BOOK REVIEW

Can Mindfulness and Meditation Make You a Better Lawyer?

By Allison C. Shields

"The Anxious Lawyer, An 8-Week Guide to a Joyful and Satisfying Law Practice Through Mindfulness and Meditation," is a straightforward book that incorporates personal stories, basic introductory information and mindfulness and meditation exercises written specifically for lawyers.

The authors, Jeena Cho and Karen Gifford, both lawyers themselves, share their experiences with meditation, the different reasons they were each separately drawn to the practice, and how it has helped them in their personal and professional lives, making their lives as lawyers — and as people — more rewarding. Cho is a bankruptcy practitioner in California, while Gifford was a litigator and enforcement attorney for the Federal Reserve and is now an investor and advisor on policy and regulatory issues in the financial technology fields.

Allison C. Shields

Law is a stressful profession, and more and more lawyers are suffering. A study released earlier this year, co-funded by the American Bar Association and the Hazelden Betty Ford Foundation, showed that more U.S. attorneys consume alcohol at levels consistent with problem drinking than other highly educated professionals in other industries, and that 28 percent of attorneys struggle with some level of depression and 19 percent show symptoms of anxiety. This represents an increase since a previous study in 1990, in which 19 percent of respondents reported depression.

The anxiety and unease in the profession are part of what inspired Legal Ease Consulting, Inc., and its corresponding website, Lawyer Meltdown. The phrase, "lawyer meltdown," resonates with far too many lawyers who are stricken with the disease of "busyness," whether it helps themselves, their clients or their firms, or not. (Although this problem is not limited to lawyers — our whole society suffers from busyness — and the lessons and concepts in this book could easily be applied to other professionals).

Meditation and mindfulness are not

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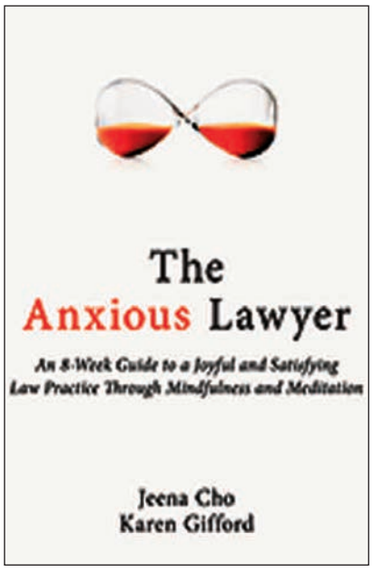

REAL ESTATE

Real Estate Transactions and Notary Public Exposure

By Andrew Lieb

In a real estate practice the act of notarizing documents is a matter of course for attorneys, paralegals and title closers alike. Often the stamps come out without even a first concern or a break for analysis because a real estate transaction is far too often undertaken while the professionals are on autopilot. Typically, a title closer will stamp documents, collect them and file them at the County Clerk's Office with minimal oversight and scant quality control measures being in place to avoid forgery or the like. The courts remind us, from time-to-time, that this is a bad idea.

The Executive Law, at section 135, results in a notary public being an essential participant at a real estate transaction by authorizing a notary "to administer oaths and affirmations … to receive … proof of deeds, mortgages and powers of attorney and other instruments in writing." Furthermore, the Real Property Law, at section 298, permits a notary public to take an acknowledgment or proof of a conveyance of real property situate in the state while section 291 of the Real Property Law requires such an acknowledgement for a conveyance of real property. The term "conveyance" is defined at section 290(3) of the Real Property Law to include "every written instrument, which any estate or interest in real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected." In all, a real estate transaction cannot escape involving a notary public. However, rarely do the professionals consider the effects of notarial misconduct. Perhaps they mistakenly believe that a notary public will be exposed for their own wrongs and recovery can protect against any damage.

Andrew Lieb

In June 2016, the Appellate Division, Second Department, in the case of *Chicago Total Insurance Company v. LaPierre*, analyzed the extent of a notary public's exposure for misconduct. In *LaPierre*, the plaintiff, as subrogee, sought to recover attorney fees and costs allegedly incurred by reason of notarial misconduct. Simply stated, the Appellate Court was faced with the issue of whether Executive Law §135's damages provision for notarial misconduct, which states "all damages sustained by them," includes the recovery of attorney's fees and costs.

The 2016 decision was the second time that this same caption found itself before the Second Department in recent years. In 2013, the Appellate Division initially addressed the standard for pursuing a claim of notarial misconduct. Therein, the defendant argued that the Second Department should look to its prior holding from *Rastelli v. Gassman*, which was decided in 1996, for the rule that a claim of notarial misconduct requires proof of detrimental reliance by the plaintiff. However, the 2013 Appellate Court ruled that detrimental reliance is not a requisite element of a cause of action for notarial misconduct, except where a plaintiff alleges that such plaintiff was defrauded as a result of the notarial misconduct. The 2013 Appellate Court explained that were a plaintiff asserted, "that the notarial misconduct had resulted in the conveyance of her property without her consent" it would be a functional impossibility to demonstrate detrimental reliance where "by the very design of the plan, [the subrogors were] not meant to know of it." Therefore, the Second Department distinguished *Rastelli* from *LaPierre* by explaining that the former case involved a plaintiff who was damaged by a fraud brought about by the notarial misconduct whereas the latter case involved a plaintiff who was damaged from the simple fact that the notarial misconduct enabled the conveyance of her property without her knowledge or consent by way of a forged deed. In such, the Appellate Division looked to "the plain language of the statute" to determine liability in *LaPierre*. The plaint language of Executive Law §135 states: "[f]or any misconduct by a notary public in the performance of any of his powers such notary public shall be liable to the parties injured for all damages sustained by them." Consequently, the Appellate Court held, in *LaPierre*, that a plaintiff is only required to demonstrate misconduct by a notary public that causes damages in order to prevail. So, in 2013 it seemed that a notary public's misconduct could easily result in damages to compensate the injured party by way of a lawsuit.

In 2016, the extent of those damages was the issue before the Second Department when the Appellate Court was asked to interpret the second half of section 135's language, to wit: "for all damages sustained by them." In ruling on the issue, the Appellate Division held that "the plain language of the statute does not explicitly permit recovery of attorneys' fees and costs." To justify its holding, the Appellate Division, Second Department, looked to "the public policy of the American Rule" that "attorney's fee[s] [are] merely an incident of litigation and is not recoverable absent a specific contractual provision or statutory authority."

So, even though a notary public is liable for misconduct, the plaintiff's recourse did not include their attorneys' fees and costs in pursuing such recourse. Therefore, avoiding misconduct in the first instance is more preferable than recouping damages stemming from such misconduct retroactively. Without the availability to recover attorneys' fees and costs, a plaintiff will never be made whole by their lawsuit, no matter how spectacular litigation counsel performs. As a result, practitioners need to keep a watchful eye on notary publics.

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Lieb is a past Co-chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property in The Suffolk Lawyer for several years.