

MINDFULNESS MEDITATION, THE CULTIVATION OF AWARENESS, MEDIATOR NEUTRALITY, AND THE POSSIBILITY OF JUSTICE

*Evan M. Rock**

I. INTRODUCTION

In mediation,¹ justice can be understood as the justice that the parties themselves experience, articulate, and embody in their resolution of dispute.² It is the decision making power of the parties

* A.B., with honors, Brown University, 2001; J.D., Benjamin N. Cardozo School of Law, Yeshiva University, June 2005. Thanks go to Professor Lela P. Love and to Professor Leonard L. Riskin for their support and insight.

¹ Mediation in this Note refers specifically to facilitative mediation. The term “facilitative” mediation, as opposed to “evaluative” mediation, derives from an article by Professor Leonard L. Riskin. See Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 *ALTERNATIVES TO HIGH COST LITIG.* 111, 111 (1994) [hereinafter Riskin, *Mediator Orientations*]. Professor Riskin originally described facilitative mediation in the following way:

[T]he facilitative mediator assumes that his principal mission is to enhance and clarify communications between the parties in order to help them decide what to do. The facilitative mediator believes it is inappropriate for the mediator to give his opinion, for at least two reasons. First, such opinions might impair the appearance of impartiality and thereby interfere with the mediator’s ability to function. Second, the mediator might not know enough—about the details of the case or the relevant law, practices or technology—to give an informed opinion.

Id. at 111-12; see also Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 *HARV. NEGOT. L. REV.* 7, 23-24 (1996). Professor Riskin has incorporated many of the criticisms of his original terminology into his most recent article on the topic. See Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and The New New Grid System*, 79 *NOTRE DAME L. REV.* 1 (2004). In this latest article, Riskin seeks to move beyond the polarity created by the terms “facilitative” and “evaluative,” suggesting that the crystallization of the mediation movement around these terms is limiting and misguided. See *id.*

² See Jonathan M. Hyman & Lela P. Love, *If Portia were a Mediator: An Inquiry Into Justice in Mediation*, 9 *CLINICAL L. REV.* 157, 164 (2002) [hereinafter Hyman and Love, *An Inquiry Into Justice in Mediation*]. There is significant debate within the literature over the meaning of justice within the context of mediation, and over which aspects of justice are to be focused on in promoting just outcomes from mediation. See, e.g., James Coben, *Gollum, Meet Smeagol: A Schizophrenic Rumination on Mediator Values Beyond Self Determination and Neutrality*, 5 *CARDOZO J. CONFLICT RES.* 65 (Spring 2004) (discussing the current ways in which justice is understood in the mediation community); Craig A. McEwen & Laura Williams, *Legal Policy and Access to Justice Through Courts and Mediation*, 13 *OHIO ST. J. ON DISP. RESOL.* 865 (1998) (arguing that increased access to mediation through the court system, without diminishing access to adjudication, increases the possibility of just outcomes); Jacqueline M. Nolan-Haley, *Court Mediation and the Search and the Search for Justice Through Law*, 74 *WASH. U. L. Q.* 47, 49 (1996) (noting

348 CARDOZO J. OF CONFLICT RESOLUTION [Vol. 6:347]

which allows parties the freedom to craft solutions that best comport with their individual understanding of a just outcome. Mediator neutrality is necessary for the parties' retention of decision-making power. When a mediator loses neutrality by taking sides or promoting solutions, the parties' ability to craft their own solutions is threatened. Thus, mediator neutrality is necessary for party empowerment, and is therefore fundamental to the emergence of just outcomes from mediation.³

A mediator's awareness of his own thoughts and emotions is central to the possibility of just outcomes in mediation. Neutrality is usually defined as impartiality, or as the absence of bias.⁴ When neutrality is viewed as synonymous to impartiality, the thoughts and emotions of the mediator, the awareness of those thoughts and emotions, and the ability to exclude those thoughts and emotions from the external process of the mediation are the central aspects

that justice is derived in mediation "not through the operation of law, but through autonomy and self-determination"); Mary Ellen Reimund, *Mediation in Criminal Justice: A Restorative Approach*, 46 *ADVOC.* 22 (May 2003) (arguing that the humanistic model of mediation, and restorative justice is an important part of the future of criminal justice); Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation — Tension Between The Aspirations of a Private Facilitative Process and The Reality of Public Adversarial Justice*, 19 *OHIO ST. J. ON DISP. RESOL.* 509 (2004) (arguing that courts must increase their supervision of mediation processes in order to ensure procedurally just outcomes); Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 *J. DISP. RESOL.* 179 (2002) (arguing that procedural justice considerations should underlie all of the third party processes that are institutionalized within the courts, regardless of whether those processes are consensual or non-consensual); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 *WASH. U. L.Q.* 787 (2001) (arguing that procedural justice is important for just outcomes in mediation, and that a "rush towards bargaining and settlement" could erode mediation's ability to deliver procedural justice).

³ See Sydney E. Bernard et al., *The Neutral Mediator: Value Dilemmas in Divorce Mediation*, 4 *MEDIATION Q.* 61, 65-66 (1984) (discussing neutrality as a settlement strategy for divorce mediators); Sarah Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 *L. & SOC. INQUIRY* 35 (1991) [hereinafter Cobb & Rifkin, *Deconstructing Neutrality*] (advocating the adoption of a poststructural perspective of neutrality as a practice in discourse); Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 *GEO. J. LEGAL ETHICS* 503, 505-08 (1991) (discussing the relationship between mediator neutrality and mediator accountability); but see David Dyck, *The Mediator as a Nonviolent Advocate: Revisiting Questions of Mediator Neutrality*, 18 *MEDIATION Q.* 129, 139 (2000) (critiquing the classical conception of mediator neutrality, arguing that neutrality is illusory because the mediator is an advocate of a particular process and the outcomes of that process); Christopher Honeyman, *Bias and Mediators' Ethics*, 2 *NEGOT. J.* 175, 175-77 (1986) (arguing that classical mediation theory creates a false image of the neutrality of mediators and advocating the acceptance and disclosure of bias); Matthew A. Levitt, *Kilometer 101: Oasis or Mirage? An Analysis of Third Party Self-Interest in International Mediation*, 15 *MEDIATION Q.* 155, 155 (1997) (asserting that "[i]n reality the myth of the scrupulously neutral mediator is just that - a myth").

