

AN INCONVENIENT TRUTH: THE NEED TO EDUCATE EMOTIONALLY COMPETENT LAWYERS*

ROBIN WELLFORD SLOCUM**
CHAPMAN UNIVERSITY, ESTADOS UNIDOS
slocum@chapman.edu

ABSTRACT: The dominant presumption within legal education, that we can teach students to “think like lawyers” with a nearly singular focus on training the analytical mind, is a fiction based on a 19th Century understanding of the human brain that is inherently flawed. Modern neuroscience reveals that the ideal of a dispassionate analytical mind untainted by emotions and personal biases is a fallacy. Nonetheless, this fallacy has spawned an equally faulty premise that still dominates legal education today - that we can train students to be effective lawyers by virtually ignoring students’ emotions and by marginalizing the development of the emotional competencies. These presumptions impose a significant cost on our students and on the legal profession. By marginalizing the importance of emotional competence, we ill-prepare our students to work effectively with the complex interpersonal legal problems they will encounter in the practice of law. As troubling, by dismissing emotions as irrelevant to legal thinking, we ignore that which has true meaning to students – their emotional compass and values. By doing so, we systematically strip students of what is actually meaningful to them as people and ill-prepare them to develop a professional identity that can guide them in their professional careers.

This article describes four basic domains of emotional competency that are demanded by the practice of law and reflects on some of the costs we incur by continuing to marginalize emotional competency training in the law school curriculum. The article concludes by offering suggestions for incorporating emotional competency training into the law school curriculum. These ideas range from relatively minor shifts in emphasis in doctrinal and lawyering skills classes to the addition of courses focused exclusively on developing the emotional competencies that are required skill-sets in modern legal practice.

Keywords: Law schools, legal education, emotional competencies, modern legal practice.

* This article was first published in WELLFORD SLOCUM, Robin. *An Inconvenient Truth: The Need to Educate Emotionally Competent Lawyers* (July 19, 2011). Chapman University Law Research Paper No. 11-31. Available at SSRN: <http://ssrn.com/abstract=1889756> or <http://dx.doi.org/10.2139/ssrn.1889756>

** Associate Professor of Law at Chapman University School of Law.

UNA VERDAD INCONVENIENTE: LA NECESIDAD DE EDUCAR ABOGADOS EMOCIONALMENTE COMPETENTES

RESUMEN: La presuposición dominante dentro de la enseñanza del Derecho, que podemos enseñar a estudiantes a “pensar como abogados” con un enfoque casi singular en el entrenamiento de la mentalidad analítica, es una ficción basada en un entendimiento del siglo XIX del cerebro humano que es inherentemente defectuoso. La neurociencia moderna revela que el ideal de una mente analítica desapasionada no contaminada por las emociones y prejuicios personales es una falacia. Sin embargo, esta falacia ha dado lugar a una premisa igualmente defectuosa que todavía domina la educación legal de hoy - que podemos formar a los estudiantes para ser abogados eficaces mediante virtualmente prescindiendo de las emociones de los estudiantes y mediante la marginación del desarrollo de las competencias emocionales.

Estas presunciones imponen un significativo costo en nuestros estudiantes y en la profesión jurídica. Por marginar la importancia de la competencia emocional, mal-preparamos a nuestros alumnos para trabajar eficazmente con los complejos problemas jurídicos interpersonales que se encontrarán en el ejercicio de la abogacía. Tan preocupante que, al desestimar las emociones como algo irrelevante para el pensamiento jurídico, ignoramos aquello que tiene verdadero sentido para los estudiantes - su ámbito emocional y valores. Al hacerlo, despojamos de manera sistemática a los estudiantes de aquello que es realmente significativo para ellos como personas, y los mal-preparamos para desarrollar una identidad profesional que puede guiarlos en sus carreras profesionales.

Este artículo describe cuatro ámbitos básicos de competencia emocional que son demandadas por la práctica del Derecho y reflexiona sobre algunos de los costos en que incurrimos al continuar marginando la formación en competencias emocionales de las mallas curriculares de las escuelas de Derecho. El artículo concluye ofreciendo sugerencias para incorporar la formación en competencias emocionales en el currículo de una escuela de Derecho. Estas ideas van desde cambios relativamente menores en el énfasis en las clases de doctrina y de habilidades jurídicas hasta la incorporación de cursos enfocados exclusivamente en el desarrollo de las competencias emocionales que requieren conjuntos de habilidades en la práctica jurídica moderna.

Palabras clave: *Escuelas de Derecho, formación jurídica, competencias emocionales, práctica jurídica moderna.*

1. INTRODUCTION

Imagine a world in which lawyers were respected as true “counselors” at law, professionals of the highest ethical stature who, with impeccable judgment, helped their clients achieve their loftiest goals and aspirations. Imagine a world in which lawyers woke up each morning eager to begin their workday, knowing they would be using their finely honed legal skills to help the people who came to them for guidance. Imagine a world in which the eager first-year law students who enter law school during orientation week were even more engaged and enthusiastic about the practice of law by the time they graduate.

Why is this vision so far removed from present reality? Why are lawyers, as a group, among the unhappiest professionals in this country?¹ Why are lawyers vilified by the public² and routinely the butt of lawyer jokes in the media and at cocktail parties? Why are lawyers so often ineffective in their efforts to dissuade their clients from conduct that is self-defeating and even unethical?³ Why are our courtrooms too often little more than legalized battlefields, with lawyers assuming the role of hired guns doing their clients' bidding? Why do so many eager and excited first-year law students become jaded and apathetic by the time they graduate from law school?

Although there are likely a myriad of reasons for this disconnect, our current system of legal education assumes a significant role in creating the dichotomy between this vision and the present-day reality. As educators we are still largely reliant on the Langdellian model of teaching,⁴ a model premised on the idea that law is a science, the study of which should be separate and distinct from the influence of emotions. Although few would currently claim that law is a science, Langdell's influence is pervasive even today. Over 140 years later, there still exists a prevailing notion that we can teach students to be effective lawyers by training them to "think like lawyers," and that we can do so with a nearly singular focus on training the analytical mind, with a nod to clinical and skills courses to round out their education.⁵

There is of course good reason to value the teaching of analytical skills. This country is founded on the rule of law and legal precedent, and interpretation of the law requires the development of skills in legal analysis and logic. Moreover, there is some merit to the disdain for emotions. The "neural static" from emotions can sabotage our ability to reason clearly and creatively, and to achieve the perspective necessary to grasp the "bigger picture."⁶ Given this unwelcome by-

¹ See, e.g., KEEVA, Steven. *Transforming practices: finding joy and satisfaction in the legal life*. Contemporary Books, 1999, p. 5 (reporting that, while alcoholism and substance abuse in the general population is about 10%, it is estimated that about 15 to 18% of the nation's lawyers abuse alcohol and drugs); RHODE, Deborah. *In the interests of justice: reforming the legal profession*. 2000, p. 25 (noting that lawyers "are four times more likely to be depressed than the public at large, and they have the highest depression rate of any occupational group"); DAICOFF, Susan. "Law as a Healing Profession: The 'Comprehensive Law Movement'", in: *Pepp. Disp. Resol. L.J.*, n° 6, 2006, p. 55 (hereinafter Daicoff, *Law as a Healing Profession*) (noting that "[l]awyers experience alcoholism, depression, and other forms of psychological distress and dissatisfaction at a rate of about twenty percent, about twice the amount found in the general population") (citing DAICOFF, Susan. *Lawyer, Know Thyself: A psychological analysis of personality strengths and weakness*. 2004, p. 8).

² See, e.g., ALLEGRETTI, Joseph. "Have Briefcase Will Travel: An Essay on the Lawyer as Hired Gun", in: *Creighton L. Rev.*, n° 24, 1990, pp. 749-750.

³ See generally WELLFORD SLOCUM, Robin. "The Dilemma of the Vengeful Client: A Prescriptive Framework for Cooling the Flames of Anger", in: *Marq. L. Rev.*, n° 92, 2009 pp. 481, 499-501 (contending that lawyers' relative lack of success stems in part from their inability to understand and then respond effectively to their clients' emotionally-infused "logic").

⁴ Christopher C. Langdell, Dean of Harvard University Law School in 1870, has been credited with the advent of our American legal education system.

⁵ See, e.g., the Carnegie Report, in which the authors contend that legal education inadequately prepares students for legal practice by relying "upon a single, heavily academic pedagogy, the case-dialogue method," which emphasizes abstract analytical reasoning. The Carnegie Foundation for the Advancement of Teaching: SULLIVAN, William, et al. *Educating lawyers: Preparation for the profession of law*. Observation 3, 2007 (hereinafter "Carnegie Report").

⁶ CAINE, Renate & CAINE, Geoffrey. *Making connections: Teaching and the Human Brain*. 1994, pp 69-70; GOLEMAN, Daniel. *Emotional Intelligence: Why it can matter more than IQ*. 2006, p. 295 (hereinafter GOLEMAN, *Emotional Intelligence*). See also GINO, Francesca & SCHWEITZER, Maurice. "Blinded by Anger or Feeling the Love: How Emotions Influence Advice Taking", in: *J. of Applied Psych.*, n° 93, 2008 pp. 1165, 1170 (describing a study in which incidental emotions unrelated to the advice being

product of emotions, it is perhaps not surprising that the legal academy has turned its collective back on emotions and relegated them to a peripheral role in legal education. The goal has been to train lawyers to reason analytically without the cumbersome weight of emotions to obscure clarity.

