

# Modern Legal Practice

## Business • Strategy • Leadership



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*Legal Upheaval: A Guide to Creativity, Collaboration, and Innovation in Law*  
by Michele DeStefano

Reviewed by William G Young,  
United States District Judge for  
the District of Massachusetts



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### **Citation**

This journal should be cited as MLP Vol 2 [2019]

### **To subscribe**

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### **Annual subscription**

Price for hard copy or digital £295/\$425/€375  
Price for hard copy/digital bundle £345/\$495/€450  
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### *Modern Legal Practice*

is published by

Globe Law and Business Ltd

3 Mylor Close

Horsell, Woking

Surrey GU21 4DD

Tel: +44 20 3745 4770

[www.globelawandbusiness.com](http://www.globelawandbusiness.com)

Printed and bound by Hobbs

ISSN: (Hard copy) 2398 - 5410

*Modern Legal Practice: Business • Strategy • Leadership*

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The idea for this journal arose from the 'Business of Law' series of books, which is co-published with the International Bar Association. The journal is complementary to the book series, and the publishers gratefully acknowledge the support of the IBA.

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# A mindful perspective on wellbeing in the law

Judi Cohen

The legal profession has become interested in wellbeing as a measure of success, most recently in light of two US studies published in 2016. These studies indicate that wellbeing in the law is deeply compromised, negatively affecting law student and attorney competence. Mindfulness is an effective, scientifically validated path to wellbeing. Already offered in numerous corporations,<sup>1</sup> schools,<sup>2</sup> and even the British Parliament,<sup>3</sup> mindfulness training is also making impressive inroads into law school curriculum and law firm training.<sup>4</sup>

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This article discusses some of the causes and conditions for the diminished state of wellbeing in the legal profession, and how that negatively affects law student and attorney competence. It explains how mindfulness supports wellbeing, competence and profitability, and concludes with recommendations for the integration of mindfulness into firms and legal organisations.

## Taking the measure of lawyer wellbeing

Profits per partner have been the focus of law firm wellbeing at least since the storied 'Cravath System' and its 'tournament of lawyers' model of growth became standard in the early 20th century.<sup>5</sup> To this day, surveys of law firm wellbeing concentrate primarily on profit and other financial measures, with little attention to attorney wellbeing.<sup>6</sup>

That trend is finally shifting amid a "growing worldwide consensus that success [in the law] should not be measured solely in economic terms", and that instead, "[m]easures of wellbeing also have an important role to play in defining success and informing policy".<sup>7</sup> This language, from "The Path to Lawyer Well-Being Report: Practical Recommendations for Positive Change" (the Lawyer Well-Being Report or the Report), has set in motion a long overdue international inquiry into lawyer wellbeing.

The Lawyer Well-Being Report is a response to two studies released in 2016 by the American Bar Association (ABA), on lawyer wellbeing and law student wellbeing. Conducted by the ABA Commission on Lawyer Assistance Programs (CoLAP) and the Hazelden Betty Ford Foundation, the "Lawyer Study" collected data from nearly 13,000 practising attorneys and provided the first information of statistical significance on wellbeing in the profession.<sup>8</sup> The "Law Student Study" collected data from 15 American law schools and over 3,300 law students,

and was the first significant multi-school study in 20 years.<sup>9</sup>

## Findings of the Lawyer Study

The Lawyer Study found that 20.6% of participants qualified as problem drinkers and 36.4% engaged in "hazardous drinking or possible alcohol abuse or dependence".<sup>10</sup> Depression, anxiety, and debilitating stress measured at 28%, 19%, and 23%, respectively, with 61% of lawyers reporting concerns with anxiety, and 46% with depression, at some point in their careers.<sup>11</sup> Younger lawyers, men, and those in private practice reported the highest rates of problem drinking and depression; women, the highest rates of anxiety.<sup>12</sup>

Only 3,419 lawyers answered the questions posed about illegal drug use. Patrick Krill, the Study's lead author and also a lawyer, said, "It's left to speculation what motivated 75 percent of attorneys to skip over the section on drug use as if it wasn't there."<sup>13</sup> In his opinion, they were afraid to answer.<sup>14</sup>

