The case for mindfulness in New Zealand legal education

Dr Anna High, University of Otago, reviews the research

INTRODUCTION

I read once that the practice of law is like attempting to drink water from a fire hose. And if you are under stress, meditation — or whatever you choose to call it — helps. Very often I find myself in circumstances that may be considered stressful, say in oral arguments where I have to concentrate very hard for extended periods. If I come back at lunchtime, I sit for 15 minutes and perhaps another 15 minutes later. Doing this makes me feel more peaceful, focused and better able to do my work.


Peace, focus and the ability to perform under stressful conditions — these are obviously worthy objectives in any vocation. They are particularly important attributes in the high-pressure, high-stakes and highly competitive field of law. In the United States, a growing number of law school educators are encouraging students to follow Justice Breyer’s example and use mindfulness practices such as meditation to help them survive and thrive in law school and beyond.

In 1998, Yale Law School offered a meditation retreat for its students and faculty. The retreat marked the beginning of a “mindfulness movement” in United States legal education. Since that first retreat, there has been a rapid proliferation of mindfulness initiatives in law schools across North America and internationally. These range from faculty training and extra-curricular student meditation retreats, to the development of semester-long papers explicitly focused on training law students in mindfulness techniques to better prepare them for ethical and effective practice. Some law schools are offering retreats, workshops and CLE courses for practicing lawyers in meditation and mindfulness. In 2010, the University of California at Berkeley hosted the Mindful Lawyer Conference, the first American conference on integrating contemplative practices with legal education. Dozens of law review articles have been published in the United States reporting both scientific and anecdotal evidence of the benefits of mindfulness for law students and practitioners. “Mindful law” is having a moment. What does mindfulness look like in the legal education context, and how might mindfulness practices be beneficial for New Zealand law students?

WHAT IS MINDFULNESS?

“Mindfulness” is a term used differently in different contexts. The practice of mindfulness originated as a religious concept associated with the ancient Eastern spiritual practice of meditation. The contemporary, secularised concept of mindfulness has been described by psychologists as “clear-sighted attention to ongoing subjective experience together with an attitude of acceptance towards that experience” (Ortner, Kilner and Zelazo “Mindfulness Meditation and Reduced Emotional Interference on a Cognitive Task” (2007) 31(4) Motivation and Emotion 271 at 271) — in other words, being continually attuned, in a non-judgmental and compassionate way, to the present events and experiences of the mind and body. Mindfulness is a present, engaged and self-aware state of mind, associated with mental, emotional and physical wellbeing, that is cultivated through brain training exercises in order to be applied in daily life more generally.

A number of contemplative practices and methods are associated with developing mindfulness. The foundational practice is meditation, which can be a religious or secular experience depending on an individual’s belief system. To illustrate, Professor Scott Rogers, founder and director of the University of Miami School of Law’s Mindfulness in Law Program, has described a simple, secular meditative exercise that he frequently uses to introduce law students and lawyers to the pursuit of mindfulness (“The Role of Mindfulness in the Ongoing Evolution of Legal Education” (2014) 36 U Ark Little Rock L Rev 387 at 393):

Mindful sitting involves a few simple instructions that embody intentionally paying attention to present moment experience in a way that is engaged and unassuming. In fact, it is so simple that you may do so now, even as you read the following instructions (closing your eyes is optional, but can be helpful).

1. Assume a seated posture that is upright and stable.
2. Lower or close your eyes.
3. Bring your attention to an object (e.g., the movement of the breath through the body).
4. Form the intention to keep your attention on the object.
5. When you notice your mind wandering, bring your attention back to the object.
6. Do this for a few minutes.

Practicing mindfulness can be as simple as engaging in this sort of focused, quiet sitting on a regular basis.

