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Who's minding the mediator? Mindfulness in mediation

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New perspectives in ADR

Who's minding the mediator? Mindfulness in mediation

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In the beginner's mind there are many possibilities, but in the expert's there are few.

Shunryu Suzuki *Zen Mind: Beginner's Mind*¹

In this article I propose to build on work by others to explore the concept of 'mindfulness' as it may be relevant to mediation. I am far from expert on either the Buddhist or psychological groundings of the concepts of these disciplines and hope I am not wrenching them too badly from their origins.

Mindfulness is the name applied to a specific technique used in some forms of Buddhist meditation. However, at least in the meditative approaches of Vipassana (or Insight Meditation) and the Ordinary Mind Zen School² there is agreement that mindfulness is not restricted to certain spiritual or psychological practices but is a fundamental orientation toward life in general. Since conflict is an integral part of everyday life, I shall argue that a mindful approach to managing it seems an appropriate avenue for exploration.

(Please note: only the mindful reader will unerringly distinguish between the similar looking words *mediation* and *meditation*.)

Teaching mediation mindlessly: an unhypothetical example

I learn a lot from teaching. Last year, as I have done in the past, I offered a demonstration of a mediation model that we had been building up step by step in class. I selected a 'simple' role play scenario that I had used for several years in this connection. It was entitled 'Catering and printing: a business dispute'.

Key points of the scenario included the following. Chris has a small catering business and uses Dale's 'Secretarial and Printing Services' for word processing, photocopying and printing. A dispute arose when Dale did not deliver new menus on time. When they arrived, they were printed in different colours than the ones Chris believed they had agreed on. Chris also believes Dale has charged more than they had agreed and is refusing to pay the bill. Dale had experienced technical problems that delayed the printing and finds Chris's way of making decisions and following them up is very haphazard, resulting in misunderstandings. As a teacher, I wished to use this scenario to demonstrate stages of the linear model through which I introduce mediation in a university course, having a little over an hour to do so. I selected two experienced role players and saw this as a straightforward teaching exercise in which the disputants would arrive at a settlement in which joint responsibility would be recognised,³ and the business relationship would be continued within the context of some clearer procedural guidelines. I knew what to expect. After all, I had 'done it' before.



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As the role play progressed, I began to realise something was 'wrong'. Although the disputant Dale was being 'co-operative' (that is, playing the role in a way familiar to me), the disputant Chris was being 'difficult'. We just didn't seem to be getting anywhere fast.

As it turned out, Chris had decided to experiment with the idea of separating the professional from the personal relationship, wanting to sever the former while continuing the latter. This interpretation derived both from personal factors and the fact that she had not been given the common information that contained the sentence, 'They both want to sort this out and resume what had been an amicable and useful professional relationship'. Thus, she drew heavily on an instruction for Chris that read 'Nevertheless, you are genuinely fond of Dale' but apparently ignored one that read 'and you want to get it [the business relationship] working again'. Dale's views belatedly became clear to me, but by then we were running out of time and I had to bring the exercise to a highly unsatisfactory close.

After class, in a debriefing with the student who had played Chris, I learned that she had felt 'violated' by the process, the mediator and the other disputant. I felt crushed that I had been the instrument of such personal intrusion and, as I later reflected, that I had missed a golden opportunity for enhanced teaching and learning.

New stage in the field

When I started both practising and teaching mediation in the late 1980s, I drew heavily on Christopher Moore's model. His work has been seminal in the field for he was able to both situate mediation practice in a broad theoretical and empirical context and provide a range of thoughtful strategies to deal with many contingencies. Not unexpectedly, however, in the first edition of his formative work he does write about '*the mediation process*' and offers a '*comprehensive stage by stage sequence* of activities that can be used by mediators'.⁴

Within a decade, however, writers on mediation were becoming more sophisticated as they sought to address growing debates about 'real' mediation. For example, Laurence Boulle offered a

synthesis of four kinds of mediative practice, with differing mediator roles: settlement, facilitated, therapeutic, and evaluative.⁵ Leonard Riskin provided a 'grid for the perplexed' to illustrate a similar four component conceptualisation.⁶

By the dawn of the new millennium, however, some experienced and thoughtful writers in the field were openly advocating transcending models and KSAOs (knowledge, skills, attitudes, other attributes).⁷ Workshops and presentations at the 2001 American Conflict Resolution Conference featured concepts such as 'mastery' and 'artistry', as well as the more prosaic approaches to improved mediation practice. A new mediation vocabulary featured terms such as:

- mindfulness;
- reflective mediation;
- the protean negotiator; and
- the self-reflective practitioner.