## Findings of the Law Student Study

The Law Student Study found that 17% of students screened positive for depression, 14% for severe anxiety, and 23% for mild to moderate anxiety, and that 6% reported serious suicidal thoughts in the past year.<sup>15</sup> In addition, 43% reported binge drinking at least once in the prior two weeks, and fully one-quarter were at risk of alcoholism for which further screening was recommended.<sup>16</sup>

However, only 4% of students had used a health professional for alcohol or drug issues,<sup>17</sup> and while 42% felt they needed help for mental health issues, only half of those sought help.<sup>18</sup> Reasons included a perceived threat to bar admission (63%) or job or academic status (62%), social stigma (43%), and concerns about privacy (43%).<sup>19</sup> Another 39% believed they could handle the problem themselves.<sup>20</sup>

Notably, 49% indicated, "If I had a drug or alcohol problem, my chances of getting admitted to the bar are better if the problem is hidden", and 43% said the same about a mental health problem, with male students much more likely to keep their problems hidden.<sup>21</sup> Most importantly, the greater the number of problems a student reported (from among alcohol, drugs, and mental health), the more likely they were – 72% for alcohol/drugs, 64% for mental health – to believe they should hide the problems.<sup>22</sup>

### **The difficulty with wellbeing for lawyers**

Four elements of legal education, training and practice may account for the high rates of depression, anxiety, substance use, and other issues in the profession. These elements are overwhelm, reactivity, perfectionism and living surrounded by conflict.

#### **Overwhelm**

Beginning on the first day of law school, students quickly learn that the right answer to every opportunity is "yes". Once barred, lawyers are expected to bill vast numbers of hours, rarely if ever daring to say "no" to a partner or client. The goal is the opposite, with lawyers continually trying to increase capacity and do more.

This unmitigated "yes" can tip into being overwhelmed, which can trigger anxiety, depression and hopelessness. Many attorneys live with a vague (or profound) sense that their work will never be finished, and no number of billed hours is enough to stave off the fear of being let go.

Trapped in a perceived cycle of perpetual work, desperation can turn into depression, push a lawyer (further) towards alcohol or drugs, or turn into a sense of complete hopelessness. None of these states of mind are compatible with being an efficient, effective counsellor, advocate or rainmaker.

#### **Reactivity**

Reactivity is the second peril of the law. Knowing how to 'spot issues' is the fundamental tool in the legal toolbox. It is the first thing a law student learns.

The profession uses various metaphors to describe issue-spotting: looking for what could go wrong, what could 'go south', what could 'blow up'. The images are dire yet accurately depict not just the consequences to the client, but also the fear a lawyer has of missing

something important that results in a client losing a fortune, their liberty or even a child.

The importance of good issue-spotting notwithstanding, a lawyer who spends her time scanning the horizon for what could go wrong, is at risk of finding things wrong, not only in her law practice but also in her colleagues, loved ones and self. And not only finding things wrong, but reacting out of an unconscious fear that to not react could result in dire consequences. In this mode, with the mid-brain over-activated<sup>23</sup> and sensing constant danger, the lawyer is thrust into fight or flight mode<sup>24</sup> where she will attack with little provocation or avoid or panic about conflict even though her job is to engage.

#### **Perfectionism**

The third peril of legal education and training is perfectionism. Anyone who has ever re-written a simple email a dozen times, or become frustrated with someone else's mistakes (or their own), is familiar with this quality of mind.

Clients may appreciate perfectionism, and to a lawyer perfectionism may even seem like the only option. But perfectionism is not excellence, but staving off blame and shame.<sup>25</sup> A lawyer who is a perfectionist<sup>26</sup> is at risk of forgetting she is only human and live in terror of making even the slightest mistake. Perfectionism puts lawyers at risk of depression as it is impossible to be perfect; anxiety, when perfectionism remains the highly prized yet unattainable goal; and even suicide.<sup>27</sup> Perfectionism may also lead to substance use as a 'remedy' for unbearable feelings of imperfection.