⁴ See discussion *infra* Part II (discussing the mainstream understanding of neutrality as impartiality).

of neutrality. The presence of emotions, values, and agendas is part of being human. It may be impossible for anyone to be free of bias or preference.⁵ A lack of internal neutrality is only problematic in a mediation session to the extent that a mediator's internal bias is externalized in his words or actions. The more aware a mediator is of the emotions, values, and agendas he is personally experiencing during a mediation session, the more he can structure his outward behavior to dissipate any manifestation of bias or preference. Therefore, while internal neutrality may be impossible to achieve, a mediator's awareness of his own thoughts and emotions is important for maintaining external neutrality.

The benefits of such awareness and its cultivation through mindfulness meditation have been increasingly discussed in the context of Alternative Dispute Resolution (ADR) and in the practice of law.⁶ Through the practice of mindfulness meditation, a person develops the ability to recognize thoughts and emotions as they arise.⁷ This recognition enables a person to make conscious and

⁵ See discussion *infra* Part IV (discussing one critique of neutrality as impartiality and the alternative understanding of neutrality as a practice in discourse).

⁶ See generally BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION 263-78 (Daniel Bowling & David Hoffman eds., 2003); William S. Blatt, *What's So Special About Meditation? Contemplative Practice For American Lawyers*, 7 HARV. NEGOT. L. REV. 125 (2002); Douglas A. Codiga, *Reflections on The Potential Growth of Mindfulness Meditation in the Law*, 7 HARV. NEGOT. L. REV. 109 (2002); Clark Freshman, Adele M. Hayes, & Greg C. Feldman, *Adapting Meditation to Promote Negotiation Success: A Guide to Varieties and Scientific Support*, 7 HARV. NEGOT. L. REV. 67 (2002) [hereinafter Freshman, Hayes, and Feldman, *Adapting Meditation to Promote Negotiation Success*]; Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to The Problem of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83 (2002); Nora C. Porter, *Stress Reduction: The Mountain Comes to Mohammed*, 23 AUG. PA. LAW. 14 (2001) (describing the adoption of a mindfulness meditation stress-reduction course at the law firm of Hale & Dorr); Leonard Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002) [hereinafter Riskin, *The Contemplative Lawyer*]. See also <http://www.law.missouri.edu/csdr/mindfulness.htm> (the website of The Initiative on Mindfulness in Law and Dispute Resolution at the University of Missouri-Columbia School of Law) (last visited Feb. 20, 2005).

⁷ See discussion *infra* Part I (discussing the practice of mindfulness meditation). Mindfulness meditation has garnered significant attention in the medical community and has been studied, and continues to be studied, with regard to its psychological and physiological effects on practitioners. Perhaps best known is the work of Jon Kabat-Zinn, Ph.D., and the Center for Mindfulness, Healthcare, and Society at the University of Massachusetts Medical School. See generally www.unmass.edu/cfm/ (last visited June 22, 2005); see also Kabat-Zinn J., Massion A. O., Kristeller J., Peterson L. G., Fletcher K. E., Pbert L., Lenderking W. R., Santorelli S.F., *Effectiveness of a meditation-based stress reduction program in the treatment of anxiety disorders* AM. J. OF PSYCHIATRY, Jul 1992, at 936-43 (concluding that a "group mindfulness meditation training program can effectively reduce symptoms of anxiety and panic, and can help maintain these reductions in patients with generalized anxiety disorder, panic disorder, or panic disorder

350 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 6:347]

deliberate choices with a clear understanding of the thoughts and emotions they are experiencing in that moment. A mediator who has developed these skills can recognize the presence of his own biased thoughts and emotions in relation to the parties as they arise.

This Note argues that the cultivation of awareness through meditation enhances a mediator's ability to be neutral, thereby increasing the possibility of just outcomes from mediation sessions. Part I introduces and explains the basic practice of mindfulness meditation. Part II examines the necessity of neutrality for just outcomes in mediation, the classical view of neutrality as impartiality, and the importance of a mediator's awareness of his biases and preferences for maintaining neutrality. Part III examines the use of procedure in maintaining neutrality during a mediation session, and how a mediator's awareness of his thoughts and emotions can be helpful in maintaining neutrality through procedure. Part IV examines some critiques of mediator neutrality *qua* impartiality, and explains why the cultivation of awareness is still important for neutrality particularly if those critiques are accepted. Finally, Part V proposes the incorporation of mindfulness meditation into mediator training.

II. THE PROMISE OF MEDITATION: A BRIEF DESCRIPTION OF THE PRACTICE OF MINDFULNESS MEDITATION

The goal of mindfulness meditation has been described as trying to see what *is*.⁸ In other words, meditation is a means of cultivating an awareness of what exists in the present moment, without objective, ambition, or judgment.⁹ Practicing mindfulness medita-

with agoraphobia"); Kabat-Zinn J., Lipworth L., Burney R., *The clinical use of mindfulness meditation for the self-regulation of chronic pain*, J. OF BEHAV. MED., June 1985 at 163-90 (concluding that patients who had been trained in mindfulness meditation experienced a reduction in their chronic pain and related symptoms). The use of mindfulness in the treatment of Attention Deficit Hyperactivity Disorder ("ADHD") is currently being studied at the UCLA Neuropsychiatric Institute. See www.adhd.ucla.edu (last visited June 22, 2005). The above cited studies and projects focus on the use of mindfulness meditation to achieve self-regulation of stress, pain, and attention span. I mention these studies and projects specifically because they lend weight to the central assertion of this Note, i.e., that the practice of mindfulness meditation allows the practitioner to cultivate an awareness of his thoughts and emotions, and that such awareness allows the practitioner to modify his *behavior* accordingly.

⁸ See CHÖGYAM TRUNGPA, MEDITATION IN ACTION 52-53 (1969) [hereinafter TRUNGPA, MEDITATION].