In one conference institute on artistry in mediation, Michael Lang drew on the 'reflective practitioner' work of Donald Schön,⁸ referring to artistry as a 'knowing in action', a competence beyond conscious description. Among the hallmarks of artistry are:

- responsiveness in the moment;
- openness to new perspectives;
- an attitude of exploration and discovery (not being bound by limiting assumptions);
- resilience; and
- flexibility.

Even more radical was a session by Daniel Bowling and Leonard Riskin entitled 'Mindfulness and the presence of a conflict resolver', in which participants (and there were hundreds!) were given meditative exercises to do as a way of enhancing their capacity to listen accurately in difficult circumstances.

Recent published work by these writer-practitioners has brought such approaches to print. In addition to Lang and Taylor on artistry in mediation,⁹ Bowling and Hoffman reflect on the role and qualities of the mediator by finding inspiration in recent trends in psychotherapy and the 'new sciences'.¹⁰ Such developments point in the direction of the holistic qualities of any complex system, in which the components are inevitably interactive

rather than simply reactive recipients of influence. This understanding, of course, includes the observing mind, which also becomes recognised as a player influencing the action. From such work, the authors propose that 'the mediator is inevitably part of the conflict he or she seeks to resolve' and therefore their personal qualities 'can be influential in shaping the process and its outcome'.¹¹ Moreover, they suggest that 'the effectiveness of our interventions often arises not from their forcefulness but instead from their authenticity'.¹² According to Bowling and Hoffman, among the personal qualities embodied by the effective mediator are self-awareness, presence, congruence and integration.

Mindfulness

Buddhist concepts of mindfulness, particularly those associated with Insight Meditation or the Vipassana tradition, provide a useful way into understanding how the mediator or negotiator can enhance their 'presence' in a conflict situation. Both Bowling and Riskin refer explicitly to the work of Jon Kabat-Zinn, the founder and director of the Stress Reduction Clinic at the University of Massachusetts Medical Center and a pioneer in the application of meditation to pain reduction. Kabat-Zinn describes mindfulness as 'paying attention in a particular way: on purpose, in the present moment, and non-judgmentally ... the direct opposite of taking life for granted'.¹³ Rob Nairn, trained in law, psychology and criminology, and now an Insight Meditation teacher, defines it quite simply as 'knowing what is happening, while it is happening'.¹⁴ Riskin describes mindfulness as the capacity for one 'to notice, without judging and with equanimity, whatever passes through her awareness — bodily sensations, emotions, sounds and thoughts'.¹⁵

In a book aimed at explaining mindful meditation to English speaking readers, Sri Lankan born teacher Venerable Henepola Gunaratana enumerates various characteristics of mindfulness. These include:

- mirror thought — reflecting 'only what is presently happening ... in the way it is happening';

- non-judgmental observation — observing 'without criticism ... like a scientist';
- impartial watchfulness — not taking sides;
- present time awareness — observing 'what is happening right now';
- non-egoistic alertness — adding neither enhancement nor emphasis; and
- participatory observation — being 'both participant and observer at one and the same time'.¹⁶

Riskin explicitly draws on such Buddhist concepts to suggest that integrating mindfulness into both the training and practice of lawyers could enhance both realms. He reviews how some law firms and law schools have participated in meditation training or retreats and then points out how mindfulness meditation programs have been adopted by the corporate sector, professional sport, health care and medical education, and organisations in fields as diverse as journalism, philanthropy and the military. In summary, he points out that research studies have documented a range of benefits from such training, including:

- improved concentration and a sense of calm;
- decline in anxiety, hostility and depression; and
- increases in the ability to regulate chronic pain.¹⁷