#### **Conflict**

The fourth peril of legal education and training is living surrounded by conflict. The common law system is an adversary system by design, and common law lawyers commend themselves to this system.<sup>28</sup> Still, it is a shock to experience the reality of perpetual conflict not only in battleground fields like criminal defence and family law, but also in transactional and other purportedly collegial practices. Other professions compete, but lawyers actually reap financial rewards for hostility.<sup>29</sup> In comparison with medicine, it would be like having two surgeons in the operating theatre, one replacing a knee and the other trying to cut off the leg.<sup>30</sup>

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As a result of the conflict, lawyers are both combative and embattled. Anxiety can arise over the possibility of losing or not doing enough to win. Depression can set in when work feels like it is just about ‘living to fight another day’. Substance use makes perfect sense. After a day at war, who would not want one or two or three drinks, or something stronger?

#### **The Lawyer Well-Being Report**

Respondents to the Lawyer and the Law Student Studies answered that question with a resounding, “not me”. The Studies were shocking yet not shocking: law students, law schools, lawyers and law firms have known about and been ignoring the issues for decades.<sup>31</sup>

Therefore, it is either impressive or just a relief that CoLAP did not simply report the Studies. Instead, as mentioned above, together with numerous partners,<sup>32</sup> CoLAP created the (US) “National Taskforce on Lawyer Wellbeing”, which in turn analysed the Studies and then compiled “The Path to Lawyer Well-being Report”.<sup>33</sup>

The Report begins with this preamble:

*To be a good lawyer, one has to be a healthy lawyer. Sadly, our profession is falling short when it comes to well-being. The two studies referenced above [the Lawyer and Law Student Studies] reveal that too many lawyers and law students experience chronic stress and high rates of depression and substance use. These findings are incompatible with a sustainable legal profession, and they raise troubling implications for many lawyers' basic competence. This research suggests that the current state of lawyers' health cannot support a profession dedicated to client service and dependent on the public trust.*

*The legal profession is already struggling. Our profession confronts a dwindling market share as the public turns to more accessible, affordable alternative legal service providers. We are at a crossroads. To maintain public confidence in the profession, to meet the need for innovation in how we deliver legal services, to increase access to justice, and to reduce the level of toxicity that has allowed mental health and substance use disorders to fester among our colleagues, we have to act now. Change will require a wide-eyed and candid assessment of our members' state of being, accompanied by courageous commitment to re-envisioning what it means to live the life of a lawyer.<sup>34</sup>*

Not to put too fine a point on things, the Report additionally notes that: “The parade of difficulties also includes suicide, social alienation, work addiction, sleep deprivation, job dissatisfaction, a ‘diversity crisis’, complaints of work-life conflict, incivility, a narrowing of values so that profit predominates, and negative public perception”.<sup>35</sup>

#### **CoLAP's argument for wellbeing**

In a three-pronged argument in support of lawyer wellbeing, the Report initially notes that wellbeing is “an important form of human capital that can provide a competitive advantage”. Naming lawyer turnover, which costs BigLaw upwards of \$25 million per year, client satisfaction, and higher productivity and profitability, the first argument the Report makes for wellness is that, “enhancing lawyer health and well-being is good business and makes sound financial sense”.<sup>36</sup>

Next, the Report cites the ABA's Model Rules of Professional Conduct, which call for lawyers to strive to attain the highest level of skill, improve the profession and exemplify the profession's ideals of public service, asserting that:

*... major depression is associated with impaired executive functioning, including diminished memory, attention, and problem-solving. Well-functioning executive capacities are needed to make good decisions and evaluate risks, plan for the future, prioritize and sequence actions, and cope with new situations. Further, some types of cognitive impairment persist in up to 60 percent of individuals with depression even after mood symptoms have diminished, making prevention strategies essential. For alcohol abuse, the majority of abusers (up to 80 percent) experience mild to severe cognitive impairment. Deficits are particularly severe in executive functions, especially in problem-solving, abstraction, planning, organizing, and working memory – core features of competent lawyering.<sup>37</sup>*