There is a growing body of scientific evidence connecting a sense of mindfulness with measurable improvements in concentration and productivity, a heightened ability to tackle complex problems, better emotional regulation and empathy, physical health and a more peaceful mind-set (for an overview, see Rogers (2014), above, at 391–392). Mindfulness practices can be used to help us to think straight rather than being overly reactive or overwhelmed by circumstances — when confronted with a technically challenging question of law, an emotionally fraught case, or the pressure of balancing work and life commitments.
A number of law schools, including Florida, California Berkeley, Miami, and San Francisco, have introduced formal “mindfulness in law” programs. These programs incorporate a range of elements including optional, non-credit meditation training and extended retreats for students, continuing education and conferences for practitioners, designated “mindful spaces” and for-credit elective papers added to the curriculum (see, for example, Scott Rogers “The Mindful Law School: An Integrative Approach to Transforming Legal Education” (2012) 28(4) Touro Law Review 1189, explaining the Miami Law program). Mindfulness papers typically teach students strategies for wellbeing, stress management and self-care in practice, including meditation, journaling and other contemplative practices, and offer an extended opportunity to reflect on the values and principles that they plan to pursue as practicing lawyers. For example, Berkeley Law offers a non-credit introduction to mindfulness workshop for first-years, and a for-credit elective on mindfulness for greater effectiveness and wellbeing in the study and practice of law (see “The Mindful Lawyer: Why Contemporary Lawyers are Practicing Meditation” (2012) 61 J Legal Educ 641 at 644–646 for instructor/founder Professor Charles Halpern’s description of the history, structure and content of these initiatives). At the University of Miami Law School, students can choose from four optional papers on mindfulness, including Mindfulness and Leadership, and Jurisight®, an innovative program crafted by Professor Scott Rogers to teach mindfulness to law students, attorneys and judges using legal terms of art such as “acceptance”, “courtroom drama” and “hearsay” (Rogers (2012) above at 1193–1195; <jurisight.com>).

HOW COULD MINDFULNESS HELP LAW STUDENTS?

Focus and performance

Today’s “digital native” students are working in a distracting world. As Professor Shailimi Jhandal George has noted, research shows that many students are distracted by the very devices they rely on for learning; as students juggle multiple technologies and internet access, their attention is regularly divided rather than focused, which can have a negative impact on academic performance (“The Cure for the Distracted Mind: Why Law Schools Should Teach Mindfulness” (2015) 53 Duq L Rev 215 at 217–220). This lack of focus was noted anecdotally in Baird and Caldwell’s 2016 survey of fifteen employers of New Zealand law graduates, with a number of survey respondents expressing concern about “the short attention span of today’s graduates, including the inability to undertake a sustained piece of work” and noting the tendency of graduates to jump to conclusions and look for “fast answers” rather than “well considered answers” (2016 NZLJ 390).

Mindfulness advocates argue that contemplative practices such as meditation can help clear the mind, which allows students to pay attention, study more efficiently and perform better in distressing or unpredictable situations such as exams and internships (R Lisle Baker and Daniel P Brown “On Engagement: Learning to Pay Attention” (2014) 36 U Ark Little Rock L Rev 339; Leonard Riskin “The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients” (2002) 7 Harvard Negotiation L Rev 1). This claim is backed up by empirical studies that show the benefits of mindfulness on...
cognitive function. For example, research shows regular mindfulness practice is an effective and efficient technique for improving the ability to maintain focused attention, leading to improved memory, reading comprehension and academic performance (Mrazek and others “Mindfulness Training Improves Working Memory Capacity and GRE Performance While Reducing Mind Wandering” (2013) 24 Psychol Sci 776; Jha, Krompinger and Baiame “Mindfulness Training Modifies Subsystems of Attention” (2007) Cognitive Affective & Behav Neuroscience 109; Tang and others “Short-term Meditation Training Improves Attention and Self-Regulation” (2007) 104 Proc Nat’l Acad Sci US 17152).

Mindfulness practice has also been shown to bolster working memory capacity in high-stress situations (Jha and others “Examining the Protective Effects of Mindfulness Training on Working Memory Capacity and Affective Experience” (2010) 10 Emotion 54).

**Resilience and wellbeing**

Readers of this journal will be well aware of the personal strain frequently experienced by lawyers. International research suggests legal practice is comparatively detrimental to mental health, with higher rates of depression, anxiety, suicide, substance abuse and general un-wellness in the profession (Riskin (2002) above at 10–11; Martin (2014) above; Candice Marcus “Lawyers’ Alarming Depression Rates Prompt Efforts to Boost Mental Health Support” (21 November 2014) ABC News; Enyati 2011). The New Zealand Law Society has acknowledged the inherently stressful nature of legal practice in its “Practising Well” program, which provides resources to assist lawyers concerned about their health and wellbeing (<www.lawsociety.org.nz/practice-resources/practising-well>).

