



(MCLE Specialty Credit – Competency Issues)
Competency and Mindful Lawyering

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Functional Mindfulness



Mindfulness-Based Mediation

Mindful Lawyering: Using Mindfulness to Detect and Transform Mental Issues That Impair the Ability to Perform Legal Services with Competence

How we perceive, think and respond in our daily lives affects our mental competence as professionals. We can use mindfulness based emotional intelligence to detect and transform cognitive and emotional impediments to professional competence. Here is a summary of common mental issues that impair professional competence and functional mindfulness skills you can use right now to be more competent, effective, and develop a greater sense of well-being. This was presented at the League of California Cities, 2021 City Attorneys' Spring Conference.

Mindfulness is a way of paying attention: on purpose; in the present moment; without judgment or agenda; to experience more clearly just what is so. (Kabat-Zinn, *Mindfulness for Beginners*, Sounds True 2012, pg. 1.)

Emotional Intelligence is the ability to monitor one's own and others' feelings and emotions, to discriminate among them and to use this information to guide one's thinking and actions. (Tan, *Search Inside Yourself*, Harper-One 2012, pg. 31.)

Detection of Mental Issues That Impair Competence

1. **Multitasking.** You can only do one thing well at a time. You will get more done, in less time, do a better job and be much less stressed out if you do one thing at a time.
2. **Checking Messages.** Do it less. Turn notifications off when doing work that requires focus.
3. **Social Media.** Set specific times during the day to engage. When you are on social media, just do that. You will enjoy it more.
4. **Competitiveness.** It's not about winning; it's not about you. It's about getting the job done for the benefit of those you serve.

5. **Busyness.** Is not a virtue. If you often feel too busy, put more effort into: setting priorities; being better organized; getting assistance from others; using tech more efficiently; taking on less work. Work to live; avoid living to work.
6. **Aggression.** Is overrated. It is distracting and often has unintended consequences. Alternative: calm and respectful assertiveness.
7. **Fear.** Mainly of failure; not meeting other's expectations. Practice: mindful non-attachment to the outcome. Prepare, do your best, then stand back.
8. **Sorrow.** Getting involved with client's lives. Being asked questions for which we don't have immediate answers. This causes anxiety. Practice: mindful, compassionate detachment. It is not your case; it is not your life. You are not the cause of the problem.
9. **Repressing emotions.** Using analytical skills without emotions. Taught that otherwise, thinking gets clouded. While effective, this causes anxiety. It's both OK and more effective to be mindfully emotional.
10. **Being Right.** We are expected to be right, all the time. This causes anxiety. See (7) above.
11. **Critical Thinking.** Devolves into negative thinking and looking for what is wrong with everything. Impediment to competence, e.g., over-lawyering on deals.
12. **How You Treat Other Lawyers.** Treating them all the time as adversaries, being uncivil, belittling, however well deserved it may seem is counterproductive and causes you more anxiety.
13. **Sleep Derivation.** Not getting 7 to 8 hours of sleep everyday affects everything about how you do and feel, how long and well you will live. You have complete control of this.
14. **Being Late.** The amount of stress this causes you and others is huge and it hinders your effectiveness on arrival. You have complete control of this. Use your devices to prompt you to be mindful of Time.

Functional Mindfulness Practices

The above-listed impediments to competence are habits. Ideas alone will not affect those habits. To change habits requires diligent practice to develop skills to first detect and then transform a habit that impedes competence. First, we need to soften and bring our nervous systems into balance. (Strom, *A Life Worth Breathing*, Skyhorse Publishing, 2010, at pg. 54.) Then we can use simple methods of mindful awareness to detect and then transform habits which impede professional competence and develop new habits which

allow us to be more effective, more at ease, with a greater sense of well-being.

1. **Soften and Balance the Nervous System.**

a. **Breath Initiated Movement (BIM).** To establish a daily mindfulness practice, do this for a few moments each day just after you wake up and before you engage your devices or the rest of the world.