⁹ See *id.*

tion allows the development of a person's innate ability to recognize thoughts and emotions as they arise.¹⁰ Conscious and deliberate choices can then be made by a mediator in light of the thoughts and emotions he or she may be experiencing in that moment.¹¹ Mindfulness meditation can be practiced in a number of ways.¹² One can practice meditation while sitting, walking, standing, or moving in more complex ways, such as in yoga.¹³ The most basic practice involves sitting and using breathing as the focus of the meditation.¹⁴

Basic mindfulness meditation is uncomplicated. It has been described simply as "sitting on the ground, assuming a good pos-

¹⁰ It is understandable that the reader may not be willing to accept this proposition, as it lies outside the pale of accepted Western thought. Meditation is a practice, the benefits of which are best understood through meditating. Buddhist history teaches that the Buddha admonished his followers, "Monks, just as the wise accept gold after testing it by cutting, heating, and rubbing it, so are my words to be accepted after examining them, but not out of respect [for me]." B. Alan Wallace, *Afterword: Buddhist Reflections*, in CONSCIOUSNESS AT THE CROSSROADS: CONVERSATIONS WITH THE DALAI LAMA ON BRAIN SCIENCE AND BUDDHISM 153-74, available at <http://www.investigatingthemind.org/reading.list.html> (last visited Feb. 20, 2005).

¹¹ See SAKYONG MIPHAM, TURNING THE MIND INTO AN ALLY 5 (2003) (stating that by "[t]raining our mind through peaceful abiding, we can create an alliance that allows us to actually use our mind, rather than be used by it").

¹² See Riskin, *The Contemplative Lawyer*, *supra* note 5, at 23 n.108 (2002). Professor Riskin notes differences between the practices of mindfulness meditation in various forms of Buddhism, writing:

The variety of mindfulness practice, also known as insight meditation or Vipassana, is characteristic of Theravadin Buddhism, which is prevalent in Sri Lanka, Thailand, Burma Laos and Cambodia. Tibetan Buddhism and Zen Buddhism - the latter is dominant in East Asia, including China, Korea, and Japan - incorporate, but place less emphasis upon, mindfulness meditation practices.

Id. In the author's experience of Tibetan Buddhism, taught at the Shambhala Meditation Center in New York City, mindfulness meditation (known in Sanskrit as *Shamatha*) is central to Tibetan Buddhist practice. In fact, the practice of *Shamatha* predates Buddhism by several thousand years. See generally <http://www.ny.Shambhala.org> (last visited Feb. 20, 2005). See also MIPHAM, *supra* note 10, at 5 (defining *Shamatha* as "peaceful abiding") "while the distinctions between Viapssana and Shamatha are important, the goal of cultivating mindfulness is central to both practices." *Id.* Riskin also differentiates between mindfulness as described in Buddhist practice and the use of the term 'mindfulness' in the work of Harvard psychology professor Ellen Langer, which is wholly based on the "Western tradition." See Riskin, *The Contemplative Lawyer*, *supra* note 5, at 23 n. 108 (citing ELLEN J. LANGER, MINDFULNESS (1989); ELLEN J. LANGER, THE POWER OF MINDFUL LEARNING (1997); Ellen J. Langer, *Mindful Learning*, 9 CURRENT DIRECTIONS IN PSYCHOL. SCI. 220 (2000)).

¹³ See, e.g., JOSEPH GOLDSTEIN, INSIGHT MEDITATION: THE PRACTICE OF FREEDOM 139 (1994) (describing the use of walking meditation); JON KABAT-ZINN, FULL CATASTROPHE LIVING: USING THE WISDOM OF YOUR BODY AND MIND TO FACE STRESS, PAIN AND ILLNESS 94-113 (1990) (discussing the practice of yoga as a form of meditation).

¹⁴ See MIPHAM, *supra* note 10, at 58-59.

352 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 6:347]

ture, and developing a sense of our spot, our place on this earth.”¹⁵ Correct posture is important because it allows for a free flow of breath, and because it helps provide a sense of being in place.¹⁶ The practitioner uses the breath as the object of meditation; in other words, the practitioner focuses his mind on the physical process of his own breathing.

Concentration on the breath is used for developing an awareness of the present moment. Chögyam Trungpa¹⁷ described the practice of meditation in the following way:

Each breath is separate from the next and is fully seen and fully felt, not in a visualized form, nor simply as an aid to concentration, but it should be fully and properly dealt with. Just as a hungry man, when he is eating, is not even conscious that he is eating food. He is so engrossed in the food that he completely identifies himself with what he is doing and almost becomes one with the taste and enjoyment of it. Similarly with the breathing, the whole idea is to try and see through that very moment in time.¹⁸

The breath is not used simply as an aid to concentration. Rather, the idea is to focus the mind on the breath because the breath is an excellent embodiment of the passage of time, and of the uniqueness and impermanence of each passing moment. Furthermore, by resting the mind on the breath, the practitioner cultivates an awareness of the present moment.

A result of practicing mindfulness meditation is the realization that a person's thoughts are not the same thing as that person.¹⁹

¹⁵ CHAÖGYAM TRUNGPA, SHAMBHALA: THE SACRED PATH OF THE WARRIOR 37-8 (1995) [hereinafter TRUNGPA, SHAMBHALA] (describing basic meditation practice, the importance of posture and the breath, and the bravery of just “being on the spot”).

¹⁶ See MIPHAM, *supra* note 10, at 39 (stating that “[t]he reason. . . [to] put so much emphasis on sitting up straight is that slouching impairs the breathing, which directly affects the mind” and asserting that “[i]f you slump, you’ll be struggling with discomfort in your body at the same time you’re trying to train your mind”).

¹⁷ The Vidyadhara Chögyam Trungpa Rinpoche (1939-1987) was the eleventh descendent in the line of Trungpa *tilkus*, important teachers of the Kagyü lineage, one of the four main schools of Tibetan Buddhism and renowned for its strong emphasis on meditation practice. In addition to being a key teacher within the Kagyü lineage, Chögyam Trungpa was also trained in the Nyingma tradition, the oldest of the four schools and was an adherent of the *ri-me* (“non-sectarian”) ecumenical movement within Tibetan Buddhism, which aspired to bring together and make available all the valuable teachings of the different schools, free of sectarian rivalry. Throughout his life, he sought to bring the teachings he had received to the largest possible audience. See <http://www.shambhala.org> (last visited Feb. 20, 2005).