Although the goal might be laudable, it is based on a 19th Century understanding of the human brain that is inherently flawed. The ideal of a dispassionate analytical mind untainted by emotions and personal biases is a fiction.⁷ As modern research in neuroscience makes abundantly clear, the limbic region of the brain (the “emotional” brain) is so intertwined with the cerebral cortex (the “thinking” brain) that we literally cannot “think” without its influence.⁸ The emotional brain is an integral partner with the thinking brain in the way that we process and assess information, for it is the emotional brain that assesses the value and meaning of the information we appraise and that determines its significance.⁹ As one neuroscientist notes: “Generated by the value systems of the brain, these emotional activations pervade all mental functions.... *Creating artificial or didactic boundaries between thought and emotion obscures the experiential and neurobiological reality of their inseparable nature.*”¹⁰ In other words, emotions are essential to our ability to reason and problem-solve; we simply cannot exercise judgment and discernment without the input of the emotional brain.¹¹

Unfortunately, the flawed 19th Century understanding of the human brain upon which legal education was built has spawned an equally faulty premise that still exists today - that we can train law students to be effective lawyers by virtually ignoring students’ emotions and the development of the emotional competencies.¹² This artificial separation of emotions from “thinking” imposes a tremendous cost on our students and on the legal profession. By marginalizing and minimizing the importance of skills in emotional competency, we ill-prepare our students to work effectively with

proffered were shown to “significantly” influence the participants’ trust in their advisor, as well as their willingness to take the advisor’s advice).

⁷ This fictionalized ideal surfaced in concerns raised by some members of the Senate Judicial Committee that Justice Sotomayor would be ill-suited to be a Supreme Court Justice because she inferred in several speeches that she would apply the law through the lens of her own background and experiences. Yet logic and reasoning are inextricably bound up with the emotional brain, and “reality” is inevitably perceived through the lens of one’s personal experiences and biases. See SIEGEL, Daniel. *The Developing Mind: Toward a Neurobiology of Interpersonal Experience*. 1999, pp. 158-159.

⁸ COZOLINO, Louis. *The Neuroscience of Psychotherapy: Building and rebuilding the Human Brain*. 2002, pp. 8-9, 16-21; SIEGEL, *supra* note 7, at 159.

⁹ SIEGEL, *supra* note 7, at 159.

¹⁰ *Id.* (emphasis in original).

¹¹ BECHARA, Antoine, *et al.* “Poor Judgment in Spite of High Intellect: Neurological Evidence for Emotional Intelligence”, in: *Handbook of Emotional Intelligence*, R. Bar-On and J.D.A. Parker, eds., 2000, pp. 192, 193. The importance of the limbic system to our reasoning capacity has been documented in studies of people who have sustained damage to the circuit that links the prefrontal neo-cortex with amygdala in the limbic region of the brain. Patients who sustain damage to this circuit exhibit “terribly flawed” decision-making abilities, even though they maintain their previous I.Q. level and cognitive abilities. Without this critical link between the emotional and thinking centers of the brain, the patients lose access to the emotional memories stored in the amygdala. *Id.*, citing DAMASIO, Antonio. *Descartes’ Error: Emotion, Reason and the Human Brain*. 1994. Without access to emotional memory, “everything takes on a gray neutrality,” making it virtually impossible to engage in decision-making. GOLEMAN, *Emotional Intelligence*, *supra* note 6, at 28.

¹² See *infra*, Emotional Competency Skills Required in the Practice of Law for a definition and discussion of “emotional competency.”

the complex interpersonal legal problems they will encounter in the practice of law.¹³

Moreover, by dismissing emotions as irrelevant to legal thinking, we not only strive to accomplish what is a neurological impossibility, but we unwittingly ignore that which has true meaning to students – their emotional compass and values. As neuroscientists make clear, it is our value-laden emotional activations that “*literally create meaning in life.*”¹⁴ The implications of this statement are sobering. Legal education is still largely reliant on a system of teaching that systematically strips students of what is actually meaningful to them as people (and to their future clients). As troubling, this disdain for emotions hinders our ability to help students develop a professional identity.¹⁵ Because it is emotions that give meaning to abstract thoughts, emotions can serve as a meaningful moral rudder to inform students of what they value and find important and signal to them when they have lost their way.¹⁶

This article first describes four basic domains of emotional competency skills that are demanded by the practice of law, and then reflects on some of the costs we incur by continuing to marginalize emotional competency training in the law school curriculum. The article concludes by sharing some thoughts and suggestions for incorporating emotional competency training into the law school curriculum. These ideas range from relatively minor shifts in emphasis in doctrinal and lawyering skills classes to the addition of courses focused exclusively on developing the emotional competencies that are required skill-sets in modern legal practice.

2. EMOTIONAL COMPETENCY SKILLS REQUIRED IN THE PRACTICE OF LAW

Our students are preparing to enter a profession that will demand emotional competence, and, if they want to excel in the profession, superior emotional competence.¹⁷ Emotional

¹³ See, e.g., the Carnegie Report, in which the authors describe “two major limitations” of legal education. First, they contend that “[m]ost law schools give only casual attention to teaching students how to use legal thinking in the complexity of actual law practice,” creating an unbalanced emphasis that “can create problems as the students move into practice.” Second, they contend that, unlike other professional schools, “[l]aw schools fail to complement the focus on skill in legal analyses with effective support for developing ethical and social skills.” Carnegie Report *supra* note 5, Observation 3. See also SILVER, Marjorie. *The affective Assistance of Counsel: Practicing Law as a Healing Profession*. 2007, pp. 5-6. Silver notes: “Whether or not we admit it, whether we are aware of them or not, whether or not we like it, emotions are always influencing our cognitive functioning and moral judgments. Yet, as Susan Bandes has noted, ‘There may be no other profession whose practitioners are required to deal with so much pain with so little support and guidance.’”, quoting BANDES, Susan. “Repression and Denial in Criminal Lawyering”, in: *Buff. Crim. L. Rev.*, n° 9, 2006, pp. 339, 342.

¹⁴ SIEGEL, *supra* note 7, at 159 (emphasis added).

¹⁵ See, e.g., Carnegie Report *supra* note 5, at 31. The authors contend that students and faculty alike must have a sense of the social context in which professionalism issues arise in order to grasp “the core commitments that define the profession.... Ethics rightly includes not just understanding and practicing a chosen identity and behavior but, very importantly, a grasp of the social contexts and cultural expectations that shape practice and careers in the law.”

¹⁶ See SIEGEL, *supra* note 7, at 159.

¹⁷ Emotional competence has variously been defined as “a learned capability based on emotional intelligence that results in outstanding performance at work;” GOLEMAN, Daniel. “An EI-Based Theory of Performance”, in: *The Emotionally Intelligent Workplace*, Cary Cherniss & Daniel Goleman, eds., 2001, pp. 27, 28 (hereinafter GOLEMAN, *An EI-Based Theory*), and as those “competencies that constitute selfawareness, self-management, social awareness, and social skills at appropriate times and in sufficient frequency to be effective in the situation.” BOYATZIS, Richard, *et al.* “Clustering Competence in Emotional Intelligence: Insights from the Emotional Competence Inventory (ECI)”, in: *Handbook of Emotional Intelligence*, R. Bar-On and J.D.A.

competency is integral to the exercise of good judgment and to the ability to communicate, persuade, and influence others.¹⁸ Most of our students will spend a significant percentage of their time working with people – from cultivating new clients, to advising and counseling clients, to negotiating deals with other lawyers, to persuading judges and juries about the merits of their clients' cases, to working with their colleagues and managing partners, to working with teams of other professionals to solve complex problems. These communications are not casual and breezy in nature. They invariably involve difficult and challenging issues that require sophisticated and deft maneuvering; and they often involve conflict – a veritable landmine of hidden hazards in which missteps and miscues can be counter-productive to a client's interests.

Over the past thirty or more years, numerous studies have evaluated employee performance across a broad spectrum of industries and disciplines¹⁹ and have documented the importance of emotional competency to effective performance in the workplace.²⁰ From this research, certain propositions have achieved a strong consensus. The studies suggest that, while important, IQ and academic success are not alone good predictors of success in the workplace.²¹ Instead, professional success depends upon a combination of IQ, expertise, and emotional competence.²² One study of 181 competency models from 121 organizations worldwide concluded that emotional competency skills account for 67% of the abilities deemed “essential for effective performance,”²³ with numerous studies suggesting that the importance of emotional competence increases with the complexity of the job requirements.²⁴ Of particular importance to educators, the studies provide strong evidence that emotional competency skills can be taught and learned.²⁵ Indeed,

Parker, eds., 2000, pp. 343, 345 (hereinafter BOYATZIS, *et al.*, *Clustering Competencies*).

¹⁸ See BECHARA, *et al.*, *supra* note 11, at 193; BAR-ON, Reuven, *et al.* “Expanding the Neurological Substrate of Emotional and Social Intelligence”, in: *Brain, A Journal of Neurology*, n° 126, 2003, pp. 1790, 1799. See also SILVER, *supra* note 13, at 10, n. 22 (citing the work of numerous legal scholars who argue that emotional competency is important to effective lawyering).

