

THE EMOTIONALLY ATTENTIVE LAWYER: BALANCING THE RULE OF LAW WITH THE REALITIES OF HUMAN BEHAVIOR

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INTRODUCTION

The law and emotions have an uneasy, if not antagonistic, relationship. In an extreme view, emotions are antithetical to the rule of law—human frailties that pose a constant threat to the orderly and impartial dispensation of justice. The central purpose of a statute or legal principle, in this view, is to ensure that emotions like empathy, anger, and revenge do not poison the objective analysis of facts and the uniform application of rules. The rule of law and the progression of society “from Status to Contract” are intended to elevate the judicial system above personal pique and favoritism, displacing emotions with uniformity and predictability.¹ The sign that a law student has evolved from a naïve scholar to an incipient lawyer is the belief, as expressed by one student, that a lawyer’s work is “like a ‘mathematical problem’ to be solved” and, for that reason, “I don’t get too emotionally involved in what I’m doing.”²

Although the law may denigrate the role of emotions, the successful practice of law requires a high level of emotional intelligence. The traits that comprise emotional intelligence (self-awareness, self-management, social awareness, and relationship management skills) are essential to superior attorney performance.³ These traits also are essential to developing the sense of personal meaning, responsibility, and fulfillment that distinguish expert performers.⁴

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¹ HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 170 (1861).

² Tan Seow Hon, *Birthing the Lawyer: The Impact of Three Years of Law School on Law Students in the National University of Singapore*, *SING. J. LEGAL STUD.* 417, 449 (2010); see generally ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* (2007).

³ See generally *VENTURING BEYOND THE CLASSROOM* (Christopher Honeyman et al. eds., 2010); David J. Arkush, *Situating Emotion: A Critical Realist View of Emotion and Noncon-*

This article explores the tension between the law and emotional intelligence and suggests that emotional intelligence is unjustifiably neglected in legal education and professional development. Part I begins with a brief discussion of the historical conflict between the law and emotions, and then Parts II and III explain why emotional intelligence is central to effective attorney performance and the prevention of legal malpractice claims. To augment our understanding of how emotions affect the actual practice of law, Part IV presents excerpts from attorney interviews reported in *How Leading Lawyers Think: Expert Insights into Judgment and Advocacy*.⁵ The article concludes, in Part V, by highlighting specific changes in medical school education and practice that demonstrate the critical importance of emotional intelligence and indicate that the legal field is woefully late in incorporating communication, observation, and problem-solving skills into law student selection criteria and law school course requirements.

I. CONFLICTS BETWEEN LEGAL EDUCATION AND EMOTIONS

Both legal education and law practice are “aggressively rational, linear, and goal-oriented,” and lawyers tend to be unaware of the “wishes, fears, beliefs, and defenses that motivate our actions,” according to Professor Melissa Nelken, Faculty Chair of the Hastings Center for Negotiation and Dispute Resolution.⁶ She notes that lawyers deliberately divorce emotional issues from client cases, seeing emotions as impediments to intelligent, rational problem solving:

Law, many lawyers say, is based on facts, not feelings; it is logical; and success is measured by whether you win or lose in court or by the dollar amount of settlements. Lawyers must *act* on behalf of their clients, and there is a premium on

scious Cognitive Processes for Law and Legal Theory, 2008 BYU L. REV. 1275; Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 GEO. J. LEGAL ETHICS 137 (2011); Peter H. Huang, *Reasons Within Passions: Emotions and Intentions in Property Rights Bargaining*, 79 OR. L. REV. 435 (2000); William W. Maddux et al., *Chameleons Bake Bigger Pies and Take Bigger Pieces: Strategic Behavioral Mimicry Facilitates Negotiation Outcomes*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 461 (2008); Myeong-Gu Seo & Lisa Feldman Barrett, *Being Emotional During Decision Making—Good or Bad? An Empirical Investigation*, 50 ACAD. MGMT. J. 923 (2007).

⁴ See generally THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE (K. Anders Ericsson et al. eds., 2006); MIHALY CSIKSZENTMIHALYI, CREATIVITY: THE PSYCHOLOGY OF DISCOVERY AND INVENTION (1996); MIHALY CSIKSZENTMIHALYI, FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE (1990); HANDBOOK OF COMPETENCE AND MOTIVATION (Andrew J. Elliot & Carol S. Dweck eds., 2005).