Of course, it is not just lawyers feeling the pressure. Research from the United States suggests legal practice is comparatively detrimental to mental health, with higher rates of depression, anxiety, suicide, substance abuse and general un-wellness in the profession (Riskin (2002) above at 10–11; Martin (2014) above; Candice Marcus “Lawyers’ Alarming Depression Rates Prompt Efforts to Boost Mental Health Support” (21 November 2014) ABC News; Enyati 2011). The New Zealand Law Society has acknowledged the inherently stressful nature of legal practice in its “Practising Well” program, which provides resources to assist lawyers concerned about their health and wellbeing (<www.lawsociety.org.nz/practice-resources/practising-well>).

Of course, it is not just lawyers feeling the pressure. Research from the United States suggests law students are more stressed and anxious than other graduate students including medical students, and that stress increases over the course of a law degree (Soonpaa “Stress in Law Students: A Comparative Study of First-Year, Second-Year, and Third-year Students” (2004) 36 Conn L Rev 353 at 359–371; Iijima “Lessons Learned: Legal Education and Law Student Dysfunction” (1998) 48(4) of Legal Educ 524). Closer to home, the New Zealand Law Students’ Association 2013 survey of 880 students found over 60 per cent attributed high personal stress levels to their studies, and a quarter reported onset of a clinical mental health disorder since commencing at university; of those, over half cited being a law student as a contributing factor (<www.nzlsa.co.nz/mental-health-and-wellness/>). As many of us know from experience, law school can be competitive and at times demoralising. Law students may be particularly prone to measure their worth and prospects by their grades, which they often strongly associate with future happiness and success.

Of course, stress is not inherently bad or counter-productive. Stress can be energizing and motivating; in some contexts, it is essential for survival. Our job as educators is not to ensure that law school is constantly fun and pleasant, or to coddle our students by abolishing pressure. However, we should ensure we are equipping them to be resilient and balanced as they navigate the pressures, long hours and fraught emotions of law school and practice, such that stress does not interfere with personal health and welfare or become a debilitating barrier to academic performance or professional competence. Resilience — in the face of difficult co-workers, emotionally taxing cases, challenging assignments — is an important attribute for practice-ready lawyers, and one that was noted as lacking among New Zealand law school graduates by a third of respondents to Baird and Caldwell’s employer survey ([2016] NZLJ 400 at 392).

There is ample evidence to suggest that mindfulness and meditation practices are effective methods for improving resilience, wellbeing (reduction in anxiety, depression/substance abuse relapse) and emotional regulation (see Rogers (2014) above, at 392 for an overview of the scientific literature on these points). Even relatively short periods of training can have significant results; in one study, undergraduates who were given five days of twenty-minute meditative training showed lower levels of anxiety, depression and anger, a significant decrease in stress-related cortisol and enhanced positive moods/reduced negative moods (Tang and others (2007) above). Mindfulness is also associated with self-compassion, an attribute that is helpful in dealing with the negative self-talk and lack of confidence that many students and young professionals experience. In line with this research, law schools in the United States are increasingly using mindfulness practices to teach students to cope with stressful circumstances by responding reflectively, rather than reactively. In this way, students are proactively equipped to be more resilient, balanced and confident in their studies and when they enter practice.

**Competence and professionalism**

In 2007, Professor Elizabeth Mertz published a groundbreaking study of first-year contract law classes at eight different United States law schools. Her research showed that law students were frequently being taught to set aside their personal moral values and feelings of compassion, in favour of a dispassionate, analytical and strategic approach to legal problems (Mertz The Language of Law School: Learning to “Think Like a Lawyer” (Oxford University Press, 2007) 6 at 95–99). Professor Lawrence Krieger’s research has likewise supported the view that “both legal education and early lawyering experiences can tend to erode integrity by separating people from their personal values and beliefs, conscience, truthfulness, and intrinsic needs for caring and cooperation” (“The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness” (2005) 11 Clinical L Rev 425 at 432).

If students are indeed at risk of losing authenticity and connection with their value structures in law school, this could adversely impact both their wellbeing and professional competence as students and future lawyers. Professor Krieger has proposed that for both law students and lawyers, these two aspects are integrally connected ((2005) above, at 426):

I ... argue (1) that satisfaction and professional behavior are inseparable manifestations of a well-integrated and well-motivated person; and (2) that depression and unprofessional behavior among law students and lawyers typically proceed from a loss of integrity — a disconnection from intrinsic values and motivations, personal and cultural beliefs, conscience or other defining parts of their personality and humanity.