Finally, the Report points to interconnectedness. “From a humanitarian perspective”, the Report suggests, “promoting wellbeing is the right thing to do. Untreated mental health and substance use disorders ruin lives and careers. ... We all contribute to, and are affected by, the collective legal culture. ... Our interdependence creates a joint responsibility for solutions.”<sup>38</sup>

### **Wellbeing, defined**

The Lawyer Wellbeing Report asserts that wellbeing is: “a continuous process whereby lawyers seek to thrive in each of the following areas: emotional health, occupational pursuits, creative or intellectual endeavors, sense of spirituality or greater purpose in life, physical health, and social connections with others”.<sup>39</sup> Recommendation 8 of Appendix B of the Report urges high quality education on lawyer distress and wellbeing,<sup>40</sup> offering this ringing endorsement for mindfulness meditation:<sup>41</sup>

*Mindfulness meditation is a practice that can enhance cognitive reframing (and thus resilience) by aiding our ability to monitor our thoughts and avoid becoming emotionally overwhelmed. A rapidly growing body of research on meditation has shown its potential for help in addressing a variety of psychological and psychosomatic disorders, especially those in which stress plays a causal role. One type of meditative practice is mindfulness – a technique that cultivates the skill of being present by focusing attention on your breath and detaching from your thoughts or feelings. Research has found that mindfulness can reduce rumination, stress, depression, and anxiety. It also can enhance a host of competencies related to lawyer effectiveness, including increased focus and concentration, working memory, critical cognitive skills, reduced burnout, and ethical and rational decision-making ... Evidence also suggests that mindfulness can enhance the sense of work-life balance by reducing workers' preoccupation with work.<sup>42</sup>*

### **Mindfulness for the legal mind**

Mindfulness for lawyers is both a personal and a professional option, in the sense that it can be practised by individual lawyers and supported by firms and organisations.<sup>43</sup> Scientific evidence shows that mindfulness increases our ability to purposefully direct attention and behaviour, suppress inappropriate knee-jerk responses, strategise flexibly, and learn from past experience to support optimal decision-making.<sup>44</sup>

Research also supports anecdotal and consistent self-reported evidence that mindfulness reduces stress and increases emotion regulation: in a survey of published studies, one conclusion was that mindfulness meditators had a higher perceived quality of life, less anxiety, less depression, less rumination, fewer negative emotions and greater emotional stability.<sup>45</sup>

While classical mindfulness has its roots in Buddhism, in the last 40 years mindfulness in the West has taken a decisively secular turn. Jon Kabat-Zinn, Professor of Medicine emeritus at the University of Massachusetts Medical School, is the founder of the internationally renowned secular mindfulness programme, Mindfulness-Based Stress Reduction, or MBSR. Dr Kabat-Zinn defines mindfulness as “awareness that arises through paying attention, on purpose, in the present moment, and nonjudgmentally”.<sup>46</sup>

Mindfulness for the legal mind can be defined to include Dr Kabat-Zinn’s definition plus three additional qualities: courage, grace and not wishing things were other than they are.

Intentional, present, nonjudgmental awareness, Dr Kabat-Zinn’s definition is the ability, over time, to bring and continuously return the attention to the present moment, with an attitude of kindness and benevolence, initially by focusing on an object. In solitary mindfulness practice, or the practice of sitting or walking in silent meditation alone or with others,<sup>47</sup> the practitioner begins by focusing on the sensation of the breath as the object.

For beginning and experienced practitioners alike, the mind will wander dozens of times in a brief solitary mindfulness meditation. And that is precisely the point: the practitioner notices the wandering mind and, with kindness, returns the attention to the breath. Over time, the attention returns more automatically and, eventually, the mind wanders less. Because stress and anxiety most often arise in relationship to thoughts about the past or future, training in intentional, present, nonjudgmental awareness, or mindful awareness, is the first step in reducing stress and anxiety, and increasing focus, concentration, wisdom and compassion.

Courage and grace are additional components of mindful awareness. As the practitioner learns to focus and refocus on the present moment, inevitably she notices that some moments, especially in the practice of law, are quite unpleasant. Rather than shying away, in solitary practice the practitioner learns to utilise courage to meet the unpleasantness, whether it comes in the form of painful muscles or memories, or in the strong urge, fuelled perhaps by anxiety, to jump up and get back to work.