⁵ Parts of this article are excerpted from RANDALL KISER, HOW LEADING LAWYERS THINK: EXPERT INSIGHTS INTO JUDGMENT AND ADVOCACY (2011) [hereinafter KISER, HOW LEADING LAWYERS THINK]. Sections of the article regarding legal malpractice claims are excerpted from RANDALL KISER, BEYOND RIGHT AND WRONG: THE POWER OF EFFECTIVE DECISION MAKING FOR ATTORNEYS AND CLIENTS (2010) [hereinafter KISER, BEYOND RIGHT AND WRONG].

⁶ Melissa L. Nelken, *Negotiation and Psychoanalysis: If I'd Wanted to Learn About Feelings, I Wouldn't Have Gone to Law School*, 46 J. LEGAL EDUC. 420, 421 (1996).

reaching sound decisions quickly. In law school, students are taught that how they feel about the cases they read is irrelevant; what matters is the soundness of their logic. Unlike medicine, for example, law is still taught largely as an exercise in abstraction, based on case reports and analysis of judicial opinions.

Resistance to the human dimension of the lawyer's work is built into most law training.⁷

Professor Nelken contends that actual practice "inevitably involves the lawyer deeply in the hopes, fears, and conflicts of her clients" and that lawyers' conflict resolution capabilities are enhanced by emotional skills like self-observation and awareness of the "assumptions, anxieties, and conflicts that are part of who one is."⁸ Her law students, nevertheless, resist thinking about how their emotions and personal backgrounds affect their conflict resolution styles and goals. As one student said to her, "If I'd wanted to learn about feelings, I wouldn't have gone to law school."⁹

Joe Jamail, a Texas trial attorney famous for representing Pennzoil in its lawsuit against Texaco and winning a \$10.53 billion verdict in 1985 (reduced on appeal to \$8.53 billion), criticizes law school instruction that ignores the role of emotions: "'Today's law schools teach students how not to get emotionally involved in their cases,' he says. 'That's bullshit. If you are not emotionally involved, your client is not getting your best effort.'"¹⁰

A similar controversy about the role of emotions has emerged in medical schools where the "curriculum creates doctors who lack humanity, who see patients as diseases rather than as whole people and who have what the medical literature calls 'ethical erosion'—a loss of idealism, empathy, morality."¹¹ In light of research indicating that personal traits like openness, agreeableness, extraversion, and conscientiousness may be more predictive of success in clinical practice than test scores, some medical schools now introduce students to real patients on the first day of class and emphasize "relationship" skills like listening and building trust.¹²

Dr. Abraham Verghese, a professor of medicine at Stanford University and one of the leaders in bridging the gap between the art and science of medicine, says, "I've never bought this idea of taking a therapeutic distance If I see a

⁷ *Id.* at 421–22.

⁸ *Id.* at 422, 425.

⁹ *Id.* at 422.

¹⁰ Mark Curriden, *Lions of the Trial Bar: Joe Jamail*, A.B.A. J., Mar. 2009, at 32, 34; *accord* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 6 n.5 (1987).

¹¹ Anemona Hartocollis, *In Medical School, Seeing Patients on Day 1 to Put a Face on Disease*, N.Y. TIMES, Sept. 3, 2010, at A15.

¹² See Filip Lievens et al., *Personality Scale Validities Increase Throughout Medical School*, 94 J. APPLIED PSYCHOL. 1514, 1514, 1529 (2009); Haikang Shen & Andrew L. Comrey, *Predicting Medical Students' Academic Performances by Their Cognitive Abilities and Personality Characteristics*, 72 ACAD. MED. 781, 781, 785–86 (1997); Hartocollis, *supra* note 11.

student or house staff cry, I take great faith in that. That's a great person, they're going to be a great doctor."¹³

II. LAWYERING SKILLS AND EMOTIONAL INTELLIGENCE

The importance of a comprehensive skillset—integrating substantive legal knowledge with emotional intelligence—is shown in the American Bar Association's MacCrate Report, which ranks the skill of “problem solving” above legal analysis and legal research.¹⁴

