, "How To Deal with Difficult People," May 29, 2011, available at http://www.inner180.com/2011/05/29/how-to-deal-with-difficult-people/; Jennifer Gibbs, "Saving Lawyers 1 Breath at a Time: Mindfulness in the Law," Law360 (Jan. 13, 2017), available at https://www.law360.com/articles/880125.

V. Conclusion

After the exercise, you may feel calmer, energized, and/or more focused. With practice, you may be able to refresh and re-focus your attention without a full exercise, by just taking a few deep breaths in the middle of a contentious discussion with opposing counsel or a difficult conversation with a client or spouse. Engaging in the present moment mindfully, with attentive intention, may eventually become second nature.

In conclusion, if you take a few minutes to simply be, you may find, as a result, that you are better (i.e., both better able to be in each moment and healthier), and that you do better and feel better, too. Remember, we are meant to BE.

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Second Circuit Joins Eleventh Circuit in Addressing Scope of "Reasoned Award"

BY AVA J. BORRASSO

The level of detail required in an arbitration award is determined in large part by the agreement of the parties with respect to whether the award is standard, reasoned or requires even greater specificity in the form of findings of fact and conclusions of law. The issue of what qualifies as a proper reasoned award has been the subject of some challenge. Recently, the United States Court of Appeals for the Second Circuit, in Leeward Construction Co. Ltd. v. American University of Antigua, No. 13-1708-cv (2d Cir. June 24, 2016), applied the rationale previously set forth by the Eleventh Circuit on this issue.

The Second Circuit, in assessing the issue with respect to a challenge to an international arbitration award that was denied before the District Court in the Southern District of New York, reasoned that:

> [a] reasoned award is something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel. A reasoned award sets forth the basic reasoning of the arbitral panel on the central issue or issues raised before it. It need not delve into every argument made by the parties. The award here satisfies that standard: while it does not provide a detailed rationale for each and every line of damages awarded, it does set forth the relevant facts, as well as the key factual findings supporting its conclusions. . . . No more is needed.

In reaching its determination, the Second Circuit relied substantially on the rationale set forth in other circuits, including the Eleventh Circuit.

In Cat Charter, LLC v. Schurtenberger, 646 F.3d 836 (11th Cir. 2011), the Eleventh Circuit addressed whether the arbitrators "exceeded their powers" under the Federal Arbitration Act when they failed to issue a "reasoned award" pursuant to the agreement of the parties. The arbitration had proceeded according to the Commercial Rules of the American Arbitration Association and when the Panel issued a unanimous, albeit brief, award, the losing party moved for vacatur claiming the Panel failing to satisfy the obligation to provide a "reasoned award." The District Court agreed that the award was insufficient, vacated the award and declined to remand the case back to the Panel ruling the doctrine of functus officio precluded it from doing so.

On appeal, the Eleventh Circuit reversed and held that the award met the requisite standard:

> Logically, the varying forms of awards may be considered along a "spectrum of increasingly reasoned awards," with a "standard award" requiring the least explanation and "findings of fact and conclusions of law" requiring the most. In this light, therefore, a "reasoned award is something short of findings and conclusions but more than a simple result." (internal citations omitted).

The Eleventh Circuit determined that the award met the requisite standard, finding that "the Panel provided a detailed explanation for the only conclusion that truly required it" and specificity where needed and concluded:

> In the present case, three validly-appointed arbitrators oversaw a five-day hearing and rendered a thoughtful, reasoned award. We decline to narrowly interpret what constitutes a reasoned award to overturn an otherwise apparently seamless proceeding. The parties received precisely what they bargained for — a speedy, fair resolution of a discrete controversy by an impartial panel of arbitrators skilled in the relevant areas of the law. To vacate the Award and remand for an entirely new proceeding would insufficiently respect the value of arbitration and inject the courts further into the arbitration process than Congress has mandated. As such, the Award should be confirmed and this controversy should be put to rest once and for all.

The Eleventh Circuit upheld the award under the facts before it and this rationale was adopted by the Second Circuit in Leeward Construction.

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Trapped in the Trustee's Claws: How Your Client's Thriving Business Might Become Ensnared in Bankruptcy Law

BY ZAKARIJ LAUX

You represent a successful business. Profit margins are up, plans to expand into new markets are in the works, and the furthest thing from your client's mind is the Federal Bankruptcy Code.

But what commercial litigators don't always realize is that it's not just the status of their own client's finances that can draw the Bankruptcy Code into sight. In many cases, it's the financial condition of a business's customers, clients, and vendors. When one of these entities files for bankruptcy, the focus can shift to your client's thriving business as the recipient of payments and the Bankruptcy Code grants a trustee with broad powers to "claw back" certain payments for the benefit of the bankruptcy estate.

When your client's business finds itself in the crosshairs of a bankruptcy trustee, mistakes, misconceptions, and in the worst cases, malpractice are common. Here are three tips for commercial litigators to share with their unsuspecting clients:

First – "Don't get heated." Your client's first reaction may be: "but I didn't do anything wrong." That is likely true, but it doesn't matter. The trustee's claw-back powers do not generally require any amount of knowledge or wrongdoing on the part of the target. Remember that one of the goals of the Bankruptcy Code is to level the playing field for all creditors. By paying your client before declaring bankruptcy, the debtor depleted funds that would otherwise be available to be divided among all creditors, pro rata. The trustee has a fiduciary duty to creditors to see that each gets its fair share of the pie—nothing more and nothing less. For your client, this can't be about emotion; it's about economics and fairness.

Second – "Don't burry your head in the sand." Procedures are slightly relaxed in bankruptcy litigation. For example, an action against your client will likely not commence with the usual "you've been served." Under the Federal Rules of Bankruptcy Procedure, service of a complaint is permitted by US Mail. But the consequences of your client ignoring that envelope can be severe. A judgment from a bankruptcy court is just as dangerous to your client's business as a judgment from any state or federal court and comes with all the same tools for execution. It's far better to take action early than to wait to seek assistance from a qualified bankruptcy attorney after the trustee has begun collection proceedings.

Third – "You probably have viable defenses." Due to the strict liability nature of the trustee's claw-back powers, the Bankruptcy Code itself provides a number of defenses for would-be defendants. For example, a trustee generally cannot recover payments made in the same manner they've always been made pursuant to a long-standing contract with the debtor. Bankruptcy law can affect the prosperous and downtrodden, alike. It is also a complex area of law that is unfamiliar to many business litigation attorneys. Informing your client of its rights and obligations when it finds itself in a bankruptcy trustee's claws is essential. Seeking counsel from an experienced bankruptcy practitioner will help to ensure your client mounts the best defense possible.

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