Courage is also key to a portable mindfulness

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*While classical mindfulness has its roots in Buddhism, in the last 40 years mindfulness in the West has taken a decisively secular turn.*

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practice. Portable mindfulness is mindful awareness in everyday life. From a mindfulness perspective, courage in everyday life is the ability to remain present for even very difficult real-life moments. Resilience by another name, this element of mindful awareness is the next step in reducing anxiety and stress, and also depression, and supports the process of examining the causes of, and eventually mitigating, alcohol and substance use.

Grace is the practice of ethical, rational decision-making, even in high stakes situations and with difficult people. It is wisdom in action, the element of cognitive reframing mentioned in the Lawyer Wellbeing Report. Grace manifests as the ability to be a passionate advocate and still follow the Shakespearean admonition to “strive mightily, but eat and drink as friends”.<sup>48</sup>

Not wishing things were other than they are, is both a solitary and portable practice unto itself, and a byproduct of solitary practice. We engage in an uncanny amount of wishing things were different, whether we are sitting still or moving about our day. The next time you are doing the dishes or trying to get out of the office on a Friday, notice how often your attention wanders off into the future, wishing the dishes were done or the document complete.

Over time, mindfulness practice helps us see, through direct experience, that the present moment is the only available moment. The past with its regrets and mistakes is gone, and the future is unknown, no matter how well planned. Letting go of wishing the past was other than it is, or the future was here, is a powerful aspect of mindfulness training. When we begin to do this, we experience less depression about the past, and less anxiety about the future.

As we engage with dedication in solitary and portable mindfulness, we begin to reframe our experience. Never-ending work becomes manageable and even joyful. The present, with its overwhelm, perfectionism, reactivity and conflict, is more bearable. We become more resilient and graceful. We realise the present moment is a much happier, more productive place than the past or the future. Eventually we discover that the present moment

contains very little stress at all, a great deal of wisdom, a comforting measure of compassion and a solid foundation of equanimity.

### **Implementing mindfulness at the firm**

Implementing a mindfulness programme at a law firm or legal organisation is not difficult, but it does require commitment. Here are a few suggested guidelines:

**Training.** Mindfulness training can be in person, live online, or on demand. Ideally, training should be available to all attorneys and legal professionals at the firm.

**Trainers.** Outside trainers should understand mindfulness and the legal mind. Alternatively, the firm may want to invest in someone in-house to undertake a teacher training course in mindfulness-in-law.

**Incentives.** The more incentives for lawyers to undertake mindfulness training, the better. One incentive is for the firm to provide continuing legal education credit for mindfulness training. An even greater incentive is for the firm to count mindfulness training, and possibly also regular solitary practice, towards billable hours requirements.

**Essential practices.** Training should initially include three solitary mindfulness practices: focused awareness, choiceless awareness and lovingkindness.

*Focused awareness* is described above. It is the practice of placing the attention on an object like the breath, and returning the attention to that object whenever the attention strays, for short and then increasing periods of time.

*Choiceless awareness* begins with focusing on the breath. Once focused, the practitioner releases the breath, and pays attention to whatever is arising, including thoughts, emotions, sensations, smells, tastes, sounds and sights (even if the eyes are closed). From here, the practitioner simply notes, then lets go,

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*Because stress and anxiety most often arise in relationship to thoughts about the past or future, training in intentional, present, nonjudgmental awareness, or mindful awareness, is the first step in reducing stress and anxiety, and increasing focus, concentration, wisdom and compassion.*

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of each object of awareness as it arises and passes away, learning to observe the changing nature of experience and gaining a sense of relief by realising that the difficulties of practising law are also always changing and impermanent.

**Lovingkindness** develops the quality of non-discriminating care and compassion for self and others, without limiting the practitioner's ability to powerfully advocate for their client or justice. In this training, practitioners classically wish themselves and others happiness, good health, peace and freedom from suffering. Given the adversarial nature of the profession, this practice of 'warming the heart' is especially powerful and important for lawyers.