¹⁸ TRUNGPA, *MEDITATION* *supra* note 7, at 53.

¹⁹ See Riskin, *The Contemplative Lawyer*, *supra* note 5, at 26 (noting that observing the mind's operation in this way helps us to notice the randomness and impermanence of our

Through meditation one is able to develop a detachment from one's thoughts.²⁰ This is not the same thing as simply getting rid of one's thoughts. Rather, it is the understanding that thoughts, and the emotions that may be connected with those thoughts, are only an aspect of the present moment and do not fully constitute that moment.²¹

Furthermore, mindfulness meditation cultivates one's ability to observe one's thoughts, and to recognize the emotions that arise from those thoughts.²² This ability of observation and recognition gives a person a choice of whether or not to act on an emotion, or a thought.²³ In this way, practicing mindfulness meditation can result in a freedom to act in non-habitual ways. Recognition of a thought process or an emotional reaction while it is occurring allows a person to make a conscious decision about the best way to act rather than acting in direct response to the thought or emotion.

The practice of mindfulness meditation allows the development of a person's ability to recognize his or her thoughts and emotions as they arise, and to make choices grounded in a clearer understanding of those thoughts and emotions. Strengthening a mediator's ability to make choices about how and when to base his or her actions or speech on particular thoughts or emotions is consistent with the goal of ensuring and increasing just outcomes from mediation sessions.

III. THE NECESSITY OF NEUTRALITY FOR JUST OUTCOMES IN MEDIATION

In mediation, retention of decision making power allows the parties in a dispute the freedom to craft solutions that best comport with their individual understandings of a just outcome. A loss of mediator neutrality threatens the parties' ability to craft their own

thoughts). *See also* CHÖGYAM TRUNGPA, *THE PATH IS THE GOAL* 23-26 (1995) (discussing "The Watcher," or the awareness which observes thoughts and emotions as they arise, known as *she-shin* in Tibetan).

²⁰ *See* TRUNGPA, *SHAMBHALA supra* note 14, at 68-69.

²¹ *See id.*

²² *See* Riskin, *The Contemplative Lawyer, supra* note 5, at 26 (noting that, through mindfulness practice we can recognize some emotions as habitual reactions to certain kinds of situations and that "[s]uch recognition can give us the power to watch such phenomenon rise and fall away, rather than getting caught up in them").

²³ *See id.*

354 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 6:347]

solutions. Thus, party empowerment and the possibility of just outcomes are based on a foundation of mediator neutrality.²⁴

Despite its centrality, the substantive nature of mediator neutrality is elusive.²⁵ One simple definition of mediator neutrality is “refraining from taking sides in a dispute.”²⁶ Certainly this aspect of neutrality is crucial to just outcomes in mediation sessions. The traditional understanding of mediator neutrality seems to be best understood as impartiality, or as treating the parties equally.²⁷

Many mediation organizations focus on whether the mediator gives “scrupulous attention to doing exactly equal to and for each disputant.”²⁸ The mediator must be even-handed and free from bias.²⁹ The Model Standards of Conduct for Mediators require that a mediator act as an “impartial third party.”³⁰ Furthermore, commentators have noted that achieving impartiality generally requires that mediators avoid displaying bias, favoritism or prejudice.³¹ The Ethical Guidelines for Mediators defines impartiality as “freedom

²⁴ See *supra* note 3.

²⁵ See Alison Taylor, *Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence and Transformative Process*, 14 *MEDIATION Q.* 215, 217 (1997) [hereinafter Taylor, *Concepts of Neutrality*] (noting a “dearth of writings” on neutrality).

²⁶ See BLACK’S LAW DICTIONARY 1063 (7th ed. 1999) (defining Neutral as: “1. Indifferent. 2. (Of a judge, mediator, arbitrator, or actor in international law) refraining from taking sides in a dispute.”).

²⁷ See Scott R. Peppet, *Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 *TEX L. REV.* 227 (2003) [hereinafter Peppet, *Contractarian Economics*] (discussing the understanding of mediator neutrality as impartiality); *but see* JOSEPH B. STULBERG, *TAKING CHARGE MANAGING CONFLICT* 37 (1987) [hereinafter STULBERG, *TAKING CHARGE*]. Professor Stulberg defines neutrality and impartiality differently and argues that both are necessary “job qualifications of a mediator.” For Stulberg, “neutral” means that “a mediator must have no personal preference that the dispute be resolved in one way rather than another,” and “impartial” means that “a mediator must treat parties in comparable ways, both procedurally and substantially.” *Id.* at 37. This separation of the two terms seems to be a parsing of substantive and procedural neutrality. While the “neutral” mediator has “no personal preference” in the resolution of a conflict, the “impartial” mediator “treats parties in comparable ways.” A reconciliation of Stulberg’s terminology with the terminology proposed in this Note would read Stulberg’s “neutrality” as internal neutrality, meaning that the mediator is *actually* neutral on an emotional and psychological level, and would read Stulberg’s “impartiality” as external neutrality, meaning that the procedures and behavior of the mediator are neutral in the perception of the parties.

²⁸ See Taylor, *Concepts of Neutrality*, *supra* note 26, at 218.

²⁹ See KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 123-25 (2d ed. 2000) [hereinafter Kovach, *Mediation*] (discussing various definitions of neutrality and impartiality).

³⁰ MODEL STANDARDS OF CONDUCT FOR MEDIATORS § I P4.

³¹ See Claudia L. Hale & Chris Nix, *Achieving Neutrality and Impartiality: The Ultimate Communication Challenge for Peer Mediators*, 14 *MEDIATION Q.* 337, 340 (1997).

from favoritism or bias in word, action and appearance.”³² Impartiality, then, is a central aspect of mediator behavior, and one way of understanding neutrality.

Impartiality is important for several reasons. The impartiality of a mediator restricts the mediator from taking sides with any party.³³ When the mediator does not take sides, the power of each party is neither strengthened nor weakened by the presence of the mediator. If a mediator were to support one party over another, disfavored parties might become distrustful and recalcitrant, creating further obstacles in reaching an agreement.³⁴ A detached impartiality may allow the mediator to have a dispassionate and rational view of the dispute. Such a view is important for the mediator’s role in reframing arguments, and facilitating parties’ understanding of each other.