Riskin then suggests that incorporation of mindfulness education in legal practice and training will result in both 'helping lawyers feel and perform better in general' and in 'weakening the dominance of adversarial mind-sets ... thereby providing more appropriate service ... and gaining more personal satisfaction from their work'.¹⁸

For almost 30 years, Harvard psychologist Ellen Langer has been conducting research into mindfulness and mindlessness from the standpoint of behavioural science. Social psychological experiments into aging, health care, prejudice, creativity and the workplace have provided her with a rich store of empirical evidence on the effects of mindless behaviour and ways in which it can be changed. Although she specifically distances her academic approach from the spiritual practices already touched on, she does recognise striking conceptual similarities.¹⁹

Using colloquial language, Langer refers to mindlessness as occurring 'when the light's on and nobody's at home'. She then offers three basic definitions of the mindless state:

- (1) trapped by categories;
- (2) automatic behaviour; and
- (3) acting from a single perspective.

Some reasons why we act mindlessly, Langer suggests, are as follows:

- repetition and expertise — doing a task while no longer knowing how we do it;
- premature cognitive commitments — a commitment to 'one predetermined use of the information ... other possible uses or applications are not explored'²⁰ (such a state she contrasts with that of a 'limber' state of mind);²¹
- belief in limited resources — for example, mistaking positions for underlying interests, confusing expandable pies for zero sum ones, being unable to mobilise sources of personal energy;
- acceptance of the notion of linear time — lack of control over our environment;
- being educated for the outcome; and
- the power of context — perceptions of appropriate behaviour and thinking in a given situation.²²

The nature of mindfulness, according to Langer, thus lies in:

- creating new categories;
- welcoming new information;
- accepting more than one view;
- exerting control over context; and
- placing process before outcome.²³

Mediation: mindless clients

It often appears to mediators that in conflict situations the clients with whom they are working are in the grip of mindlessness when they first present. Taking such a view is not to imply that they are necessarily acting irrationally but rather that their rationality may be severely circumscribed. To use Langer's concepts, mediators may perceive such client behaviour as being consistent with an interpretation that they are trapped by categories, on automatic pilot or acting from a single perspective.

In their analysis of the role of emotions, Jones and Bodtger start 'from the assumption that emotion is the foundation of all conflict' and thus



'central in all mediation contexts'.²⁴ Effective mediation, they argue, must 'attend to the three key components of emotion: expressive, physiological and cognitive'. Emotions colour thinking and behaviour in the expressive realm of communication as 'emotional expression can create conflict as well as reflect

mindless mediator, as illustrated in my opening training scenario. At their worst, the mindless mediator may actually do harm to clients without even realising it. More commonly, I suspect, the mindless mediator fails to maximise a party driven process by missing opportunities to create an

It may be easy for mediators to perceive mindless behaviour in their clients, for that is what's expected ... The more serious problem ... is that of the mindless mediator ...

conflict' and influence the ways in which we both encode and decode messages to other parties. Emotions also influence our physiology. For example, emotional flooding, or 'system overload', may result in our 'being swamped by emotion to the extent that [we] cannot function or think effectively'. Similarly, people can be 'infected' by the emotions of others, which may lead to an escalation of conflict. From a cognitive viewpoint, we may both 'become emotional when we appraise a situation' and then experience meta-emotions about having such emotions, both of which can contribute to the conflict at hand.

From a psychotherapeutic point of view, people in conflict can be both the perpetrators and victims of transference.²⁵ Essentially, this involves relating an inappropriate association of qualities from a past figure to a current figure, which may lead to a re-enactment of a past relationship, in turn fuelling the conflict in ways that are not immediately apparent.

In one way or another, these types of behaviours are consistent with descriptions of mindlessness. Part of the job of the third party is thus to create a climate in which such mindlessness can move toward greater mindfulness.

Mediation: mindless mediator

It may be easy for mediators to perceive mindless behaviour in their clients, for that is what's expected and, to some extent, mediators are trained to deal with it. The more serious problem, it seems to me, is that of the

environment conducive to the most appropriate outcomes, whatever they may be. What is most insidious about the mindless state, by its very definition, is that it is resistant to recognition by the mind in which it is produced.

What are some symptoms of the mindless mediator at work? A sample litany, suggestive rather than exhaustive, that draws on the earlier discussion might incorporate the following.