That report also identifies communication, counseling, negotiation, advising a client, and the ability to recognize and resolve ethical dilemmas as “fundamental lawyering skills.”¹⁵ These fundamental skills necessarily require a blend of human judgment, technical proficiency, and emotional maturity. The MacCrate Report's concerns about the narrowness of attorney education are reiterated by The Carnegie Foundation for the Advancement of Teaching:

The difficulty, as we see it, lies in the relentless focus, in many law school courses, on the procedural and formal qualities of legal thinking. This focus is sometimes to the deliberate exclusion of the moral and social dimensions and often abstracted from the fuller contexts of actual legal practice.¹⁶

In a study of two thousand attorneys and law students, law professor Marjorie Shultz and psychology professor Sheldon Zedeck found that successful lawyers demonstrate strong competencies in “networking, building relationships, practical judgment, ability to see the world through the eyes of others, and . . . commitment to community service.”¹⁷ These traits are predominantly emotional, and their importance and development are neglected in the traditional law school curriculum. These traits, moreover, are “negatively associated” with high academic performance, meaning that law students with high grades do not frequently exhibit these traits.¹⁸ Thus, academic success, as measured by grades received in a conventional legal curriculum, is unlikely to ensure emotional development.

III. LEGAL MALPRACTICE LIABILITY AND EMOTIONAL INTELLIGENCE

At the most elemental level of law practice, emotional intelligence appears to be necessary for attorneys to avoid malpractice liability. Malpractice claims data show a significant and persistent conflict between client expectations and

¹³ Denise Grady, *Physician Revives a Dying Art: The Physical*, N.Y. TIMES, Oct. 12, 2010, at D1.

¹⁴ *Legal Education and Professional Development—An Educational Continuum*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO B. 138.

¹⁵ *Id.* at 138–40.

¹⁶ WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 145 (2007).

¹⁷ William D. Henderson, *The Bursting of the Pedigree Bubble*, NALP BULL., July 2009, at 1, 13.

¹⁸ *Id.*

attorney performances in “soft” skills requiring judgment, discernment, awareness, and perspective: case evaluation, risk assessment, strategy development, client communication, and settlement negotiations. According to the American Bar Association’s “Profile of Legal Malpractice Claims,” the specific activity “Settlement/Negotiation” constituted 6.79 percent of all malpractice claims in the 2008–2011 period, and 7.67 percent of all malpractice claims in the earlier 2004–2007 period (when claims are classified by “type of activity”).¹⁹ The errors “Failure to Follow Client’s Instructions,” “Failure to Know or Properly Apply the Law,” “Failure to Obtain Client’s Consent or to Inform Client . . . of various alternatives or the risks involved,” “Inadequate Discovery of Facts or Inadequate Investigation,” and “Planning or Strategy Error” constituted 35.99 percent of all malpractice claims in the 2008–2011 period and 37.58 percent of all malpractice claims in the 2004–2007 period (when claims are classified by “type of alleged error”).²⁰ Thus, more than one-third of all malpractice claims allege errors relating to professional skills required in pre-trial evaluations, discovery, procedures, counseling, negotiations, and settlements. These skills necessarily entail an integration of substantive legal knowledge with a broader range of competencies embraced by emotional intelligence—listening, understanding, communicating, conceptualizing, anticipating, simulating, and perspective-taking.

The critical importance of emotional intelligence is further demonstrated by legal malpractice claims data compiled by an Ontario, Canada insurer, The Lawyers’ Professional Indemnity Company (“LAWPRO”). Its data regarding attorney malpractice claims are the most complete because, unlike their American counterparts, all attorneys in Ontario are required to carry malpractice insurance, and LAWPRO is the only carrier.²¹ (The American Bar Association has compared its malpractice data with that of LAWPRO and concluded that the results “show relatively similar claims experiences between the two countries.”)²² LAWPRO’s data indicate that the major cause of malpractice claims has shifted during the last thirty years from calendaring mistakes (usually failing to file an action before it was barred by the statute of limitations) to “attor-

¹⁹ AM. BAR ASS’N STANDING COMM. ON LAWYERS’ PROF’L LIAB., PROFILE OF LEGAL MALPRACTICE CLAIMS: 2008–2011, at 9 (2012) [hereinafter 2011 ABA MALPRACTICE STUDY]; AM. BAR ASS’N STANDING COMM. ON LAWYERS’ PROF’L LIAB., PROFILE OF LEGAL MALPRACTICE CLAIMS: 2004–2007, at 7 (2008) [hereinafter 2007 ABA MALPRACTICE STUDY]; cf. AM. BAR ASS’N STANDING COMM. ON LAWYERS’ PROF’L LIAB., PROFILE OF LEGAL MALPRACTICE CLAIMS: 2000–2003, at 7 (2005) [hereinafter 2003 ABA MALPRACTICE STUDY] (showing “Settlement/Negotiation” constituted 8.20 percent of all malpractice claims in the 2000–2003 period).