As Peterson has noted, the work of Mertz and Krieger poses a challenge for law schools: how can we help students to culture their own values and connect with other people as an aspect of wellbeing and professionalism? Many educators see mindfulness training as the answer, in that it can assist...
students in self-reflection and moral discernment. Meditation, journaling, and other contemplative practices can be used in ethics/professionalism classes to help students to think clearly about the beliefs and values that they want to be guided by in practice. As Professor Rhonda Magee has argued, contemplative practices in law go beyond mere stress reduction. They can be incorporated into education and practice to reshape “the foundations of a lawyer’s sources of .... ethical grounding, serving as ... internally-generated, professionally consistent ethics” (“Educating Lawyers to Meditate?” (2010) 79(3) UMKC L Rev 1 at 3).

There are other possible connections between mindfulness practices and professional competence. Professor Riskin has argued that mindfulness practices can be useful for learning essential skills such as deep listening, reflective negotiation, conflict resolution and interpersonal professionalism, leading to better outcomes for both (future) clients and practitioners ((2012) above, at 46-59). For example, mindfulness may help lawyers move beyond the adversarial mindset that tends to dominate legal practice and education, making room for “broader and deeper perspectives [and] thereby providing more appropriate service (especially through better listening and negotiation) and gaining more personal satisfaction from their work” (2002) at 9). In this way, mindfulness training could be an important complement to adversarial training (2002) at 8):

Although [adversarial] mind-sets have great strengths, they also have draw-backs. They tend to promote egocentric behavior, excessive adversarialism, and a lack of balance between personal and professional aspects of life, which often lead to unhealthy levels of stress, to experiences of isolation, emptiness, and absence of meaning, and to the rendering of inadequate or inappropriate services. Mindfulness practices, by contrast, have been associated with improved social engagement, compassion and empathy (Condon and others “Meditation Increases Compassionate Responses to Suffering” (2013) 24 Psychol Sci 2125). Professor Halpern has argued that the compassion emphasis of mindfulness and meditation is a key practice skill that should be incorporated into legal education (Halpern (2012) above, at 644–646):

Meditation increased our ability to be fully present in the moment and to see things as they were, free of our own preconceptions. This enabled us to connect better with complex situations in a court room or to make an empathetic connection with all participants in a negotiation process so that solutions could be explored through richer understanding. … As meditation opens these students to look deeply at themselves and accept who they are, it also creates the possibility that they will see others — including clients, judges and adversaries — with the same clarity and acceptance. This empathetic connection has revolutionary implications for the ways that law can be practiced.

CONCLUSION

Mindfulness is becoming mainstream. The benefits of mindfulness practices have been scientifically verified, leading to adoption by police forces, Google, oil rigs, professional sporting teams and the Pentagon. Far from detracting from the traditional doctrinal approach to legal education, the United States experience suggests that mindfulness can be incorporated seamlessly into legal education to enhance learning experiences and academic competence, while also ensuring the law school environment is one that prioritizes and facilitates student wellness. The groundswell of support for mindfulness initiatives in United States law schools suggests that mindful lawyers — focused, balanced, less stressed, and more effective as advocates — may be the way of the future.

If you are interested in incorporating mindfulness in legal education in New Zealand, or wish to share your thoughts or experiences, please contact Anna High at <anna.high@otago.ac.nz>.

Penalty

Judge Mill imposed fines of $25,000 for each of the five s 12A charges, $85,000 in respect of the first s 13(e) charge, and $100,000 in respect of the second. Fujitsu was also held liable for costs and fees. The different level of penalty for each of the s 13(e) charges was to differentiate between conduct that had occurred before the 2014 increase to maximum available penalties and that which had occurred after.

CONCLUSION

While in many ways s 12A plays a supplementary role to other prohibitions under the FTA, it is nonetheless an important tool in ensuring traders give careful consideration to representations made. In addition, the upsurge in consumer complaints regarding traders’ representations (as observed by the Commission in its Consumer Issues Report 2016/17, 13 September 2017), may mean that prosecutions for unsubstantiated representations occur more frequently in future.