- *Model bound expertise*: 'I will mediate you through my model regardless of the consequences (for you).' 'I don't offer settlement oriented mediation. I will transform you.' 'Emotions have no place in such disputes' (besides, they're messy — see below).
- *Ego driven goals, personal standards*: 'We have only one hour to complete this process.' 'I must please my employer.' 'I am proud of my settlement rate.'
- *Premature cognitive commitment*: 'This is a simple commercial matter.'
- *Meta-emotions*: 'I'm afraid of emotional outbursts.' 'Real men shouldn't compromise.'
- *Transference or counter-transference*: 'You are acting like the school bully who used to push me around.' 'You've impugned my integrity just like that client did the other day.'

Becoming mindful

To transform mindlessness into mindfulness we first must become conscious of it. Recommendations to mediators working to increase their



mindfulness first stress self-awareness. There is a hierarchy (or set of concentric circles) of self-sensitisation that starts with our body and moves upwards (or outwards) through related feelings, underlying thought patterns and the foundation assumptions on which they are built. So, while meditating, I might feel tension in my temples and realise that I am thinking about the conference paper I am writing instead of concentrating on my breathing. I may realise that this is an instance of my typical pattern of planning for the future and that it may be linked to some deep seated drive for maximal control of my environment.

Translating such advice into a mediation context, we may first ask ourselves, 'What is going on in my body?' as we check for the areas of tension or discomfort. Then we might inquire, 'What feelings are these bodily sensations an indication of? Frustration? Boredom? Sadness? Impatience?' Probing more deeply, we might reflect on what thought patterns are revealed by these feelings. 'Do I think I am wasting my time or that the disputants are not seeing the obvious?' Finally, we might invite ourselves to think about the assumptions on which such thought patterns are based. 'Perhaps I really am here to feel better about myself' or 'I am uncomfortable with unresolved conflict and believe it can (and should) be settled through mutual compromise'.

A technique used by some Zen practitioners to quiet the activities of the 'monkey mind' during meditation is to label the thoughts that arise, diverting our single-minded attention from the task at hand.²⁶ By naming each thought, we may be able to break our self-identification with our own thinking and to recognise those thoughts for what they are. Hence, while thoughts are running amuck during my meditation I might recognise 'conference paper mind' or, generically, 'planning mind'. From a mediation perspective I might use the following labels to identify my mindless wanderings: 'staring at the clock mind'; 'parking meter mind'; 'if he'd only apologise mind'; or 'she looks just like my sister in law mind'.

Resonances with recent mediation approaches

Mindfulness, as described above, resonates powerfully with some of the more sophisticated approaches to mediation theory and practice developed in recent years. For example, Bush and Folger, who introduced the concept of 'transformative mediation', caution against the injection of the mediator's agenda into the conflict situation. They point out that specifically in 'problem solving' mediation:

... mediators' interests, as shaped both by the problem solver role and by their own values, become forces at play in mediated conflicts ... [A]s these third party interests enter a conflict, the problem solving focus shifts away from a sole concern with disputants' needs to a joint focus on disputants' and third party interests ... win-win-win solutions.²⁷

In narrative mediation the mediator's focus should be on the exploration and re-creation of clients' stories, a stance that demands both self-awareness and total openness to the disputants. As Winslade and Monk write, 'the background assumptions and narrative accounts of the mediator are intimately related to the approach that will be taken to the mediation'. Moreover, the mediator must have genuine respect for the parties' competencies and resources and 'avoid assuming an authoritative stance' that may constrain one or more participant.²⁸

Identification of the assumptions on which consistent thought patterns are founded is reminiscent of Lang and Taylor's advice to mediators to become aware of their 'constellation of theories ... that function as lenses through which [mediators] view and make sense of their experience'.²⁹

The concept of mindfulness also resonates with some of the more self-reflective writing on effective mediation training. It provides a sound basis for understanding the difference between the prescriptive and elicitive modes, as identified by Lederach. The former has been defined as 'training as transfer' in which the trainer is the expert who knows what participants need. The participants' knowledge is assumed to be 'less relevant and credible' and the

goal of the training is to learn a specific model.³⁰ Such an approach is reminiscent of Paulo Freire's analogy of education narrowly conceived of as 'banking' in which students withdraw knowledge from a storehouse.³¹ Others have pointed out that the prescriptive approach is monochromatic (that is, one thing at a time), agreement oriented and confers on the disputants' responsibility for the outcome but not the process.³²