¹⁹ GOLEMAN, Daniel. *Working with Emotional Intelligence*. Bantam, 2006, pp. 30-38 (hereinafter GOLEMAN, *Working with EI*). Goleman describes the range and scope of the typical studies. He notes that typical studies correlate competencies to performance in the workplace, with a pool of top performers in the field typically being selected on the basis of “hard” criteria, such as sales and other objective indicia of performance, or on the basis of confidential 360-degree ratings, where supervisors, peers, and customers or clients are interviewed and rate the job performances of the employees being evaluated. In some studies, panels of experts were asked to describe the competencies they found typified top performers in their industries, a less precise method than the other tests. See also KELLY, Robert & CAPLAN, Janet. “How Bell Labs Creates Star Performers”, in: *Harv. Bus. Rev.* n° 71, July-Aug. 1993, pp. 128, 130 (describing a multi-year study of engineers at Bell Labs).

²⁰ GOLEMAN, *An EI-Based Theory*, *supra* note 17 at 30. See also BAR-ON, Reuven *et al.*, *supra* note 18, at 1799. The authors concluded that the ability to make “emotionally and socially intelligent decisions” is essential in order to “perform well and be successful in one’s professional and personal life.” *Id.*

²¹ KELLY & CAPLAN, *supra* note 19, at 130; DULEWICA, Victor & HIGGS, Malcolm. “Emotional Intelligence – A Review and Evaluation Study”, in: *J. of Managerial Psych.* n° 15, 2000, pp. 341, 347.

²² KELLY & CAPLAN, *supra* note 19, at 130; DULEWICA & HIGGS, *supra* note 21, at 345-346.

²³ See GOLEMAN, *Working with EI*, *supra* note 19, at 31. These findings were confirmed by another company who was commissioned to conduct an independent study of the results. *Id.* at Appendix 2.

²⁴ See HUNTER, John, SCHMIDT, Frank and JUDIESCH, Michael. Individual Differences in Output Variability as a Function of Job Complexity”, in: *J. of Applied Psych.*, n° 75, vol. 1, 1990, pp. 28, 38. GOLEMAN, *Working with EI*, *supra* note 19, at 33.

²⁵ BOYATZIS, *et al.*, *Clustering Competencies*, *supra* note 17, at 156-57; DULEWICA & HIGGS, *supra* note 21, at 350. See also KELLY & CAPLAN, *supra* note 19, at 130. In the Bell study, the performance ratings of engineers who participated in the emotional competency training program improved at twice the rate of engineers who did not participate in the training over an eight-month period following the completion of the training. The results were even stronger for women and minority engineers. *Id.* at 137.

the importance of emotional competence is a reality that some of the best business schools in the country now recognize, where courses designed to develop the emotional competencies are becoming standard fare.²⁶

The inconvenient truth is that effective lawyering requires emotional competence, because it is the emotional competencies that help form such essential lawyering skills as good judgment, sound perspective, and effective relational skills.²⁷ These important qualities of lawyering demand at least a certain level of emotional competency across four basic domains:²⁸ 1) Self-Awareness (including emotional awareness); 2) Self- Management (including control of one's emotions); 3) Social Awareness (including empathy); and 4) Relationship Management (including the ability to persuade and influence others, and to manage conflict effectively).²⁹

2.1. *Self-Awareness*

Lawyers must have some degree of emotional Self-Awareness in order to recognize and appreciate the emotions and unmet needs that underlie their clients' (and other lawyers') value-laden reactions and goals. Without that understanding, they cannot effectively convey empathy to others or have the vision to problem-solve in ways that effectively address the underlying humanistic and emotional needs and concerns of their clients. Self-awareness is also an essential foundation from which students can begin to exercise emotional self-management, and to

²⁶ See ROSENBERG, Joshua. "Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance, of Human Relationships in the Practice of Law", in: *U. Miami L. Rev.*, n° 58, 2004, pp. 1225, 1277 (citing Stanford and Wharton as examples of two such schools). The Weatherhead School of Management (WSOM) at Case Western Reserve University has also been recognized as a leader in training their students to develop these competencies. See BOYATZIS, Richard, *et al.* "Learning Cognitive & Emotional Intelligence Competencies Through Graduate Management Education", in: *Acad. of Manage. Learning & Educ.*, n°1, 2002, pp. 150 (hereinafter BOYATZIS, *et al.*, *Graduate Management Education*) (describing a multi-year study conducted at the WSOM of its MBA program).

²⁷ See, e.g., STUCKEY, Roy, *et al.* *Best practices for Legal Education: a Vision and Road Map*. Clin. Legal Educ. Assn., 2007, pp. 52-60 (citing these skills as important characteristics of professional lawyers). "Practical and prudential wisdom" have also been described by the Professionalism Committee of the ABA Section of Legal Education and Admission to the Bar as "essential characteristics of the professional lawyer." *Id.* at 52. See also SHULTZ, Marjorie & ZEDECK, Sheldon. *LSAC Final Report: Identification, Development, and Validation of Predictors for Successful Lawyering*. 2008, pp. 23-24, available on-line: www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf; BAR-ON, Reuven *et al.*, *supra* note 18, at 1799 (concluding that emotional intelligence is "significantly related" to good judgment and "highly connected" with performance); BOYATZIS, *et al.*, *Clustering Competencies*, *supra* note 17, at 360.

²⁸ BOYATZIS, *et al.*, *Clustering Competencies*, *supra* note 17, at 360. This book chapter discusses the research and empirical studies that formed the basis for the four basic domains of emotional competency, and the "clusters" of competencies (behavioral groupings) within each of the four domains. See also GOLEMAN, *An EI-Based Theory*, *supra* note 17, at 30 (positing that each of the four domains derives from different neurological substrates); JOHNSON, Marvin, *et al.*, "Emotionally Intelligent Mediation: Four Key Competencies", in: *Bringing Peace into the Room: How the Personal Qualities of the Mediator impact the process of Conflict Resolution*, David Bowling & David A. Hoffman, eds., 2003, pp. 151, 155 (contending that effective mediation requires a "high degree of emotional intelligence").

²⁹ GOLEMAN, *An EI-Based Theory*, *supra* note 17, at 28 (citing a number of studies reflecting that professional success requires competency in at least three of the four domains, while superior performers exhibit a "spread of strengths" across the four domains). See also BOYATZIS, *et al.*, *Clustering Competencies*, *supra* note 17, at 356 (describing a study finding that the partners who contributed "significantly more profit" to their consulting firm than other partners demonstrated a "significant number" of competencies above a "tipping point"); MCCLELLAND, David. "Identifying Competencies with Behavioral- Event Interviews", in: *Psych. Science*, n° 9, 1998, pp. 331, 338.

understand their own role in contributing to conflict.³⁰

Even to be effective legal *thinkers*, lawyers must have some rudimentary understanding of the emotional brain and how emotions, biases and selective memory skew their perception of “reality” and undermine the clarity of their thinking. The emotional brain is crude and sloppy in the way that it processes information, and is often inaccurate.³¹ Unchallenged and unexamined, the emotional brain quickly leaps to premature conclusions based on largely unconscious biases and historical associations.³²

Equally as dangerous, the emotional brain is also self-confirming.³³ Because only a fraction of what we see or experience actually presents itself to our conscious awareness, the brain is selective, uploading only the data that it deems appropriate for presentation.³⁴ Hidden layers of neural processing in the brain selectively interpret the world by highlighting those aspects of “reality” that reinforce our beliefs, and minimizing or even “completely blocking” from the conscious mind those aspects of “reality” that do not conform to our beliefs.³⁵ Thus, premature conclusions and biases become reinforced and unquestioned over time as the emotional brain strives to prove that it is “right.”³⁶ In a very real sense, the unexamined emotional brain can subvert the thinking brain, offering tainted justifications and biased rationalizations to appease the thinking brain’s need for logic.³⁷ Without a basic understanding of the emotional brain and how it can undermine logic and skew perspective, lawyers cannot effectively recognize and challenge the flaws in their own perceptions and premature conclusions.³⁸

³⁰ GOLEMAN, *An EI-Based Theory*, *supra* note 17, at 31. See also MISCHEL, Walter, *et al.* “Self-Regulation in the Service of Conflict Resolution”, in: *The Handbook of Conflict Resolution*, Morton Deutsch, *et al.*, eds., 2d ed., 2006, pp. 294, 307 (contending that “[o]ne way to facilitate more constructive conflict resolution is to become more self-aware”); MARVIN E. JOHNSON, *et al.*, *supra* note 28, at 156. In contending that mediators must possess a high degree of emotional intelligence, the authors argue that “until one becomes sufficiently aware of one’s own emotions to feel and diagnose them accurately, one remains emotionally incompetent.” The authors note: “Until we develop emotional self-awareness, we will project our own unrecognized emotions onto others. Such projections are a fundamental source of most conflict.” *Id.* at 156.

³¹ GOLEMAN, *Emotional Intelligence*, *supra* note 6, at 294-95. Goleman notes that, “while the rational mind makes logical connections between causes and effects, the emotional mind is indiscriminate, connecting things that merely have similar striking features.” (citing EPSTEIN, Seymour & BRODSKY, Archie. *You’re smarter than you think*. 1993, p. 55.

³² GOLEMAN, *Emotional Intelligence*, *supra* note 6, at 294-95.