Commentators have argued that the traditional view of impartiality requires the “absence of emotions, values or agendas.”³⁵ Neutrality defined as the absence of emotions, values, or agendas, while coextensive with impartiality, may have some qualitative differences from impartiality. Neutrality in this sense may require the suppression of a mediator’s preferences and opinions in order to remain neutral in a substantive sense.³⁶

Certainly, internal bias and external impartiality are coextensive to the degree that a mediator’s external impartiality is threatened when internal bias is manifested as external bias, whether towards a particular party, or a particular solution to the conflict; thereby betraying mediator neutrality. Neutrality, then, should be thought of as both internal and external. Internal neutrality refers to the absence of emotions, values or agendas from the mind of the mediator. External neutrality refers to the absence of emotions, values or agendas from the words, actions, and appearance of the mediator.

The more aware mediators are of the emotions, values, and agendas they are experiencing internally during a mediation ses-

³² ETHICAL GUIDELINES FOR MEDIATORS § 3 (Ass’n for Attorney Mediators), available at <http://www.attorney-mediators.org/ethics.html>; see also CODE OF PROF’L CONDUCT FOR MEDIATORS § 2 (Ctr. for Dispute Resolution 1982) (defining impartiality as “freedom from bias or favoritism either in word or action”).

³³ See Michael Watkins & Kim Winters, *Intervenors with Interests and Power*, 13 NEGOT. J. 119, 130 (1997) (noting the importance of perceived neutrality in eliciting trust from the parties).

³⁴ See Peppet, *Contractarian Economics*, *supra* note 28, at 255.

³⁵ See Cobb & Rifkin, *Deconstructing Neutrality*, *supra* note 25, at 42.

³⁶ Cf. William P. Smith, *Effectiveness of the Biased Mediator*, 1 NEGOT. J. 363, 364 (1985) (discussing the importance of perceived mediator “[i]ndifference towards parties’ positions”).

sion, the more they can structure their outward behavior to dissipate any external manifestation of bias or preference. The practice of mindfulness meditation aids in the development of an awareness of one's thoughts and emotions as they arise. The development of a strong awareness of internal biases and preferences can help mediators to maintain external neutrality during mediation sessions, and thereby promote just outcomes from mediation.

IV. MAINTAINING NEUTRALITY THROUGH PROCEDURE

The maintenance of external neutrality in mediation is primarily addressed through procedure.³⁷ The procedures of facilitative mediation strive to place and keep the power of self-determination with the parties, while protecting all parties' abilities to present issues and concerns equally in the mediation session.³⁸ A severe imbalance in power between parties threatens the integrity of any possible agreement. Thus, the goal of any procedural framework in a facilitative mediation is to maintain mediator neutrality while restricting party behavior in order to maintain relative party equality. Neutrality is approached through both the general procedural structure of a mediation session, and by the mediator's attention to details which may affect the power dynamic between parties.

There are many ways in which a mediation session might proceed.³⁹ However, mediations generally proceed according to the following pattern. First, the parties must agree to mediate or be ordered to do so by a court.⁴⁰ In some cases there will be an initial intake procedure to determine in advance whether the case is an

³⁷ See Hyman and Love, *An Inquiry Into Justice in Mediation*, *supra* note 2, at 172 (noting that "[w]hile mediation lacks the formality and elaborate procedural rules of litigation, it nonetheless provides a rich opportunity to implement procedural justice").

³⁸ See *id.* at 173 (asserting that "[m]ediation (at least in the facilitative variety) is most emphatically a forum in which the parties can be heard" and that "[p]arties' statements and interactions are not constrained in the way that they are in more formal adjudicative forums").

³⁹ See CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 203 [hereinafter MOORE, *THE MEDIATION PROCESS*] (noting that "the most common, but not necessarily the most effective" method to begin the mediation process is to focus on the substantive issues).

⁴⁰ Cf. Rhonda MacMillion, *Expanding ADR Options: Legislation Aimed at Federal Court Advances in Congress*, 84 ABA J. 98 (June 1998) (noting the controversial nature of court-mandated mediation and stating the ABA's opposition to mandatory mediation or arbitration, even when the process is non-binding); Dana Shaw, *Mediation Certification: An Analysis of the Aspects of Mediator Certification and an Outlook on the Trend of Formulating Qualifications for Mediators*, 29 U. TOLEDO L. REV. 327, 337 (1998) (arguing that forcing mediation constitutes a lack of due process in denial of its access to trial).

appropriate one for mediation.⁴¹ There may also be a pre-mediation interview of the parties.⁴² The intake process allows for a determination of who should attend a mediation session and whether all necessary parties are available to, or capable of, participating.

A mediation session begins with an opening statement by the mediator, describing the process of mediation and the role of the mediator in that process.⁴³ The mediator may use this opportunity to reinforce the parties' commitment to resolving the issues before them. At this point the mediator explains the rules of the mediation session.⁴⁴ The next step involves issue identification.⁴⁵ Each party speaks and explains the issues that have brought them to the mediation session. The mediator may summarize each party's concerns and identify issues that can be discussed in the mediation session. Dialogue may ensue between the parties, and the mediator's role is to facilitate conversation.⁴⁶ This basic structure allows for the possibility of a balanced and controlled conversation between the parties.

Paying attention to the details which may affect the power dynamic between parties is important to external neutrality. Such details include the physical orientations of the parties to each other

⁴¹ See MOORE, *THE MEDIATION PROCESS*, *supra* note 40, at 153 (discussing the initial measures of a mediation).

⁴² See Nadine DeLuca Elder, *A Mediation Primer for the Solo or Small Firm Practitioner*, 4 GA. B.J. 38, 42 (Dec. 1998) [hereinafter Elder, *A Mediation Primer*] (discussing how some mediation sessions may be preceded by a pre-mediation conference call in which the mediator and the parties "iron out procedural details" and gives the mediator "an opportunity to ask preliminary questions or to suggest additional fact development that he believes is necessary").