By way of contrast, an elicitive model sees training 'as discovery and creation' with the trainer as 'a catalyst and a facilitator' in which a model is created rather than presented. Participants are partners and resources in creating an 'emerging content'. The trainer 'assumes a perspective of ignorance'.³³ In a similar vein, Lang and Taylor advocate coaching in an elicitive rather than a prescriptive style.

Recent writing on a transformative approach to training echoes the importance of self-awareness and authenticity so central to mindfulness. Folger and Bush state that 'An important goal of either basic or advanced training should be to encourage mediators to think through the underlying assumptions they bring to their practice'.³⁴ Another transformative mediation trainer writes, 'The ability to practice in a transformative manner springs from the heart of the practitioner'.³⁵

Suggestions: mindless clients

Many of the techniques normally taught and used by mediators are, in fact, designed to help clients move from degrees of mindlessness to greater mindfulness. Questioning, active listening, reframing, summarising and selective facilitation are all part of the normal mediator repertoire and can be seen to aim at facilitating increased client mindfulness. Taking 'time out' and convening individual sessions are standard ways to reduce emotional flooding and emotional contagion, and thus enhance client mindfulness. Two additional suggestions are the use of silence in joint sessions (I find mediators often are fearful of silence and try to fill the gaps) and the introduction of short meditative exercises, where appropriate.



Suggestions: mindless mediator

However technically proficient a mediator may be, unless they are authentically mindful in themselves, interventions designed to create client mindfulness can be manipulative and mediator-centric rather than driven by concern for the clients.³⁶ Drawing on the earlier discussion of mindful practices, we may recall the unhypothetical example of the mindless mediation teacher (who will now reveal himself, unsurprisingly, as the author) at work as described above and reflect on how he might have helped himself move toward greater mindfulness.

We may start fruitfully by considering the symptoms of my mindlessness. First, I exhibited clear signs of being bound by my expertise in the model chosen to illustrate a generic form of mediation for beginners. I had used the role play before and was, to some extent, on 'automatic pilot', despite my stated commitment to

dispute resolution under the shadow of the law, whose behaviour conformed to my expectations. Some degree of transference or counter-transference probably occurred in my reaction to Dale's reaction to her instructions, which resulted in my feeling challenged and inadequate.

How might the mindless mediator here have benefited from a practice in mindfulness?

Preparation

It would have been wise to have given myself some 'breathing space' between the prior class activity and simulation exercise instead of rushing from one to another, as I tend to do in a crowded weekend of teaching. For example, I might have treated myself to a few minutes of sitting or lying down and just followed my breathing or completed a short progressive relaxation exercise³⁸ (to get more in touch with my body and hence my mind).³⁹

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mediation as a personalised exercise, tailored to the needs of individual clients in unique situations. In so doing, I provided a clear illustration of the difference between my 'espoused theory' and my 'theory in use'.³⁷ I was animated by ego driven commitment to specific goals, such as moving quickly through the process, illustrating each stage in a linear fashion and finishing within a limited time. My mind was not in a 'limber' state. Rather, I had made a premature commitment to a single, predetermined use of the information available, neatly summarised in the subtitle of the scenario: 'a business dispute'. Such a mindset was reinforced by the behaviour of Chris, the experienced professional in settlement oriented

Body awareness

Once the simulation was under way, I could have noted when I was becoming physically uncomfortable — I often first feel tension in my temples, neck or shoulders. Such physical tension warns me that emotional tension may be present.

Labelling

I then might have been able to start labelling what was going on in my mind and the feelings I was experiencing — frustration, anxiety, embarrassment. I could then ask myself, 'What thought patterns are underpinning these feelings?' For example, am I receiving internally pre-programmed messages, such as 'teacher knows best', 'role player is "naughty"', 'this is supposed to



be an “easy” scenario’ or ‘this is about a “business dispute” not a personal one’?