²⁰ 2011 ABA MALPRACTICE STUDY, *supra* note 19, at 12; 2007 ABA MALPRACTICE STUDY, *supra*, note 18, at 10, 23–24; cf. 2003 ABA MALPRACTICE STUDY, *supra*, note 19, at 10 (showing that these errors constituted 41.54 percent of all malpractice claims in the 2000–2003 period).

²¹ Kara MacKillop & Neil Vidmar, Legal Malpractice: A Preliminary Inquiry 18 (June 29, 2006) (unpublished manuscript), available at <http://ssrn.com/abstract=912963>.

²² *Id.* at 21.

ney/client communication and relationship issues.”²³ According to law professors Kara MacKillop and Neil Vidmar, communication and relationship problems were responsible for 46 percent of all claims and 51 percent of claims costs.²⁴ The errors, they note, “fall into four categories: failure to follow client instructions (13.7% of claims, 13.6% of costs), inadequate discovery or investigation (12.9%, 15%), failure to inform or obtain consent (11.6%, 13.4%), and poor communication (8%, 9%).”²⁵ Calendaring issues constituted only “14% of the total number of claims and 11% of claim costs,” although they were the primary type of malpractice claim thirty years ago.²⁶ Because contemporary attorneys are more likely to face a malpractice claim regarding their relationship skills than their calendaring systems, attorneys who lack emotional intelligence are a swelling financial risk for law firms and malpractice insurers.

IV. ATTORNEYS’ VIEWS OF THE ROLE OF EMOTIONS IN LAW PRACTICE

Seventy-eight leading litigation attorneys were interviewed for the book *How Leading Lawyers Think: Expert Insights into Judgment and Advocacy*.²⁷ These attorneys were selected from a dataset of 8114 attorneys in New York and California based on superior performances in predicting case outcomes.²⁸ Among the topics addressed in the attorney interviews was the role of emotions and the relative importance of technical legal competence and “soft” skills like empathy, maturity, judgment, and self-awareness.²⁹

A. *Legal vs. Subjective Factors in Case Evaluation*

When asked whether other attorneys’ errors in case evaluation are attributable to errors about the law or intangible factors like witness appeal and credibility, the attorneys generally point to subjective judgments as being the culprit:

- [O]f course you have to know the law. But when lawyers fail, it’s the subjective that they do not take into account. The law is not as critical as the guts that go into the jury’s deliberations.
- They [other attorneys] don’t see the soft facts and don’t appreciate the art of advocacy. The vast majority of cases that I’ve gotten large awards in had de minimis offers. They misunderstood the art of advocacy.
- The emotional component that a good plaintiff’s case has is something that is not considered by [medical malpractice] defendants because they get more attuned to the medicine. There is an emotional compo-

²³ *Id.* at 15, 19–20.

²⁴ *Id.* at 19.

²⁵ *Id.*

²⁶ *Id.* at 15, 19.

²⁷ KISER, *HOW LEADING LAWYERS THINK*, *supra* note 5, at 1.

²⁸ *Id.* at 3–4; *see also* KISER, *BEYOND RIGHT AND WRONG*, *supra* note 5, at 32–35, 431–35 (describing datasets and selection criteria).

²⁹ *See* KISER, *HOW LEADING LAWYERS THINK*, *supra* note 5, at 75–85.

ment that some defendants lose sight of as it relates to a juror's sympathy. When defendants in med mal cases get bad results at trial, it's not because they get it wrong as much as it's because it's more of a medical judgment issue to them as opposed to how people are going to respond.