⁴³ See generally *DICTIONARY OF CONFLICT RESOLUTION*, 276 (Douglas H. Yarn ed., Jossey-Bass, Inc. 1999) (describing that "classic mediation-phase model"); see also MOORE, *THE MEDIATION PROCESS*, *supra* note 40, at 153-58 (discussing the mediator's tasks when beginning a mediation session); Dana Shaw, *Mediation Certification: An Analysis of the Aspects of Mediator Certification and an Outlook on the Trend of Formulating Qualifications for Mediators*, 29 U. TOLEDO L. REV. 327, 333 (1998) (noting that the primary stage of a mediation session is important because it is when the mediation process should be described so that the parties know what is happening).

⁴⁴ See Elder, *A Mediation Primer*, *supra* note 43, at 42.

⁴⁵ DOUGLAS H. YARN, *ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PROCEDURE IN GEORGIA* 116-17 (2d ed., Harrison Co. 1997) (describing the process of defining the issues in a mediation session).

⁴⁶ See STULBERG, *TAKING CHARGE*, *supra* note 28, at 58. An exposition of one procedural model for facilitative mediation sessions is given by Joseph Stulberg in his book *Taking Charge / Managing Conflict*. Professor Stulberg describes the process of mediation through the acronym BADGER. The letters respectively stand for: Begin the discussion, Accumulate information, Develop the agenda and discussion strategies, Generate movement, Escape to separate sessions, and Resolve the dispute.

358 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 6:347]

and to the mediator,⁴⁷ the communicative aspects of physical reactions of the mediator towards the parties,⁴⁸ the consideration of time constraints,⁴⁹ the choice of words and the influence of verbal pitch, rate, volume, and tone of the mediator.⁵⁰

The way that the mediator chooses to seat the parties may impact the parties' perceptions of the mediator's neutrality. The same is true of parties' reactions to the mediator's physical reactions, choice of words, and tone, pitch, or volume level of the mediator's voice. For example, if a mediator is shouting at one party and not at another party, this may impact both parties' perceptions of the mediator's neutrality. While seating arrangements can be made before a mediation session begins, a mediator's physical reactions, his word choice, and quality of voice, all occur in the midst of a mediation session.

A mediator's control of the way he is acting and speaking during a mediation session is crucial to the maintenance of external neutrality. If a mediator has a strong awareness of his biases and preferences as they arise during a mediation session, this awareness gives the mediator the freedom to decide not to incorporate such

⁴⁷ See Jeffery S. Wolfe, *The Hidden Parameter: Spatial Dynamics and Alternative Dispute Resolution*, 12 OHIO ST. J. ON DISP. RESOL. 685, 686 (1997) [hereinafter, Wolfe, *Spatial Dynamics*]. Physical orientation is one factor which may affect the attitudes of parties throughout the mediation. For example, seating parties across a table from each other may promote an adversarial atmosphere. Sitting with the table as a barrier between parties may create psychological barriers to communication, recognition and agreement. If the mediator sits disputing parties next to each other, such an arrangement may promote a less oppositional tone, and increase the impression of a shared common place and predicament. See *id.*; see also Llewellyn Joseph Gibbons, Robin M. Kennedy and Jon Michael Gibbs, *Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message*, 32 N.M. L. REV. 27 (2002) [hereinafter Gibbons, Kennedy, and Gibbs, *Cyber-Mediation*]; Jeffery D. Smith, *The Advocate's use of Social Science Research into Nonverbal and Verbal Communication: Zealous Advocacy or Unethical Conduct?*, 134 MIL. L. REV. 173, 177 (1991) [hereinafter Smith, *Nonverbal and Verbal Communication*]. The position of the mediator to the parties may have important ramifications for external neutrality. For example, if a mediator sits across a table from both disputants, such positioning may promote the perception that the parties are working towards a common goal, and that the equidistant mediator is neutral. If the mediator positions himself between the two parties, such positioning may imply that the dispute cannot be resolved without mediator interference, detracting from party empowerment. Finally, if the mediator were to sit on the same side of the table as one of the parties, such positioning might create the perception of bias, alienating one of the parties from the process, and betraying external neutrality. See Gibbons, Kennedy, and Gibbs, *Cyber-Mediation* at 52.

⁴⁸ See Smith, *Nonverbal and Verbal Communication*, *supra* note 48, at 175 (discussing the effects of negotiation deadlines).

⁴⁹ See CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* 231-34 (4th ed. 2001).

⁵⁰ See ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING AND NEGOTIATION: SKILLS FOR EFFECTIVE LAWYERING* 140-43 (1990).

biases and preferences into his speech and actions. For example, a mediator may realize that he is feeling anger towards one of the parties, and instead of unintentionally manifesting his anger as shouting, the mediator can make a deliberate decision to use the same volume and tone when speaking to both parties. Because mindfulness meditation cultivates a practitioner's awareness of his own thoughts and emotions, and such awareness is helpful in maintaining external neutrality, the practice of mindfulness meditation can be used by mediators to improve their skill at maintaining external neutrality through procedure.

V. THE IMPOSSIBILITY OF INTERNAL NEUTRALITY: A CRITIQUE OF NEUTRALITY AS IMPARTIALITY

The achievement of internal neutrality⁵¹ may be impossible. If neutrality is understood as impartiality, then mediators must be aware of psychological processes that may favor either disputant.⁵² If these processes are unconscious, or outside of a mediator's awareness, then the goal of neutrality seems to require the paradoxical ability to be aware of, and monitor those psychological processes, which are outside of that person's awareness.⁵³ Several scholars have investigated the implications of such a paradox on the issues of race, ethnicity, gender, and sexual orientation.⁵⁴ If mediators believe that they are impartial, but in fact are perpetuating unconscious bias, then mediation outcomes may be "reconstituting positions of privilege, legitimizing the oppression of women and minorities, and neutralizing those conflicts that could lead to social change."⁵⁵ In accepting this critique, a mediator's awareness of his own thoughts and emotions, and of his biases and prefer-

⁵¹ See discussion *supra* Part II (discussing the semantic split between external and internal neutrality).

⁵² See Cobb & Rifkin, *Deconstructing Neutrality*, *supra* note 25, at 43.