1) **Mountain Pose.** Feet hip distance, standing tall, shoulders away from the ears, face relaxed. Put hands on *side ribs*; as you inhale, gently expand ribs into hands. Establish Full Lung Breathing, *in and out of the nose*. Deep, extraordinary breaths, filling the lungs completely on the inhale, emptying the lungs completely on the exhale. Avoid belly or upper chest breathing. **x5 breaths**

2) **Horizon Breath** (continue Full Lung Breathing, nose only, expanding side ribs). Move feet about shoulder width, slightly bend knees ("**Horse Stance**"), core tall, shoulders away from the ears. Hands together at the heart center. Then, *moving on the breath*, start to inhale then slowly push hands forward to straight arms, *palms up*, open arms out to full extension > start to exhale, then pull hands back in to the heart center. **x5 reps > Mountain Pose, savor it.**

3) **Opening the Chest** (continue Full Lung Breathing, nose only, expanding side ribs). Remember: the purpose of this exercise is to open the side body to allow you to take deeper breaths. Feet shoulder distance, *knees straight*. Left arm by side, left hand rests below left hip bone, right arm rises as you breathe in > hold breath > reach up higher, then with straight right arm, push right palm way over to the left, move left hip to the right with the left hand, slight bend of torso towards the ceiling, hold breath for a slow count to 2, exhale as you release. Switch sides. **X3 rounds > Mountain Pose, savor.**

4) **Opening the Neck.** Stand with feet straight and hip distance. Knees straight. Arms straight in front of you, palms together, shoulder height, shoulders down (away from the ears). As you breathe deeply, gently roll the head in one direction, **x8 rolls**. Switch sides. **X8 rolls > Mountain Pose, savor.**

b. **4 and Out Breathing.** Be seated. Sit tall. Inhale for a count of 4, pause; Sigh it out. **x 5 reps.**

2. **Mindfulness Meditation: to develop focused awareness; training to be present.** Takes your mindfulness (and resilience) training deeper. Add

this method **once you have established** a daily practice of Breath Initiated Movement. Reason: if you have a tightly wound nervous system, you need the breath work on its own for a bit to calm you down before you can comfortably sit in stillness. It is fine to sit in stillness right away; just know that it may feel like your busy mind is dominating the practice, which will change over time, as you train your nervous system to calm down.

Here's how. Sit in a way that you are both alert and relaxed. Ideally: on a firm chair in a quiet location; sit up straight; hands resting on the thighs; feet flat on the floor; chin level with the ground. As this becomes familiar, an option is to sit on a cushion on the floor. A good quality meditation cushion is advised. The cushion should be just high enough to raise your hips above your knees.

- a. Set a timer for 3 minutes. (Do not check your messages.)
- b. Take 3 deep, mindful breaths, in and out of the nose.
- c. Continue to breathe normally through your nose. Relax your face. Relax your shoulders. **Smile a bit**, even if you don't feel like it.
- d. Simply rest your awareness on your in-breath and out-breath. It is not focused attention or concentration. It is: *open, spacious awareness, with a deep sense of kindness, towards yourself and everything else.*
- e. As thoughts and feelings arise, which they naturally will, notice them and gently return your awareness to resting on your breath, in and out.
- f. Optional: especially when there is a lot of mental chatter: Say to yourself silently: on the in-breath, "*Breathing in, I know I am breathing in*"; on the out-breath, "*Breathing out, I know I am breathing out.*" Repeat several times. Over time, you can shorten that to silently saying "In" and "Out".
- g. Optional: if you don't do the BIM's, then just do a round of 4 & Out Breathing (§ 1(b) above) at the beginning. If so, add 1 minute to the timer, for a total of 4 mins. OK to do more breath work and/or meditation if you'd like.

Use. Do this every day. At least in the morning, preferably the first thing you do after waking, drinking some water, going to the bathroom and before you check messages or otherwise engage the world. Once that is established, add a night session, just before going to bed. As you become used to doing this, try adding a bit more time to your seated meditation, in 1 minute increments, up to a maximum of 10 minutes. It's OK to go longer. However, it is far more effective to sit for short periods every day than longer periods less than every day.

3. **Mindful Listening.** When what is before you matters.
 - a. Rest awareness on your breathing. Keeps you present, not caught in the busy mind.
 - b. Continue to notice your breathing and... Just listen: without judgment or interrupting. Listen with Curiosity and Kindness. Ok to use listening cues (nod, um hum). Ok for there to be silence.
 - c. When the speaker has finished, take a breath or two and silently process what you heard. Then respond.
 - d. Also useful at home: one of the greatest gifts you can give to a loved one: 5 minutes (or more) of deep, compassionate listening. Try it.
4. **Sacred Pause.** One deep breath, in and out. Whenever what you do or say matters. To bring awareness to emotions arising within you and in others. Allows you to respond thoughtfully instead of reacting. When you sense a strong emotion/reaction coming up: *Deep breath in; and full breath out.* Allows you to respond rather than react. Also, whenever you would like a refreshing break.
5. **S.T.O.P.** Stop; Take a full deep breath in and out; Observe what's going on in you and others; Proceed. A more structured Sacred Pause.
6. **Return to Contentment.** When you are getting caught up in stuff (e.g., anxiety, unsatisfactoriness, anger): Pause > Breath awareness > as you breath in, say "Present" and feel this moment; as you breath out say "kind" and feel your heart center expand. Repeat a few times.
7. **Simple Activity Mindfulness = More Strength Training**
Practice *gently* resting awareness on simple things. Examples:
 - a. **Brushing your teeth.** When you are brushing your teeth, just brush your teeth, noticing everything about doing that.
 - b. **Driving.** When you are driving, just drive – no music, no phone calls, no eating. Just drive, noticing everything about driving.
 - c. **Walking the dog.** When you are walking the dog, just walk the dog. No phone calls, texting, pod casts, music etc. Pay full attention to your walking, surroundings and dog. Your dog will dig it.
 - d. **Eating.** Eat without any distraction: reading, talking, TV etc. Try it with a simple meal alone, for the entire meal or just for 3 minutes. Do it with someone you care about = magic.
8. **Applied Mindfulness**
 - a. **Client Interviews.** First, use open ended questions: mindfully listen – without judgment, without interrupting, with curiosity and compassion. Then evaluate and judge. Set limits: "We have 1 hour".
 - b. **Depositions.** Prep is good; have an outline, all documents. At the depo:

- 1) First *deeply listen*: without judgment or agenda, with curiosity and compassion. Let go: of fear; of advocating; of trying.
- 2) *Sacred Pause* – a lot = one deep inhale, deep exhale.
- 3) Then judge, analyze and strategize.
- 4) Notice: opportunities to ask follow up questions – go with the flow.
- 5) Then proceed with next question. Allow yourself to diverge from your outline.
- 6) Obstreperous counsel? Sacred Pause; then respond.

c. **Negotiations**

- 1) Prepare: know what you want; know what they want; establish your Reservation Price and your BATNA (best alternative to a negotiated agreement).
- 2) Set intention: To listen. Ask for clarification. Ask questions.
- 3) Listen more than talk. Listen mindfully – without judgment or agenda, with curiosity and compassion. Then, process what you heard and respond.
- 4) Give to get.

d. **Court**

- 1) Prepare well. Then get ready to let go of your prep and... be mindfully present.
- 2) While waiting to be called, your prep is done, so don't do more. Stay calmly engaged in what is going on; mindfully breathe; stay present. Get into the judge's rhythm.
- 3) When your case is called: Take a mindful breath in; exhale as you stand (our unmute). Listening closely more than thinking of what you think you want to say.
- 4) Sacred Pause >reflect> then talk.
- 5) Look for opportunities to ask meaningful questions.

e. **Public Meetings**

- 1) Often the public is emotional, which can lead officials and staff to feel defensive and angry.
- 2) Anger is a powerful distraction and exhausting for all (see discussion of what causes anger in "[Managing Anger in Mediation](#)" *Advocate 2017*)
- 3) Unchecked anger leads to impulsive rather than rational positions and amplifies confirmation bias.
- 4) S.T.O.P. If you notice strong emotion in yourself or others arising > Stop (pause), Take a full, deep breath in and out >Observe (reflect) > Proceed (e.g., respond).

Conclusion

These functional mindfulness practices are time-tested methods validated by Western science that work to detect and transform the effects of mental issues that impair professional competence. They will work for you. You will be less stressed, sleep better, be less reactive, get in less trouble, get more done more efficiently and more beneficially. *People will like you more.* The hardest part about this work is how easy it is; a battered mind refuses to accept that something so simple can work. It can. It will work whether you think it will or not. It's not an act of faith or belief. Please give it a try. Please enjoy!

Articles. For application of these practices to mediation which also apply to all manner of what lawyers do, please click on these links:

[**Use Mindfulness to do Better at Mediation - Advocate 2016**](#)
[**Transactional Approach to Mediation - LA Lawyer 2015**](#)
[**Managing Anger in Mediation- Advocate 2017**](#)

Sleep. Sleep is the foundation for competence – and everything else that really matters. Read this book: *Why We Sleep*, Matthew Walker, PhD

Teaching. I teach functional mindfulness practices, including mindful awareness, emotional intelligence, breathing techniques and hatha yoga, to individuals, companies and professional services firms.

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Mediating. My day job is as a mediator, practicing mindfulness-based mediation, with an edge. <http://www.fingermanmediation.com>

Mindful Mondays. During the pandemic, I lead a 30 minute professional community class (no charge) at 8 a.m. Please join us <https://us02web.zoom.us/j/85335908493?pwd=RU51cXlGWtJvR1IrT1Z3U3dOdEp1QT09> . Feel free to invite others to join us.

Questions: mark@markfingerman.com.

It is an honor to be of service. Thank you.

~ Mark