Time out

Finally, I might have taken ‘time out’ (either physically or made some emotional space) to quickly identify the assumptions beneath such patterns and messages deeply embedded in my life experience — ‘teachers who don’t know the answers are failures’, ‘students do what the teacher wants’, ‘I know the solution to the problem so why doesn’t he grasp it?’ It would be useful to revisit and develop these thoughts later through debriefing with a co-mediator, supervisor or trusted colleague, or to enter them in a professional journal.

Teaching

I could have taken all these actions publicly, by way of a commentary to the class, to take advantage of a potentially powerful learning situation.

There is, of course, no guarantee that a ‘breakthrough’ would have occurred because of such strategies. Nevertheless, there is a good chance that I would have been able to separate myself from my thinking and to recognise the thinking for what it was, thus perhaps making my mind more open and limber and giving it a better chance to respond to what actually was happening in the moment. After the completion of the simulation, I could have debriefed publicly, with the whole class helping me reflect on my actions and uncovering my underlying thought patterns. Failing that, I might have made a journal entry in a mediation logbook forcing me to deal with those same questions. ●

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I would like to thank Leonard Riskin, Bob Sharples and Geoff Dawson for contributing to my understanding of some of the issues canvassed in this article.

Endnotes

1. Suzuki S *Zen Mind: Beginner's Mind* Weatherhill New York 1970 p 115.

2. For an introduction to the latter, see the works by Ezra Bayda and Charlotte ‘Joko’ Beck in these endnotes and the list of further reading.

3. I recognise the legitimacy of other, non-settlement, outcomes in the use of mediation but not for the purposes of this demonstration.

4. Moore C *The Mediation Process* Jossey Bass San Francisco 1986 p xi, emphasis added.

5. Boule L *Mediation: Principles, Process, Practice* Butterworths Sydney 1996 pp 29–30.

6. Riskin L ‘Understanding mediator orientations, strategies and techniques: a grid for the perplexed’ (1996) 1 Harv Neg L Rev 7.

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10. Bowling D and Hoffman D ‘Bringing peace into the room: the personal qualities of mediators and their impact on the mediation’ (2000) 16(1) *Negotiation Journal* 5.

11. Above note 10 at p 24.

12. Above note 10 at p 24.

13. Kabat-Zinn J *Wherever You Go, There You Are* Hyperion New York 1994 p 4.

14. Nairn R *Diamond Mind* Shambhala Publications Boston 2001 p 29.

15. Riskin L ‘The contemplative lawyer: on the potential contributions of mindfulness mediation to law students and lawyers and their clients’ (2002) 7 Harv Neg L Rev 1 at 24.

16. Gunaratana H *Mindfulness in Plain English* Wisdom Publications California 1992 pp 151–54.

17. Above note 15 at p 29.

18. Above note 15 at p 9.

19. Langer E *Mindfulness* Perseus Cambridge 1989 p 72.

20. Above note 19 at p 22.

21. Above note 19 at p 70.

22. Above note 16 in Ch 3.

23. Above note 16 in Ch 8.

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addressing emotion in mediation practice’ (2001) 17(3) *Negotiation Journal* 217.

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28. Winslade J and Monk G *Narrative Mediation* Jossey Bass San Francisco 2000 pp 69–70.

29. Above note 9 at p xviii.

30. Lederach J *Preparing for Peace* Syracuse University Press Syracuse 1995 Ch 5.

31. Freire P *Pedagogy of the Oppressed* Continuum New York 2000.

32. See, for example, Maxwell J ‘Conflict management and mediation training’ (1997) 15(2) *Mediation Quarterly* 83.

33. Above note 25 at p 57.

34. Folger J and Bush R (eds) *Designing Mediation* Institute for Study of Conflict Transformation New York 2001 p 169.

35. Stains in above note 29 at p 155.

36. See Fisher T ‘Advice by any other name ...’ (2001) 19(2) *Conflict Resolution Quarterly* 197.

37. Above note 8.

38. See, for example, Gawler I *Peace of Mind* Hill of Content Melbourne 1987 pp 63–71.

39. Though not strictly a mindful practice, some practitioners might engage in a quick and well practiced visualisation to ground themselves.

Further reading

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