⁵³ See *id.*

⁵⁴ See Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community Enhancing Versus Community Enabling Mediation*, 44 UCLA L. REV. 1687 (1997) [hereinafter Freshman, *Privatizing Same-Sex "Marriage"*]; Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 79 (arguing that standard mediation techniques might place parties in frameworks which make it hard for them to achieve self determination) [hereinafter Gunning, *Diversity Issues in Mediation*]; Janet Rifkin, *Mediation in the Justice System: A Paradox for Women*, 1 WOMEN & CRIM. JUST. 41 (1989).

⁵⁵ Cobb & Rifkin, *Deconstructing Neutrality*, *supra* note 25, at 48.

360 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 6:347]

ences, as they occur, remains crucial for party empowerment, mediator neutrality, and just outcomes in mediation.

One problem that can manifest as the product of unconscious mediator bias is essentialism.⁵⁶ Essentialism is the identification of a person through an essential characteristic, such as sexual orientation, race or gender.⁵⁷ The essentialist critique recognizes that all definitions of identity are subject to some form of criticism.⁵⁸ For example, a homosexual man may identify with the gay community. However, he may also identify with the Jewish or African-American community. The essentialist critique asks whether particular means of identification best serve the needs of a person.⁵⁹ When a mediator uses one identity of a party to help identify issues in a mediation session, he may be marginalizing other identities of that party. Whether or not the mediator is conscious of this process, the choice of applying a specific identity through which to understand a party is a use of power on the part of the mediator, which may effect a mediation session in a particular direction and, thereby, threaten mediator impartiality.

Parties themselves may be encouraged to recreate biases in a mediation session. Professor Isabelle Gunning has argued that the process of story-telling, or narratives, may “be at the heart of the

⁵⁶ See Freshman, *Privatizing Same-Sex “Marriage,” supra* note 55, at 1713. See also Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House*, 10 BERKLEY WOMEN’S L.J. 16.

⁵⁷ See *id.*

⁵⁸ See *id.*; see also Angela P. Harris, *Forward: The Unbearable Lightness of Identity*, 2 AFR. AM. L. & POL’Y REP. 207, 212 (1995) (asserting that “identities are always fluid, dynamic, and multiple”); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Martha Minnow, *Not Only For Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 656 (1996) (noting that the idea of “multiple intersecting groups . . . implies ultimately that each person is alone at the unique crossroads of each intersecting group”).

⁵⁹ See Freshman, *Privatizing Same-Sex “Marriage,” supra* note 55, at 1713. Clark Freshman has argued that a pragmatic reading of the essentialist critique is that one needs to be sensitive in thinking about the appropriate identity for the particular task at hand. See *id.* at 1714. This pragmatic approach is important for the development of mediator neutrality. If a mediator is aware of bias, and of the biases that the imposition of identity on any individual can create, the mediator can consciously and deliberately chose to work with a specific identity and explicitly address the biases associated with that identity in the mediation session. So if the issue at a mediation session is a dispute between a same-sex couple, the mediator may necessarily be working primarily with the parties’ identities as gay men. However, it is important that the mediator recognize the biases he may feel toward such an identity and that the mediator recognize the possibility of the couples’ relationship being informed by other aspects of their identities. See MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 54 (1995) (noting the possibility of having a “politics of difference” that defines people tenuously, and recognizes the necessity of group identification while also viewing such identity as “ambiguous, relational, [and] shifting”).

problem of bias in mediation.”⁶⁰ Gunning’s understanding of the development of bias in narrative is based on Sara Cobb and Janet Rifkin’s description of the mediation process as an interaction of narratives.⁶¹ Gunning argues that the first story told in a mediation session, or the primary narrative, tends to describe a series of events, the plot, characters and their roles, and an overall theme or moral code.⁶² Subsequent speakers generally connect their stories to the primary narrative and, in doing so, strengthen its legitimacy.⁶³ The telling of the primary narrative uses an interpretive framework wherein the teller is usually positioned positively and his adversary is usually positioned negatively.⁶⁴ The responding party must then attempt to reposition himself within the narrative, and so the mediation becomes a “struggle over competing definitions and descriptions of social relations.”⁶⁵ The interpretive framework itself is constructed of “cultural myths” or prior notions of the behavior of categories of people.⁶⁶ To understand the narratives being told in the mediation, the mediator will necessarily use his own cultural myths to recognize that “there is a conflict” and “to understand what the parties are arguing about.”⁶⁷

Negative cultural myths are problematic to mediator neutrality.⁶⁸ The cultural myths surrounding disadvantaged identity groups can be both negative and based on derogatory assumptions and conjecture about that group.⁶⁹ The strength of negative cultural myths can cause mediator bias and compromise neutrality.⁷⁰ One example might be a dispute between two neighbors, one of which is a black male and one is a white female. The mediator’s

⁶⁰ Gunning, *Diversity Issues in Mediation*, *supra* note 55. Isabelle Gunning is a Professor of Law at Southwestern University School of Law.

⁶¹ See Sara Cobb & Janet Rifkin, *Neutrality as a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation*, 11 *STUD. LAW POL. & SOC’Y* 69, 70 (1991) [hereinafter, Cobb & Rifkin, *Neutrality as a Discursive Practice*].

⁶² See Gunning, *Diversity Issues in Mediation*, *supra* note 55, at 68.

⁶³ See *id.* at 69.

⁶⁴ See *id.* at 70.

⁶⁵ Cobb & Rifkin, *Neutrality as a Discursive Practice*, *supra* note 62, at 76

⁶⁶ *Id.* at 73 n.10 (that “[t]here are, in any given culture, stocks of stories that actors may draw on to ‘nest’ their narratives inside of pre-existing narratives that are already legitimized in the wider culture”). *Id.*

⁶⁷ Gunning, *Diversity Issues in Mediation*, *supra* note 55, at 70.

⁶⁸ See *id.* at 72.

⁶⁹ See *id.*

⁷⁰ See *id.* Gunning argues that mediator analysis of cultural myths in the context of a particular mediation, and the use of intervention techniques by mediators to allow the parties to create more equitable interpretive frameworks, will bring the outcomes of mediation sessions closer to the ideals of justice and equality. See *id.* at 93.