³³ See ROSS, Lee, *et al.* “Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm”, in: *J. Person. & Soc. Psych.*, n° 32, 1975, pp. 880, 889 (contending that “the relevance, reliability, and validity of dubiously relevant, reliable, or valid information is resolved as a function of its consistency with the attributor’s initial impression”). See also LORD, Charles, *et al.* “Considering the Opposite: A Corrective Strategy for Social Judgment”, in: *J. of Person. & Soc. Psych.*, n° 47, 1984, pp. 1231, 1232; REDDING, Richard E. & REPPUCCI, Dickon. “Effects of Lawyers’ Socio-political Attitudes on Their Judgments of Social Science in Legal Decision Making”, in: *Law & Human Behavior*, n° 23, 1999, p. 31.

³⁴ COZOLINO, *supra* note 8, at 161.

³⁵ *Id.* See also ROSS, *et al.*, *supra* note 33, at 889. The authors contend that people minimize or are “inattentive to” the possibility that evidence superficially consistent with their initial premise may itself be unreliable or invalid, and instead conclude that the new “evidence” provides “a large measure of independent support” for their premise. The authors conclude that even a random sample of potentially relevant data, once selectively “processed” in the manner described, may strengthen an initial impression rather than challenge its validity.

³⁶ SIEGEL, *supra* note 7, at 10.

³⁷ GOLEMAN, *Emotional Intelligence*, *supra* note 6, at 295.

³⁸ See, e.g., ROSS, *et al.*, *supra* note 33, at 880.

2.2. *Self-Management*

Effective lawyers also have to possess a certain degree of emotional self-management, even in the midst of emotionally-charged exchanges when it is most challenging to stay calm and clear-headed.³⁹ Numerous studies suggest that, when gripped by anger or fear, biochemical changes in the brain disrupt the brain's ability to think clearly or creatively.⁴⁰ Instead, amygdalae located in the limbic region of the brain (emotional brain) activate pre-programmed survival responses, resulting in a narrowing of one's perceptual field.⁴¹ In this state of "downshift," a lawyer would have limited ability to be a creative problem-solver or to engage in sophisticated analytical reasoning, would be prone to stereotyped thinking and behavior, and would have a reduced ability to retain perspective.⁴² This reduced ability to think clearly has been characterized as "view[ing] situations through a narrow-angle lens."⁴³

Effective self-management also includes the discipline to act consistently with one's core values, despite pressures to behave unethically. Modern legal practice is characterized by an excessive focus on the economic outcomes of legal matters, to the exclusion of psychological and emotional costs. This has contributed to an environment of brutal competition and unethical behavior – an environment where "[e]veryone is a potential adversary" and "[t]rust is a mirage on the horizon."⁴⁴ Lawyers face pressure by clients to conceal unfavorable evidence, to barrage other parties with frivolous discovery requests, and to "do whatever it takes" to "win." And, particularly in this economic climate where lawyers are confronted with the pressure to stay economically viable, they face such temptations as padding their legal bills and making promises to clients they cannot deliver. The discipline to resist such pressures requires a solid sense of "self," including an emotional as well as intellectual understanding of one's core values.

2.3. *Social Awareness*

Lawyers must have at least a basic understanding of why people behave the way they do in order to deal effectively with others - why others might *react* rather than respond in certain situations, why they might engage in behavior that is so clearly counterproductive, why they can be resistant to "rational" arguments, why they tend to see the world through a biased lens, or why they rush to premature judgments without questioning the veracity of those judgments.⁴⁵ Effective lawyers

³⁹ See SHULTZ & ZEDECK, *supra* note 27, at 21. This ability to stay calm in the midst of emotionally charged situations is of critical importance to mediators, who have an ethical responsibility to remain neutral. See MARVIN E. JOHNSON, *et al.*, *supra* note 28, at 158 (noting: "The mediator who is aware of his or her own emotional reactions and who is adept at emotional self-management is better able to take these situations in stride and maintain neutrality").

⁴⁰ See COZOLINO, *supra* note 8, at 160-61.

⁴¹ *Id.* See also SIEGEL, *supra* note 7, at 259.

⁴² See CAINE & CAINE, *supra* note 6, at 140.

⁴³ WELLFORD SLOCUM, *supra* note 3, at 490.

⁴⁴ *Id.* at 490 (citing KEEVA, Steven. *Transforming practices: finding joy and satisfaction in the legal life*. Contemporary Books, 1999, p. 10).

⁴⁵ See REUVEN BAR-ON, *et al.*, *supra* note 18, at 1799 (concluding that good judgment, and the "ability to make emotionally and socially intelligent decisions" requires emotional intelligence). See also SHULTZ & ZEDECK, *supra* note 27, at 22-3 (concluding that "situational judgment" is an important predictor of success as a lawyer). The LSAC report also concluded that awareness of

have the perspective to appreciate the complexity of a legal drama and to see the world beyond the client's black-and-white, good-and-bad, right-and-wrong world. They have the perspective to understand where another lawyer in a negotiation is coming from and to distinguish between a bluff and a legitimate demand, and they have the judgment to know what it will take to move settlement discussions forward and to get the case (or business deal) closed on favorable terms. Effective lawyers can accurately assess the emotional impact of their arguments and discussion points upon others, and adapt their strategies accordingly.

Effective lawyers have also developed their capacity for empathy, and can meet a client emotionally without becoming drawn into the story itself.⁴⁶ They have learned to be both dispassionate *and* compassionate with clients who have entrusted their welfare into the lawyer's hands. Effective lawyers have the skill to help clients identify not just the interests and needs that appear at the surface of the legal problem, but also, where appropriate, the clients' underlying emotional, psychological and even spiritual needs.⁴⁷ Each of these important characteristics of good judgment and discernment requires competency in the domain of Social Awareness.

2.4. Relationship Management

Building upon the emotional competencies from the domains of Self-Awareness, Self-Management, and Social Awareness, lawyers must also be able to manage relationships effectively. Central emotional competencies within the Relationship Management domain include the ability to communicate, advise, influence, and persuade others, and to manage conflict productively.⁴⁸ Effective lawyers have the skill to probe clients beyond their biased perception of "what happened" to discern the other party's version of what happened, and they have the wisdom and perspective to identify the more complex "third story" that embraces both versions of the "truth."⁴⁹ Effective lawyers have the ability to convey to clients the potential problems with their clients' proposed strategies, and sometimes to discuss openly the biases and perceptual distortions that might be damaging their clients' efforts to achieve their goals – and they have the

other people's feelings was "critical" to such lawyering skills as negotiation, managing others, and networking, *id.* at 56-57, and that a lack of concern or awareness for others' feelings resulted in lower effectiveness scores among surveyed attorneys. *Id.* at 75.

⁴⁶ This quality is also of importance to mediators. "Without agreeing with a party's story or appearing to take sides, an emotionally competent mediator can acknowledge the fundamental need to be heard." MARVIN E. JOHNSON, *et al.*, *supra* note 28, at 160. An emotionally competent mediator can also help facilitate a resolution of conflict by developing the parties' empathy through a technique called "role reversal." *Id.* at 160-61.

⁴⁷ The importance of the clients' underlying needs has spawned the therapeutic jurisprudence movement, which has cut a broad swath through the disciplines, including preventive law, restorative justice, transformative mediation, facilitative mediation, holistic law, and collaborative law. *See, e.g.*, DAICOFF, *Law as a Healing Profession*, *supra* note 1, at 1 (2006); WEXLER, STOLLE & WINICK. *Practicing Therapeutic Jurisprudence: Law as a Helping Profession*. 2000; WEXLER, David & WINICK, Bruce (eds.). *Law in a Therapeutic Key: Developments in Therapeutic Agent*. 1996; WEXLER, David (ed.). *Therapeutic Jurisprudence: The Law as a Therapeutic Agent*. 1990.

⁴⁸ *See, e.g.*, STUCKEY, *et al.*, *supra* note 27, at 60 (defining "professional competence" as being comprised of "a relational function – communicating effectively with clients, colleagues, and others; and an affective/moral function – the willingness, patience, and emotional awareness to use these skills judiciously and humanely").

⁴⁹ *See* STONE, Douglas, *et al. Difficult Conversations: how to discuss what matters most*. Penguin, 1999, pp. 149- 150. In resolving conflict, Stone argues that it is important to understand, and to begin to resolve the conflict from, the "third story." Stone describes the "third story" as "one a keen observer would tell, someone with no stake in [the] particular problem." *Id.*

skill to do so without jeopardizing the attorney-client relationship.⁵⁰

Managing conflict is another emotional competency skill that is part-and-parcel of the typical lawyer's daily life, yet perhaps no other competency requires greater skill or a greater understanding of human behavior. Effective lawyers know that blame, judgment, and assumptions about other people's motivations and intentions only contribute to misunderstanding and inflame conflict.⁵¹ They understand and appreciate the complex and often competing psychological and emotional needs that are inevitably implicated in conflict. From that place of understanding, they have the skill to ask the kinds of probing questions that can shed light on the underlying unmet needs that are driving emotional reactivity, and can redirect counter-productive arguments in more productive directions.