- They don't understand how these personal factors, the intangible factors, will evolve through the process, how the facts will unfold. It comes full circle.
- We never know the truth; we know the perception. The law is the simplest part of it.³⁰

An attorney who spent decades practicing on the defense side and then became a plaintiffs' attorney noted that attorneys were technically competent but often unaware of the complexities and dynamics of jury trials: "They know what they're doing as lawyers, but not as trial attorneys and trial evaluators. They get lost in the maelstrom."³¹

B. *Risks of Emotional Involvement*

When asked whether emotions interfere with case evaluation and, specifically, whether emotions promote or hinder sound judgment and effective trial advocacy, the attorneys made some critical distinctions and highlighted the ongoing tension between emotional commitment and professional objectivity. Referring to the role of emotions in case evaluation, some attorneys remarked:

- A lot of attorneys can't take the emotion out of it. That can be a good thing but you have to be able to stand back. After the depositions are done, I start to visualize in my own mind how the trial will play out. If I think the plaintiff is likely to be sympathetic, or my client is not credible, that's a bad combination.
- Some types of clients I may visit in their homes. It gives me a better feeling for who they are and how their family relates to them. There are times when you definitely need to be emotionally involved, but you have to keep that to a minimum. It's really important to stay detached.
- There are times when you need to be emotional. There are times when you have to use some emotions to decide what to do. I'm probably more emotional than my male partners, but I think that's to my advantage.

³⁰ *Id.* at 78.

³¹ *Id.* The study attorneys' perception that their colleagues are technically proficient but occasionally insensitive to other issues is buttressed by Fulbright & Jaworski's annual survey of corporate counsel. "The good news is that only a small minority of respondents cited incompetence among their law firms as problem areas," report Fulbright partners Helen Duncan and Peter Mason. "The real issues were unpredictable costs, poor communication and inadequate preparation on case matters." Consistent with the emphasis on delivering results instead of selling expertise, corporate counsel informed Fulbright that "law firms should re-focus their efforts and that law firms can best serve their litigation clients as true service providers, not merely specialists in the law." Helen Duncan & Peter H. Mason, *In-House Counsel Offer Their Advice to Law-Firm Litigators*, S.F. DAILY J., Sept. 27, 2004, at 5.

- There are cases that benefit from a more passionate approach, some from a dispassionate approach. Whatever approach you take, you still have to be very professional.
- Emotions only sustain you for so long. But it is also a damaging tool. I've seen an attorney get too emotional—gets sidetracked, loses concentration. I think emotion is a blinder.³²

“If I really like my client,” comments a plaintiffs’ attorney, “I have to be in a position to say, ‘Whoa, we need to step back. Am I being affected by the fact I like this client and want to win for him?’”³³

Reflecting on the relationship between emotion and trial advocacy, the attorneys noted that some degree of emotional involvement or sensitivity is critical:

- It's a combination. You have to have some inner man to know if you're connecting with the jury.
- Some attorneys never connect with their clients. At times this is good because it makes you objective. But other times you have to have that missionary zeal to connect with the jury. Some attorneys are just flat, too dry, too dead. The middle ground is tough to find. Out of 1,000 cases I handled on the defense side, only three plaintiff attorneys took the time to find family and friends [who would testify regarding how the accident changed the plaintiff]. If you get the jury emotionally involved you will always win.
- There has to be a fire in the guts for the attorney and the client.
- If I get emotional about evaluating the case, I'm probably on the losing end. But in looking at what happens at trial, I have to be emotional. My forte is closing argument. Juries are primarily emotional. . . . I have to understand what that emotion is going to be when I get to trial. So I try to understand that emotion that's going to come out. If a woman has scars on her arm, I cannot argue she should wear blouses with sleeves. My time to get emotional is the night before closing argument. It's a gut instinct, it's ego. You decide what that feeling will be in your closing argument.³⁴

Another attorney who had changed his career from a defense practice to a plaintiffs’ practice noted that an attorney has to understand his own emotions very well. “You should know where your emotions are and how to stop that emotional train,” he commented.³⁵ Asked whether he was emotionally more mature now than when he started practicing law, he responded immediately, “Undoubtedly. I know myself better. You learn things about yourself, if you're paying attention.”³⁶

³² KISER, HOW LEADING LAWYERS THINK, *supra* note 5, at 79.

³³ *Id.*

³⁴ *Id.* at 79–80.

³⁵ *Id.* at 80.