**Designating space.** Ideally, the firm should designate a small room for meditation. The room need not have any special props, but should be quiet and not have a glass wall or door.

**Creating community.** Sitting together gives practitioners a place to discuss insights and concerns, whether the group is in person or online. The group can be drop in, and can be self-led or led by a trained mindfulness leader. Once a group is established, if the group is self-led the firm may find it worthwhile to periodically invite seasoned mindfulness-in-law teachers as guest leaders, to answer questions and support the firm's commitment to mindfulness.

**Supporting individual practice.** Perhaps most important of all, the firm should offer encouragement for a daily practice. Daily solitary practice can be as

brief as .1, or six minutes. Apps like Headspace<sup>49</sup> and Insight Timer,<sup>50</sup> although not specifically geared to the legal mind, offer lessons, guided meditations and timers. Again, the firm may want to consider the ultimate support: counting practice towards billable hours.

### Other wellness tools

The Lawyer Wellbeing Report includes numerous general and specific suggestions to address wellbeing, including, to name just a few, acknowledging the problems and taking responsibility; facilitating, de-stigmatising, and encouraging help-seeking behaviours; building relationships with lawyer wellbeing experts; and providing high-quality educational programmes about lawyer distress and wellbeing.<sup>51</sup> These and the many other suggestions in the Report, if implemented, can become cornerstones of wellbeing and profitability for the firm.

Mindfulness is also a cornerstone, but of a different sort. The legal profession is beginning to value attorney wellbeing, in part because of the Lawyer Well-Being Report. But if history is any indication, change will come slowly. Meanwhile, firms must find ways to support the wellbeing of their lawyers right now. Mindfulness offers that support. It offers a clear, direct way of seeing and being with the difficulties of the law as they exist today. It provides concrete instruction in how to relate to those difficulties with greater wisdom, compassion and equanimity. And, while the profession considers how to incorporate wellbeing as a measure of law firm success, mindfulness provides current support, by increasing wellbeing, competence and the financial bottom line.

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- 3 The Mindfulness Initiative, [www.themindfulnessinitiative.org.uk/about/what-we-do](http://www.themindfulnessinitiative.org.uk/about/what-we-do). See also

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- 32 The CoLAP partners included the National Organization of Bar Counsel (NOBC); the Association of Professional Responsibility Lawyers (APRL); the ABA Standing Committee on Professionalism, Center for Professional Responsibility, Young Lawyers Division, and Law Practice Division Attorney Wellbeing Committee; the National Organization of Bar Counsel; the Association of Professional Responsibility Lawyers; the National Conference of Chief Justices; and the National Conference of Bar Examiners.
- 33 "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change" (see note 7 above).
- 34 *Id.*, p1.
- 35 *Id.*, p7.
- 36 *Id.*, p8.
- 37 *Id.*, pp8–9
- 38 *Id.*, p9.
- 39 *Id.*, p9.
- 40 *Id.*, pp50–7
- 41 *Id.* The full set of recommendations includes education about (1) work engagement versus burnout, (2) stress, (3) resilience and optimism, (4) mindfulness meditation, (5) rejuvenation periods to recover from stress, (6) physical activity, (7) leader development and training, (8) control and autonomy, (9) conflict management, (10) work-life conflict, (11) meaning and purpose, (12) substance use and mental health disorders, and (13) additional topics such as psychological capital, psychological hardiness, and others.
- 42 *Id.*, pp52–53, and cites therein.
- 43 Charity Scott, "Mindfulness in Law: A Path to Well-Being and Balance for Lawyers and Law Students", 60 Ariz. L. Rev. 635 (2018), p645.
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- 49 See [www.headspace.com/](http://www.headspace.com/).
- 50 See <https://insighttimer.com/>.
- 51 "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change" (see note 7 above), pp12–21.

'A mindful perspective on wellbeing in the law' by Judi Cohen is taken from the eight issue of the new *Modern Legal Practice*, published by Globe Law and Business, [www.globelawandbusiness.com/journals/modern-legal-practice](http://www.globelawandbusiness.com/journals/modern-legal-practice)