3. THE COSTS OF MARGINALIZING EMOTIONAL COMPETENCY SKILLS

3.1. *Ineffective Preparation for the Practice of Law*

Sound judgment, perspective, professionalism, and relational skills are essential qualities of effective lawyers – qualities that we strive to inculcate in our students.⁵² Unfortunately, a common lament among legal academics is that our efforts to help students develop these critical skills all too often fall woefully short. Although we strive to educate our students to appreciate the practical as well as the legal consequences of a particular decision or legal argument, all too many students simply don't seem to absorb these lessons. This lack of insight is reflected in student responses to hypothetical questions in doctrinal classes, in the advice they give to hypothetical clients in skills classes, and in the strategic decisions they make in negotiation and mediation classes. It is also reflected in their inability to appreciate the complex shades of gray in a legal dilemma or the force of another party's position and the valid counter-arguments that can be developed.

These shortcomings are in part a consequence of our system of legal education, where students are largely left to fend for themselves in developing the emotional competencies that are essential components of required lawyering skills.⁵³ Unfortunately, we cannot adequately remedy "thinking" and judgment problems by appealing solely to cognition, because the emotional brain is an integral part of the problem. Whether we want to acknowledge it or not, our students have emotional and value-laden responses to the readings in their casebooks and to the problems assigned to them in skills classes. Their emotional responses and value-laden biases often taint

⁵⁰ A discussion of these issues should be an essential part of any client interviewing and counseling course. See, e.g., WELLFORD SLOCUM, Robin. *Introduction to Legal Reasoning, Writing, and the other lawyering skills*, Chapter 5: The Lawyer as Investigator: The Client Interview. 3d ed., 2011, p. 79 (hereinafter WELLFORD SLOCUM, *Introduction to Legal Reasoning*) (describing these interpersonal issues for students and suggesting strategies for adeptly handling them).

⁵¹ See ROSENBERG, *supra* note 26, at 1242. Rosenberg notes that studies have indicated "that the single greatest weakness of most negotiators is that they too often fail to even consider the thinking and emotions of others. Perhaps even more significantly, when we do attempt to consider the thinking and feelings of others, we usually get it wrong."

⁵² See REUVEN BAR-ON, et al., *supra* note 18, at 1798-99 (contending that the exercise of judgment and decision-making is dependent upon the limbic system of the brain).

⁵³ See, e.g., SHULTZ & ZEDECK, *supra* note 27, at 89 (concluding that the present focus of legal education – predominated by "research" at the expense of "professional competence" training, results in graduates not being adequately prepared to practice law).

their legal analysis and judgment about what the law means and their assessment of possible legal strategies, and blinds them to the efficacy of counter-arguments that can be made. Without explicit guidance or class discussion designed to bring out their emotional responses, including the values and priorities that underlie their reactions, students are largely unaware that their emotions are affecting their judgment and perspective.⁵⁴ And, absent class discussions that would force students to examine and confront the validity of their emotional reactions and biases, they are emotionally unequipped to challenge the flaws in their own thinking.

Moreover, we cannot expect our students to fully grasp the “bigger picture” or to appreciate the practical significance of their legal strategies if they share their future clients’ limited understanding of human behavior and their narrow worldviews. Absent some understanding of the complex nature of human behavior and how the emotional brain drives decision-making, students cannot fully appreciate how their clients, judges, juries or opposing counsel are likely to respond to their legal arguments or strategies.

We similarly cannot expect our students to communicate effectively with their clients and other lawyers when they lack a basic understanding of their own emotions and of the emotional drives and needs that underlie all human communication. Without that understanding, they can’t appreciate the emotional import of the decisions facing their clients or effectively convey empathy, nor are they adept at assessing the emotional impact of their arguments and strategies on others. As lawyers, we can’t expect our students to be successful in dissuading clients from imprudent and even unethical conduct when they lack an understanding of the emotional needs that are driving their clients’ unwise demands, and lack the skill-set to respond with an emotionally appropriate response.

Finally, without coursework designed to help them learn skills to deal with negative emotions effectively, our students are handicapped in their ability to manage conflict. Many students graduate from law school with almost no skill-set that would help them maintain (or regain) their emotional equilibrium when they become emotionally reactive, or defuse emotionally-charged situations with clients or other lawyers. They “know enough to be dangerous” but don’t know how to relate effectively with others, particularly in emotionally charged situations when emotional competence is most needed.

3.2. *Student Apathy & Loss of Moral Compass*

Our present system of legal education fosters the illusion that the job of being a lawyer is a sterile, intellectual undertaking that is somehow disconnected from our students’ own humanity and from the humanity of their future clients and colleagues. To the extent that students matriculate with an expectation and desire to enter a profession that involves helping people, this

⁵⁴ In the Carnegie Report, the authors contend that when legal educators dismiss as irrelevant the students’ “moral concerns or compassion for the people in the cases they discuss” without also addressing them, “students have no way of learning when and how their moral concerns may be relevant to their work as lawyers and when these concerns could throw them off track.” They conclude that students not only find this perceived irrelevance as “confusing and disillusioning”, but that the practice of introducing moral concerns “only haphazardly conveys a cynical impression of the law that is rarely intended.” Carnegie Report, *supra* note 5, Observation 3.

dream is quickly quashed. In the first year of law school students learn to view the world through a uni-dimensional lens of what is “legally significant.”⁵⁵ It is not the *people* in the legal dramas who matter; what matters are the case facts, holdings and rationale that are legally significant to their evaluation of the law.⁵⁶ Students quickly learn that their own emotional and value-laden reactions to the legal cases they study are largely irrelevant.

It should not be surprising then that many law students feel so disconnected from the study of law – they do not feel at any deep level that the law actually has meaning for *them*, as people. We suck the marrow out of the “aliveness” of being a lawyer. And we thereby promote a mindset that the law is simply a means to earn a living – a livelihood that is disconnected from the students’ own values and morality.⁵⁷ And with little focus on enhancing students’ self-awareness, including their awareness of how their emotions affect their thinking, behavior, and impact on others, the disconnect between the students’ inner lives and professional lives makes it all too easy for students to lose their moral compass when they ultimately enter the practice of law.⁵⁸

Finally, to the extent we promote the impression that our students’ emotional lives are relatively unimportant, we send an implicit message that emotional competence is either not that important to the practice of law, or that it is a skill-set that students already possess or should intuitively know how to develop. Yet neither proposition is realistic. This message merely sets students up for unrealistic expectations about their ability to work effectively with their future clients, and for apathy, discontent and even depression down the road when they ultimately realize they have a limited ability to be of optimal value to many of the clients who come to them for legal guidance.

4. SOME SUGGESTIONS TO EDUCATE EMOTIONALLY COMPETENT LAWYERS

Emotional competency skills are not skills that we can expect many of our students to bring with them to law school any more than we might expect them to come to law school with minds that are already trained to “think like a lawyer.” Students need guidance and training in order to become emotionally competent to handle the challenges of modern-day legal practice. Fortunately, these are learned abilities that can be taught and developed; and, far from detracting from improvements in analytic reasoning, such training can even enhance the development

⁵⁵ Carnegie Report, *supra* note 5, Observation 3.

⁵⁶ See PERRY, Joshua. “Thinking Like a Professional”, in: *J. Legal Educ.*, n° 58, 2008, p. 159. Perry argues that we must be careful “avoid giving students the false impression” that the law exists in a vacuum. He notes that being a “legal professional” is about the lawyer’s ability to interrelate to people “as much, maybe more as it is about engaging theories and facts.” See also ROSENBERG, *supra* note 18, at 1228-29 (2004) (arguing that “success in law (as in other fields) correlates significantly more with relationship skills than it does with intelligence, writing ability, or any other known factor”).

⁵⁷ See, e.g., Carnegie Report, *supra* note 5, Observation 3. The authors point out that students quickly receive the misleading message that the practice of law involves “redefining messy situations of actual or potential conflict” as orderly legal issues that do not implicate “the rich complexity of actual situations that involve full-dimensional people” and do not thereby require “thinking through the social consequences or ethical aspects of the conclusions.” *Id.*

⁵⁸ See generally RISKIN, Leonard. “Awareness and Ethics in Dispute Resolution and Law: Why Mindfulness Tends to Foster Ethical Behavior”, in: *S. Texas L. Rev.*, n° 50, 2009, pp. 493, 501. Riskin contends that teaching students how to cultivate the ability to step back from their emotional responses fosters ethical behavior.

of critical thinking.⁵⁹ Nonetheless, these abilities are neurologically distinct from cognitive intelligence and ability, requiring a different focus and approach.⁶⁰

The tempting response would be to claim that most law professors are not trained to teach such skills, and that we should therefore ignore the problem. However, that response is neither entirely accurate nor adequate, and should be of no solace to our students. If we are serious about graduating emotionally competent law students, then we must re-think both our pedagogy and our curriculum. With thoughtfulness and reflection, skills that fall within each of the four domains of emotional competence⁶¹ can be woven into doctrinal as well as clinical and lawyering skills courses, even by teachers who have no special training in human behavior. Although these competencies should also be the subject of routinely-offered courses that focus exclusively on the development of emotional competence, such courses could be taught by teachers with a serious interest, or specialized training, in human behavior. The following suggestions range from relatively modest pedagogical shifts in emphasis that can help students develop emotional competence, to the need for regularly-offered courses specifically focused on the development of the emotional competencies required by the practice of law.

4.1. *Addressing Emotional Reactions that Undermine Analytical Clarity*

Cases or problems that are likely to incite emotional or value-laden reactions pose particular analytical problems for students, and are precisely the kinds of cases from which students need our guidance. It is when evaluating value-laden legal issues that students are most at risk of falling victim to faulty presumptions and biased perspectives. And, because the emotional brain is self-confirming, accumulating evidence that would prove it's "right" and discounting evidence that suggests there is a bigger picture, this is when students are most resistant to cognitive appeals to consider counter-analysis.