³⁶ *Id.*

C. *Effect of Emotions on Clients, Adversaries, Jurors, and Insurers*

Apart from knowing how emotions could affect their own judgment and advocacy, the attorneys repeatedly pointed to the importance of understanding how emotions affect clients and adversaries, especially in settlement negotiations:

- When I started representing plaintiffs, my first case settled for \$900,000. That's a case I would have paid \$75,000 for if we represented the defendant. Everybody is afraid—plaintiffs and defendants laying out all of this money. You have to manipulate the other side's fear and have none yourself. Fear equals the perception of risk—not even risk, but the perception of risk.
- Doctors' belief that they did nothing wrong interferes with settlement. For their part, it's an emotional issue. They believe deep down they did nothing wrong. But even if they believe they did nothing wrong, there's a business decision [to settle or try a case] that has to be made.
- People do not realize the emotional effect litigation has on clients. Young attorneys do not realize the damage that is done by having to relive the trauma of an emotionally devastating event like wrongful death. Humans have a capacity to mend, to recover over time, and litigation reopens memories that people are trying to recover from. They do not realize the damage they will do to their own clients even if they win. They [clients] have to relive all the painful events they are trying to put behind them. Most attorneys do not realize that winning is resolving a case earlier rather than winning at trial.
- I see non-money issues popping up all the time. In the case you mentioned in your letter, my client wanted the relationship to continue more than the judgment. In defendant's obstinacy and anger—just being a dickhead—he refused to continue the business relationship he was contractually bound to. As a businessman, my client wanted to earn his money. He did not just want a settlement payment. They [defendants] just wouldn't do it. We just wanted them to buy [product] from us. Even post-judgment they could have resolved this by resuming the relationship. But since the defendant wouldn't do that, we went on and also got attorneys' fees and court costs. Sometimes there is a disconnect. People are caught up in agendas—"I did nothing wrong."³⁷

The attorneys also considered the impact of subjective factors on jurors and insurance company claims representatives. In many cases, intangible features of a case were considered as important as "hard" facts:

- The soft stuff is important—the charismatic nature of the client, the attractiveness of the client. I've had adjusters say they will tender the limits after they met an attractive client.
- If I have a motorcyclist with a tattoo for a client, helping a grandmother cross a street, and he's hit by a drunk driver, that case is still worth less than a Boy Scout helping her across the street. A large part is based on subjective human behavior.

³⁷ *Id.* at 80–81.

- For jurors a big question is, “Is the plaintiff a nice person?”
- [Y]ou have to evaluate the overall case; this includes the likeability and unlikeability of the plaintiff and the defendants. We always look very carefully at the personal factors and have to ask, “Is there anything about the defendant that would offend anyone?” because that will change the evaluation.
- Personality is the most important factor in case evaluation. It’s a people skill. If you don’t have a feel for people you won’t make it. . . . This has so many facets it’s like a symphony. The tuba may not sound very good by itself, but when you put the tubas with the French horns and get them all together in the right way the sound is great.
- In a wrongful death case, I have to be very mindful of how to address the representative. I can’t address them like I would a regular plaintiff, even if I think they’re exaggerating. I have to watch my tone, my words. In one case they put their granddaughter on the stand, and I had to decide whether to cross-examine her. I said to myself, “I’ll earn my points somewhere else.” I’m not that stupid.
- If the plaintiff makes a sympathetic appearance, you have to take that into consideration. Conversely, if your client makes a poor witness—even if the medicine is on your side—it doesn’t matter. In another case I had, the jury said they had problems with my client and the doctor’s office manager’s credibility. The jurors’ perceptions of the parties go to the liability side.³⁸

Integrating all case factors—subjective and objective—into a composite evaluation is a major challenge for even the most savvy trial lawyers. “You have to become somewhat of a psychiatrist and a psychologist and relate to people and have them relate to you,”³⁹ remarks a renowned plaintiffs’ attorney.