362 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 6:347]

personal negative cultural myths about the violent nature of black men may work against the party who is the black male.⁷¹

Problematic modes of thinking, like essentialism or negative cultural myths, threaten a mediator's ability to be neutral, and, therefore, the mediator's impartiality. In response to this problem, Cobb and Rifkin argue that neutrality should not be conceived of as impartiality, but rather as a practice in discourse.⁷² Mediator neutrality, for Cobb and Rifkin, is practiced according to "the management of persons' positions in stories, the intervention in the associated interactional pattern between stories, and the construction of alternative stories."⁷³

When neutrality is understood as a practice in discourse, the mediator's role then becomes one of managing narratives. The management of narratives requires the mediator to analyze and interpret the stories being told by the parties during a mediation session. Such analysis and interpretation will be influenced by a mediator's emotions and thoughts. If a mediator has a strong awareness of his emotions and thoughts as they occur, the mediator also has the opportunity to manage narratives without being unduly influenced by those emotions and thoughts.

The understanding of neutrality as a practice in discourse regards internal neutrality as a paradox. Faced with this paradox, it focuses only on the external, on the manifestation of neutrality in discourse with the understanding that the discourse is the mediation, and not what is occurring in the mediator's psyche. The call for mediator manipulation of discourse in the name of neutrality implicitly calls for the mediator's internal assessment of the power dynamics in the dialogue between himself and the parties, and the formulation of language that manipulates the dialogue so as to balance out the power of the parties as much as possible.

If neutrality boils down to a skillful manipulation of discourse, then the cultivation of awareness through mindfulness meditation can be of great service toward that end. Meditation strengthens the practitioner's ability to concentrate on the present moment. The ability to recognize one's personal thoughts and emotions as they arise, and to dismiss them as unhelpful or to neutralize their influ-

⁷¹ See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *YALE L.J.* 1545, 1585-1587 (1991) (using a similar example in discussing the problem of mediator partiality).

⁷² See Cobb & Rifkin, *Deconstructing Neutrality*, *supra* note 25, at 62.

⁷³ *Id.*

ence, also allows a mediator to more clearly recognize the power dynamics within a discourse.

Imagine two parties at a mediation session disputing over a driveway that divides their respective houses. Party A prefers a shared driveway while Party B prefers a divided driveway. Party A is Party B's landlord. Party B wants to place a fence between the houses, but feels pressure to give in to his landlord's request. The mediator prefers the shared driveway solution for personal reasons.

As a mediator, it is essential to recognize the power dynamic between landlord and tenant as it unfolds in the discourse. A mediator who prefers a shared driveway solution may direct the parties towards that end through directive, or evaluative, statements and body language. If the mediator recognizes his preference for a shared driveway, and that his preference arises from his personal experience, he can choose to avoid promoting this solution, and thereby avoid the re-enforcement of the landlord-tenant power dynamic. Mindfulness, cultivated through meditation allows a mediator to approach neutrality in discourse through a strengthened ability to recognize personal bias when it occurs and reduce the influence of such bias on his speech and actions.

VI. INCORPORATING MINDFULNESS MEDITATION INTO MEDIATOR TRAINING

Mindfulness meditation practice can easily be incorporated into training for mediators. In fact, as described below, some professors have already incorporated mindfulness techniques into mediator training. Because the cultivation of a mediator's awareness through mindfulness meditation increases the possibility for just outcomes in mediation, mindfulness meditation practice should continue to be incorporated into mediator training.

Mindfulness meditation can be incorporated into mediator training in a number of ways. Basic sitting practice can be introduced in mediation trainings. Less formal types of activities can also be used. For example, Professor Leonard Riskin has used the technique of inviting participants to eat a raisin slowly and deliberately as a means to introduce mindfulness practice into the class-

364 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 6:347]

room.⁷⁴ Professor Riskin has also used the technique of periodically ringing a bell and having students stop and take account of their thoughts and feelings in that moment.⁷⁵ Professor Clark Freshman has proposed the incorporation of short meditation periods before brainstorming sessions when teaching negotiation.⁷⁶ Sitting meditation practice, described in Part I of this Note, has the benefit of being a simple method to teach and to practice in the classroom.

Like any aspect of mediator training, mindfulness will be understood in greater depth, and adopted to a larger degree by some students, and may be rejected by others. Mindfulness meditation is a tool which can be utilized to forward the goals of mediation. No one can force students to use any tool, no matter how helpful it is, but a tool must be made available before it can be used.

VII. CONCLUSION

Mindfulness meditation is a means of cultivating an awareness of what exists in the present moment, without objective, ambition, or judgment. Through the practice of mindfulness meditation, a person develops the ability to recognize thoughts and emotions as they arise. This awareness enables a mediator to make conscious and deliberate choices with a clear understanding of the thoughts and emotions he is experiencing in that moment.

Mindfulness meditation directly enhances a mediator's awareness of his thoughts and emotions as they arise, and gives the mediator the ability to refrain from incorporating personal preferences and biases into his words and actions in a mediation session. Therefore, the cultivation of such awareness by mediators is helpful in maintaining neutrality and in attaining just outcomes in mediation. For these reasons, mindfulness meditation practice should be incorporated into mediator training.

⁷⁴ Telephone Interview with Professor Leonard Riskin, C.A. Leedy Professor of Law and Director, Center for the Study of Dispute Resolution, University of Missouri-Columbia School of Law (Jan. 30, 2004).

⁷⁵ *See id.*

⁷⁶ *See* Mindfulness in the Law and ADR, available at www.pon.harvard.edu/news/2002/video_riskin_mindfulness.php3 (containing a video recording of the Harvard Negotiation Law Review Conference on Mindfulness in the Law and ADR, including Professor Clark Freshman, Professor of Law at Santa Clara University School of Law, who lectured about incorporating mindfulness techniques into the classroom) (last visited Feb. 20, 2005); *see also* Freshman, Hayes, & Feldman, *Adapting Meditation to Promote Negotiation Success*, *supra* note 5, at 77-78.

2005]

MINDFULNESS MEDITATION

365

It is an exciting moment in history when an ancient Eastern technique for strengthening the mind is being fruitfully used to strengthen the possibilities of justice within the Anglo-American legal system. Clarity and awareness of thought and emotion are important qualities for a mediator to successfully navigate any mediation session. Mindfulness meditation is a tool that cultivates and nurtures these very qualities. The technique is available; it has only to be applied.