4.1.1. *Recognizing Emotional Reactivity*

When assigning reading and preparing for class, it is relatively easy to identify cases or problems that are likely to incite emotional or value-laden reactions from students, and, from there, to make room in the class to discuss (and challenge) such reactions. However, even during class itself there are clear red-flags that signal when a student's emotional reactivity is undermining

⁵⁹ BOYATZIS, *et al.*, *Graduate Management Education*, *supra* note 26, at 156-57 (describing the results of a multi-year study of the MBA program at the Weatherhead School of Management (WSOM)). The authors conclude that MBAs can develop emotional intelligence competencies as a result of training. They also conclude: "In contrast to some faculty fears, improvements in emotional intelligence abilities did not detract from the improvement of cognitive abilities and may have even enhanced development of critical thinking ability." *Id.* at 157. See also GOLEMAN, *An EI-Based Theory*, *supra* note 17, at 27.

⁶⁰ REUVEN BAR-ON, *et al.*, *supra* note 18, at 1798. The authors conclude that "emotional and social intelligence is a valid construct which is neurally distinct from cognitive intelligence. The major differences between these two important components of intelligence may be that cognitive intelligence is more dependent on cortical structures that support logical reasoning, whereas emotional and social intelligence is more dependent on limbic and related neural systems that support the processing of emotions and feelings." *Id.* See also GOLEMAN, *An EI-Based Theory*, *supra* note 17, at 30-32 (detailing the different neurological circuitry underlying each of the domains of emotional competency).

⁶¹ The four domains of emotional competency are: (1) self-awareness; (2) self-management; (3) social awareness; and (4) relationship management.

the clarity of that student's perspective. One red-flag is a student's strong reaction to a case or fact pattern, particularly when coupled with an insistence on being "right" and an inability or unwillingness to grasp the merits of valid counter-arguments. Each of these behaviors is a hallmark of the emotional brain. Another red-flag is a student's language - language that reflects a strong categorical judgment that one of the parties is "good" or "bad" or "right" or "wrong" is also a hallmark of the immaturity of the emotional brain.⁶² The emotional brain strives for simplicity, and it does so by ignoring mitigating circumstances and the shades of gray that would provide students with a more reflective, and mature, perspective.

4.1.2. *Addressing the Problem*

The first time students are introduced to the dangers of emotional reactivity it is valuable to provide a simplistic overview of how the emotional brain can undermine clear thinking.⁶³ This overview can realistically be conveyed in as little as a few minutes or, in a course devoted exclusively to the development of emotional competency skills, can be fleshed out in greater detail over an entire class period.⁶⁴ A basic understanding of how the brain processes information is not only a valuable first-step in developing skills to challenge one's biases and presumptions, but can also help remove the stigma of being "wrong." Students can find it easier to thoughtfully and candidly reflect on their responses and to challenge their own thinking when they are aware that there is a neurological explanation for their resistance - and that this same neurological reality impedes everyone, including their teachers.

In my classes, I introduce the topic by telling students that it may surprise them to know that their logical thinking is influenced by their emotions and by their own values, whether they are aware of it or not. I briefly mention that neuroscientists sometimes refer to the brain as a "triune" brain; and that the brain can roughly be divided into three sections - the "reptilian" brain, regulating the nervous system and crude fight-or-flight responses; the "limbic" region of the brain, regulating emotions, values and memory (which I thereafter refer to as the "emotional brain" for ease of reference); and the cerebral cortex, regulating higher-level reasoning (which I thereafter refer to as the "thinking brain"). I then warn students of the dangers of the emotional brain if they don't understand, and then "prosecute," their own emotional reactions.⁶⁵ I conclude

⁶² See GOLEMAN, *Emotional Intelligence*, *supra* note 6, at 295.

⁶³ This knowledge helps build the emotional competency of self-awareness, as students become more adept at understanding how their emotional reactions actually interfere with the clarity of their thinking. In addition, studies in the social sciences suggest that, in order to overcome faulty belief perseverance, students must become aware of the internal thinking processes that are creating such problems. See, e.g., ROSS, *et al.*, *supra* note 33, at 880.

⁶⁴ In my class, *Psychology of Conflict Resolution*, I devote a one-hour-and-fifteen minute class to this introduction. I begin class with a short YouTube clip of interviews concerning the wrongful prosecution of three Duke Lacrosse players that ultimately resulted in the disbarment of the prosecutor in the case. I use this case as a concrete example from which to illustrate the dangers of the emotional brain, and as a springboard for class discussion of how students can "prosecute" their own thinking. My PowerPoint presentation and teaching notes are available to anyone who is interested in them. For a more extended discussion of how this topic can be conveyed to students in language they can both relate to and readily understand, see WELLFORD SLOCUM, *Introduction to Legal Reasoning*, *supra* note 50, at 65-77 (also available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1812024).

⁶⁵ See the discussion *supra*: Emotional Competency Skills Required in the Practice of Law: Self-Awareness (describing the dangers of the emotional brain).

by telling students that in order to successfully “prosecute” their thinking, they must first become aware of when their thinking is being sabotaged by their emotions, and that they can do so by paying careful attention to red-flags that signal when their emotional brain is interfering with their logic (i.e., paying attention to their language and internal judgments, and to a stubborn insistence on being “right”).

I then explain that my questions about their emotional responses are quite deliberate attempts to help students begin to identify when they are at risk of losing judgment and perspective. I cultivate this awareness by pointing out a few red-flags I would have noticed in some of the student responses, and then ask students to volunteer what they, too, have noticed about their own language or judgments.

The next step in challenging their thinking is for students to understand the core values or biases that are causing the emotional reaction. Without that understanding, students are handicapped in their ability to move past the reaction and challenge their convictions. I directly ask students what specific judgments they have about the parties in the case or legal problem. A student might heatedly respond, for example, with the statement that the defendant was “inexcusably careless” and that, because of that carelessness, “there is no valid defense for negligence.”

After identifying the specific judgment that triggered the emotional reaction, I help mature the student’s perspective by asking the reactive student what might have *prompted* the defendant to behave that way. If the student is so wedded to her position that she can’t think of any possible reasons that could explain the behavior (irrespective of whether or not the reason would provide legal justification for the behavior), I ask other students to brainstorm the possibilities (e.g., the defendant might have been careless because he was late for an important appointment, or perhaps he had just received terrible news that caused him to be distracted). By identifying a range of explanations that do not involve demonizing the wrongful party, the discussion helps resistant students begin to complexify their understanding of the behavior and soften the judgments that are undermining their perspective.

After drawing out several explanations for the offending behavior, I ask the reactive student whether she can relate to the offending party on any level – for example, whether there has ever been a time when she, too, has been careless because she was late for an important appointment or distracted by having received bad news. This line of questioning can help overcome a phenomenon of the emotional brain known as “fundamental attribution error,” where we tend to attribute other people’s “bad” behavior as character flaws, but tend to excuse our own bad behavior as being the result of an unfortunate set of circumstances.⁶⁶ I remind students that the purpose of the line of questioning isn’t to engage in a moral debate about what is “good” or “bad” or a legal debate about the behavior. Instead, the purpose of the discussion is to alert students to the reality that their own value judgments can undermine their efforts to fairly evaluate the strengths and weaknesses of both sides, and that only by softening their judgments can they attain clarity and perspective.

⁶⁶ See COZOLINO, *supra* note 8, at 163.

This entire discussion might take only a few minutes, and could certainly be accomplished in less than ten minutes, taking relatively little time away from a discussion of the legal issues. Yet within this short period of time students receive several powerful lessons. First, such discussions help develop students' emotional competence in the domains of Self-Awareness (identifying and understanding the basis for their emotional reactions), Self-Management (challenging their emotional reactions), and Social Awareness (understanding possible motivations for other people's behavior). Second, these discussions provide a model for students to challenge their own thoughts and emotional reactivity, not only within the context of the legal issue under discussion but also in their professional and personal lives.

Finally, such discussions set the stage for students to flesh out and mature their understanding of the legal issues, including the counter-arguments that could be made. For example, the reactive student in the above hypothetical discussion could be asked to challenge her emotional brain by setting aside for a moment her brain's first response that the behavior constituted legal negligence, and to "pretend" that the emotional brain's response was not only premature but also inaccurate. The challenge to the student would be to actively search for evidence that supports the opposite conclusion by identifying at least three pieces of concrete evidence (or three arguments) that support the opposite conclusion. Correctly identifying the task as an emotional challenge to "trick" their emotional brain, rather than an appeal to be impartial and fair, helps students become more successful in their efforts to challenge their own thinking.⁶⁷

4.2. *Addressing the Emotional Competencies Embedded Within Specific Lawyering Skills*

Development of the four domains of emotional competence should be an explicit goal in clinics, in lawyering skills courses such as mediation, negotiation, and client interviewing and counseling, and in introductory lawyering skills courses offered in the first-year of law school. Absent an understanding or appreciation of the emotional needs and interests that drive human behavior, students cannot realistically expect to be optimally successful when dealing with clients and other lawyers. Again, bringing emotional competency skills into the classroom need not require a major overhaul of the curriculum. Instead, by paying attention to how specific problems and topics implicate the four domains of emotional competency, we can help deepen students' understanding and appreciation of the complexity of the legal skills they are learning, and provide them with the necessary foundation upon which they can develop judgment and perspective.

Students also require emotional competence in translating the legal theories they learn in doctrinal classes into practical skills that will be of value to them in legal practice. As an example, in my Professional Responsibility course, I devote a class period to discussing the ethical rules governing billing practices. The students are assigned reading that includes "Scenes from a Law Firm," a grim portrayal of an actual lawyer's experiences in a law firm in which he was pressured to conform to a variety of billing practices that he believed were unethical and immoral.⁶⁸The

⁶⁷ See, e.g., LORD, et al., *supra* note 33, at 1239. The authors' study confirmed earlier studies concluding that the most effective way to attain impartiality is to "consider the opposite." The authors conclude that this strategy has more of a corrective effect than exhortations to be "fair, accurate and unbiased." *Id.*

⁶⁸ The reading was assigned from the following textbook: LERMAN, Lisa & SCHRAG, Philip. *Ethical Problems in the Practice of Law*.

reading describes various billing practices and invites students to consider which of them are unethical, and why.

When I first began teaching the course, I had the primary pedagogical goals of: 1) addressing how the ethical rules govern specific types of billing practices; and 2) addressing the students' ethical responsibilities in handling these billing practices, including what they should and shouldn't do under the circumstances. In recent years, I realized that students were not only likely to have an emotional reaction to the reading, but that they would also need a certain level of emotional competence in order to adequately address these problems in their legal practices. Therefore, I added the following explicit pedagogical goals: 1) to help students develop emotional Self-Awareness; 2) to help students strengthen their awareness of their own values and principles (the "trustworthiness" competency that falls within the domain of Self-Management); and 3) to facilitate a discussion of how students might successfully handle difficult conversations with senior attorneys who might pressure them to engage in unethical practices (the Social Awareness and Relationship Management domains).

I begin class discussion by explicitly asking students what emotional reactions they had to the reading. As a prompt, I ask whether any students felt sad, angry, afraid, or disheartened about the profession they were preparing to enter. This question prompts immediate student engagement, with student volunteers quickly sharing their misgivings and fears. The discussion itself helps students develop emotional self-awareness by explicitly linking specific types of unethical conduct to specific emotional responses within themselves. Because students become viscerally aware of the emotional impact that various unethical practices would have on them, this discussion also makes their personal values become more alive within them. This heightened awareness of personal values, in turn, helps develop the emotional competency of "trustworthiness."

I then ask students how they might actually handle such an untenable situation in their own careers. As in earlier years, some students indicate that they would simply leave the law firm. Interestingly, however, with the discussion of students' emotional reactions serving as a context for the discussion, the remainder of the class discussion has become both deeper and broader than it had been in the past, with greater student interest and engagement. For example, some students volunteer that they would actually address the ethical problems head-on with a senior lawyer in the firm, with the twin goals of both retaining their integrity and retaining their job. After I ask them to role-play a possible discussion with a senior lawyer in the firm, other students express surprise that they could even initiate such a discussion ("It never occurred to me that I could even *do* that"). Other students in the class point out that such a discussion might (possibly) even earn the respect of other lawyers in the firm. Inevitably, a few students share with the class a different prevailing culture they have experienced within their own clerkships. Upon being questioned about how they were so "lucky" to obtain such jobs, these students describe the subtle cues they deliberately paid attention to during employment interviews. This latter part of the discussion, including the informal role-plays, helps students develop emotional competency within the domains of Social Awareness (assessing the possible reactions and values of other lawyers by

2d ed. 2008.

whom they might be employed) and Relationship Management (how they might broach difficult topics effectively).

In sum, weaving emotions into appropriate class discussions seems to have provided students with a richer and more meaningful context from which they can imagine, and then problem-solve, how they might handle sensitive ethical and moral issues in legal practice. In doing so, it has also increased student engagement in class and their interest in practicing law. As testament to the power of these kinds of discussions, for the first time since teaching Professional Responsibility, I have had students share that this course rekindled their interest in practicing law and helped them realize that they could find meaning and satisfaction in their legal careers.

4.3. *Additional Curricular Offerings*

As valuable as these relatively minor pedagogical shifts in emphasis can be, these shifts do not adequately meet the need for legal training in the emotional competencies. We cannot realistically expect students to master the emotional competencies essential to good lawyering by introducing these competencies to students as mere adjunct components of other courses.⁶⁹ Other law school courses, including clinics and lawyering skills courses, have their own curricular goals that require time and attention.⁷⁰ Developing emotional competence “demands a profound change at the neurological level,” and is a rich and complex area that requires its own curriculum and focused concentration.⁷¹

The need for such courses is particularly acute for students whose future areas of practice involve dispute resolution, litigation, or complex problem-solving requiring teamwork with other professionals. Because these practice areas require students to be able to work successfully with others in finding constructive solutions that effectively address competing interests, these practice areas demand superior emotional competency. Students must not only have a sufficiently sophisticated understanding of how human needs and interests inflame conflict, but must also have the competence both to work effectively with clients and other lawyers who are emotionally reactive and to manage their own emotional reactivity.

The explicit pedagogical goals of such specialized courses should not only embrace each of the four domains of emotional competency, but the pedagogy should also be informed by research that suggests effective (and ineffective) curricular design.⁷² As applied to law students developing

⁶⁹ See ROSENBERG, *supra* note 18, at 1231-32 (arguing that standard skills courses and clinics cannot adequately teach emotional intelligence).

⁷⁰ For example, although clinics and lawyering skills courses clearly help prepare students for the rigors of dealing with clients and other lawyers, they each have their own rich curricular offerings and an array of skills they seek to inculcate in our students. Clinics and lawyering skills courses provide students with schemata for understanding the components of, for example, client interviews and counseling sessions, negotiations and mediations. And they also teach students such important relational skills as active listening, reframing, collaborative problem-solving, effective questioning, blocking techniques, and the like.

⁷¹ GOLEMAN, *Working with EI*, *supra* note 19, at 244. See also REUVEN BAR-ON, et al., *supra* note 18, at 1798.

⁷² See GOLEMAN, *Working with EI*, *supra* note 19, at 247-53. Based on studies assessing the effectiveness (or ineffectiveness) of emotional competency training, Goleman concludes that effective programs share certain core characteristics that are essential to learning such skills.

the emotional competency skills required of effective attorneys, the curricula of such specialized courses should have the following components:

First, students must have clear, definable learning goals for the course that are self-directed.⁷³ From a list of express curricular goals, students should focus in particular upon those goals that would help them improve specific targeted areas of personal weakness and further develop areas of strength.⁷⁴ In the course I teach, *Psychology of Conflict Resolution*, students complete an on-line survey at the beginning of the semester that measures their assessment of their strengths and weaknesses within each of the four domains of emotional competency. Selected friends and family members also complete a similar survey so that students can begin to identify how they are perceived by others, and the degree to which their self-assessment comports with the assessment of others.⁷⁵ From these assessments, students are required to identify specific learning goals, and, in their required weekly journals, to regularly reflect on their progress meeting those goals.

Second, the course goals should be clear and manageable, spelling out the specific characteristics of each competence and offering a workable plan to achieve the goal.⁷⁶ A carefully planned curriculum designed to help students develop emotional competence within the four domains is important of course. However, translating the curricular design to the students' own learning goals requires clear communication – for each class, clarifying for students how the required reading and class discussions link to specific emotional competencies, and how the exercises help develop specific competencies.

Third, there must be an opportunity for students to practice emotional competency skills, both inside and outside the classroom, and to reflect on their performances.⁷⁷ Meaningful change requires sustained practice over a period of months in different settings, both professional and personal. Students should be encouraged to practice the new skills repeatedly and consistently and to thoughtfully reflect on how effective they were and what they might have done differently have been more successful.⁷⁸ This combination of experimentation and reflection helps prevent

⁷³ GOLEMAN, *Working with EI*, *supra* note 19, at 252.

⁷⁴ See KELLY & CAPLAN, *supra* note 19, at 138 (documenting the importance of participants discovering the strengths and weaknesses of their individual work styles and developing goals that correlate with their own styles).

⁷⁵ The survey adopts the Likert scale, a psychometric scale commonly used in educational and psychological studies. Each question asserts a characteristic of a person who has a high level of emotional competency, with students indicating their level of agreement with each statement by responding that they exhibit that characteristic: “never/ rarely/ sometimes/ often/ consistently.” Survey questions are based on the emotional competency clusters developed by Daniel Goleman, Richard Boyatzis and other researchers in the field. The survey tests for strengths and weaknesses within the following clusters of emotional competencies: 1) Personal Awareness (Emotional Awareness, Accurate Self-Awareness/Acceptance, and Self-Confidence/Resiliency); 2) Self-Management; 3) Social Awareness (Empathy); and 4) Relationship Management (Listening, Influence & Persuasion, and Conflict Management).

⁷⁶ GOLEMAN, *Working with EI*, *supra* note 19, at 252.

⁷⁷ *Id.*

⁷⁸ See, e.g., WALTER MISCHEL, et al., *supra* note 30, at 308. The authors cite to recent studies demonstrating that two strategies assume a “critical role” in enabling people to analyze conflict from a cooler, broader perspective that can facilitate constructive problem solving. These two strategies are “the adoption of a self-distanced perspective, in which the individual becomes an observer of himself and the experience (rather than maintaining the usual self-immersed perspective);” and a “‘why’ focus on the specific reasons underlying one’s negative feelings.”

similar mistakes in the future and helps prepare students for greater success in future experiences. Requiring weekly journals is one method of motivating students to practice and reflect on what they are learning in and out of the classroom.

Fourth, there must be an opportunity for meaningful feedback from the teacher as well as from other students in the class.⁷⁹ Performance feedback in class, and thoughtful commenting on student journals, are effective ways to encourage student experimentation and reflection, and to help direct positive change. Performance feedback should also reinforce the positive changes students are implementing during the course of the semester, even relatively small changes. Students require recognition and encouragement to inspire further change.⁸⁰

Fifth, students must be able to perceive how class discussions and exercises are relevant to their professional lives.⁸¹ In other words, the relevance of course materials, class discussions and interactive exercises should be clearly linked to required competencies in the practice of law. To the extent that role-plays involve hypothetical situations rather than conflicts in which the students are presently involved, the hypothetical examples should mimic real-life professional situations involving clients and colleagues.

Finally, the curriculum should incorporate assessment measures that gauge what students learned over the course of the semester and how well they developed specific emotional competencies.⁸² Such outcomes can be measured through final self-reflection papers and journals, and could also be measured by requiring students to re-take the survey they completed at the beginning of the semester. In-class video clips of emotionally charged interactions would be an additional way to assess student growth, with students being required to evaluate the underlying dynamics of what was actually happening beneath the “noise” of the angry words, and to suggest a template for how the problem could be resolved more effectively. This would be particularly useful if students were asked to view and evaluate video clips at both the beginning and the end of the semester.

5. CONCLUSION

The dominant presumption within legal education, that we can teach students to “think like lawyers” with a nearly singular focus on training the analytical mind, is a fiction based on a 19th Century understanding of the human brain that is inherently flawed. This fiction has spawned an equally faulty premise that still dominates legal education - that we can train students to be effective lawyers by virtually ignoring students’ emotions and by marginalizing the development of the emotional competencies. These presumptions impose a significant cost on our students and on the legal profession. By marginalizing the importance of emotional competence, we ill-prepare

⁷⁹ GOLEMAN, *Working with EI*, *supra* note 19, at 252.

⁸⁰ *Id.* at 252-53.

⁸¹ *Id.* at 253.

⁸² *Id.*

our students to work effectively with the complex interpersonal legal problems they will encounter in the practice of law. As troubling, by dismissing emotions as irrelevant to legal thinking, we ignore that which has true meaning to students – their emotional compass and values. In doing so, we not only strip students of that which has real meaning to them as people but we also ill-prepare them to develop a professional identity that can guide them in their professional careers. It is time to re-think our model of legal education and incorporate emotional competency training as an integral and important component of the law school curriculum.

BIBLIOGRAPHY

ALLEGRETTI, Joseph. “Have Briefcase Will Travel: An Essay on the Lawyer as Hired Gun”, *in: Creighton L. Rev.*, n° 24, 1990.

BANDES, Susan. “Repression and Denial in Criminal Lawyering”, *in: Buff. Crim. L. Rev.*, n° 9, 2006.

BAR-ON, Reuven, *et al.* “Expanding the Neurological Substrate of Emotional and Social Intelligence”, *in: Brain, A Journal of Neurology*, n° 126, 2003.

BECHARA, Antoine, *et al.* “Poor Judgment in Spite of High Intellect: Neurological Evidence for Emotional Intelligence”, *in: Handbook of Emotional Intelligence*, R. Bar-On and J.D.A. Parker, eds., 2000.

BOYATZIS, Richard, *et al.* “Clustering Competence in Emotional Intelligence: Insights from the Emotional Competence Inventory (ECI)”, *in: Handbook of Emotional Intelligence*, R. Bar-On and J.D.A. Parker, eds., 2000.

_____, *et al.* “Learning Cognitive & Emotional Intelligence Competencies Through Graduate Management Education”, *in: Acad. of Manage. Learning & Educ.*, n°1, 2002.

CAINE, Renate & CAINE, Geoffrey. *Making connections: Teaching and the Human Brain*. 1994.

COZOLINO, Louis. *The Neuroscience of Psychotherapy: Building and rebuilding the Human Brain*. 2002.

DAICOFF, Susan. “Law as a Healing Profession: The ‘Comprehensive Law Movement’”, *in: Pepp. Disp. Resol. L.J.*, n° 6, 2006.

_____. *Lawyer, Know Thyself: A psychological analysis of personality strengths and weakness*. 2004.

DAMASIO, Antonio. *Descartes’ Error: Emotion, Reason and the Human Brain*. 1994.

DULEWICA, Victor & HIGGS, Malcolm. “Emotional Intelligence – A Review and Evaluation Study”, *in: J. of Managerial Psych.* n° 15, 2000.

EPSTEIN, Seymour & BRODSKY, Archie. *You're smarter than you think*. 1993.

GINO, Francesca & SCHWEITZER, Maurice. "Blinded by Anger or Feeling the Love: How Emotions Influence Advice Taking", *in: J. of Applied Psych.*, n° 93, 2008.

GOLEMAN, Daniel. "An EI-Based Theory of Performance", *in: The Emotionally Intelligent Workplace*, Cary Cherniss & Daniel Goleman, eds., 2001.

_____. *Emotional Intelligence: Why it can matter more than IQ*. 2006.

_____. *Working with Emotional Intelligence*. Bantam, 2006.

HUNTER, John, SCHMIDT, Frank and JUDIESCH, Michael. "Individual Differences in Output Variability as a Function of Job Complexity", *in: J. of Applied Psych.*, n° 75, vol. 1, 1990.

JOHNSON, Marvin, *et al.*, "Emotionally Intelligent Mediation: Four Key Competencies", *in: Bringing Peace into the Room: How the Personal Qualities of the Mediator impact the process of Conflict Resolution*, David Bowling & David A. Hoffman, eds., 2003.

KEEVA, Steven. *Transforming practices: Finding Joy and Satisfaction in the Legal Life*. Contemporary Books, 1999.

KELLY, Robert & CAPLAN, Janet. "How Bell Labs Creates Star Performers", *in: Harv. Bus. Rev.* n° 71, July-Aug. 1993.

LERMAN, Lisa & SCHRAG, Philip. *Ethical Problems in the Practice of Law*. 2d ed. 2008.

LORD, Charles, *et al.* "Considering the Opposite: A Corrective Strategy for Social Judgment", *in: J. of Person. & Soc. Psych.*, n° 47, 1984.

MCCLELLAND, David. "Identifying Competencies with Behavioral- Event Interviews", *in: Psych. Science*, n° 9, 1998.

MISCHEL, Walter, *et al.* "Self-Regulation in the Service of Conflict Resolution", *in: The Handbook of Conflict Resolution*, Morton Deutsch, *et al.*, eds., 2d ed., 2006.

PERRY, Joshua. "Thinking Like a Professional", *in: J. Legal Educ.*, n° 58, 2008.

REDDING, Richard E. & REPPUCCI, Dickon. "Effects of Lawyers' Socio-political Attitudes on Their Judgments of Social Science in Legal Decision Making", *in: Law & Human Behavior*, n° 23, 1999.

RHODE, Deborah. *In the interests of justice: reforming the legal profession*. 2000.

RISKIN, Leonard. "Awareness and Ethics in Dispute Resolution and Law: Why Mindfulness Tends to Foster Ethical Behavior", *in: S. Texas L. Rev.*, n° 50, 2009.

ROSENBERG, Joshua. "Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance, of Human Relationships in the Practice of Law", *in: U. Miami L. Rev.*, n° 58, 2004.

ROSS, Lee, *et al.* "Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm", *in: J. Person. & Soc. Psych.*, n° 32, 1975.

SHULTZ, Marjorie & ZEDECK, Sheldon. *LSAC Final Report: Identification, Development, and Validation of Predictors for Successful Lawyering*. 2008, available on-line: www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf

SIEGEL, Daniel. *The Developing Mind: Toward a Neurobiology of Interpersonal Experience*. 1999.

SILVER, Marjorie. *The affective Assistance of Counsel: Practicing Law as a Healing Profession*. 2007.

STONE, Douglas, *et al.* *Difficult Conversations: how to discuss what matters most*. Penguin, 1999.

STUCKEY, Roy, *et al.* *Best practices for Legal Education: a Vision and Road Map*. Clin. Legal Educ. Assn., 2007.

SULLIVAN, William, *et al.* *Educating lawyers: Preparation for the profession of law*. Observation 3, 2007.

WELLFORD SLOCUM, Robin. "The Dilemma of the Vengeful Client: A Prescriptive Framework for Cooling the Flames of Anger", *in: Marq. L. Rev.*, n° 92, 2009.

_____. *Introduction to Legal Reasoning, Writing, and the other lawyering skills*, Chapter 5: The Lawyer as Investigator: The Client Interview. 3d ed., 2011.

WEXLER, David & WINICK, Bruce (eds.). *Law in a Therapeutic Key: Developments in Therapeutic Agent*. 1996.

WEXLER, David (ed.). *Therapeutic Jurisprudence: The Law as a Therapeutic Agent*. 1990.

WEXLER, STOLLE & WINICK. *Practicing Therapeutic Jurisprudence: Law as a Helping Profession*. 2000.