D. Self-Awareness

The attorneys displayed a deep sense of their own skills, biases, shortcomings, and limitations. Many have developed empathy by experiencing failure and rejection in their own lives, and some have overcome alcoholism, childhood abuse, debilitating illness, and other personal tragedies. An attorney famous for his ability to connect with jurors describes a setback early in his career:

I think I see how people really are and how they come across. I also know what it’s like to be ignored. When I graduated from law school there was nothing I wanted more than to be a plaintiffs’ attorney in the San Francisco Bay Area. I got there and found it was a buyers’ market, and I could not even get an interview at [two San Francisco personal injury firms]. I showed up three times and tried to talk the receptionist into letting me talk with a lawyer at [law firm]. I couldn’t even get past the receptionist. Back then I hadn’t had a decent haircut in years and didn’t have these [points to lower teeth] because they had been

³⁸ *Id.* at 82.

³⁹ *Id.* at 83.

knocked out in a fight. I spent weeks trying to get a job before heading to [city] where I had said I would never live.⁴⁰

For every study attorney who enjoyed a comfortable childhood, another study attorney seemed to have lived a hardscrabble existence in his youth. Regardless of their backgrounds, both privileged and necessitous, the attorneys endeavored to fulfill their own concepts of accomplishment and to meet their personal standards of integrity and professional commitment to clients.⁴¹ Whatever their individual circumstances had been, the study attorneys exhibited a high level of self-awareness and deliberateness about their practices.

The self-awareness exhibited by the study attorneys is a frequently overlooked element of expertise. Expert performers like the study attorneys distinguish themselves by continually completing a self-regulatory cycle of forethought (task analysis and self-motivation), performance (self-control and self-observation), and self-reflection (self-judgment and self-reaction).⁴² Although non-experts also attempt to improve their performance in some way, experts accelerate their improvement by setting higher goals for themselves, recalling more pertinent and substantial information about their performance, and attributing errors to sources over which they have control.⁴³

Self-awareness is as important in the legal field as it is in any other professional endeavor where lives, reputations, and assets are at stake. When lawyers lack self-awareness and emotional intelligence, they unwittingly overlook key factors in case evaluation, mismanage pre-trial preparation, and fail to achieve optimal trial results. This lack of personal awareness directly harms case strategies, as law professors Stefan Krieger and Richard Neumann explain: “Most lawyers have some personality trait that, if left uncontrolled, will in one way or another obstruct strategy.”⁴⁴

The fact that some attorneys may be unaware of their emotions and how their personalities affect people is discussed by one of the study attorneys:

Case evaluation is like body consciousness. Do you know what that means? We had a guy in this office who had no body consciousness—could not walk

⁴⁰ *Id.*

⁴¹ That intrinsic motivation is a more powerful determinant of success than family income is again demonstrated by a study of ten thousand West Point cadets over fourteen years: “logistic regression results controlling for age, sex, race, high-school grades, SAT score, parental income, religion, entering year, other factors, and interaction terms indicated that the effect of holding stronger internally based reasons for attending West Point on graduating and becoming a commissioned officer was positive and significant (F4: $\beta = 0.22$, $P < 0.0001$).” Amy Wrzesniewski et al., *Multiple Types of Motives Don’t Multiply the Motivation of West Point Cadets*, 111 PROC. NAT’L ACAD. SCI. U.S. AM. 10990, 10993–94 (2014).

⁴² Barry J. Zimmerman, *Development and Adaptation of Expertise: The Role of Self-Regulatory Processes and Beliefs*, in CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE, *supra* note 4, at 705, 708.

⁴³ *Id.* at 711–12.

⁴⁴ STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* 39 (3d ed. 2007).

around without hitting something. He had a big blustery voice but no sense of how he impacted people and how he moved around the office. Many lawyers are personally brilliant but oblivious to where they are in the world. They do not see how they come off to people. They are not honed in their thinking. They might be book smart, but they are not people smart.⁴⁵

“Book smart but not people smart” suggests that attorney self-awareness has changed little since 1955, when Erwin Griswold, the Dean of Harvard Law School, said, “Many lawyers never do seem to understand that they are dealing with *people* and not solely with the impersonal law.”⁴⁶

Interacting with people and understanding the personal implications of legal decisions, the attorneys exhibited many of the core competencies that constitute emotional intelligence: self-awareness, self-assessment, consciousness, self-control, trustworthiness, conscientiousness and adaptability.⁴⁷ They were self-critical and continually monitored themselves for maladaptive behavior. In describing the interplay between emotions and law practice, they made these observations about themselves and other attorneys:

- Lawyers are ego driven, egocentric driven, especially trial lawyers. They start to believe they are invincible, they can do anything, like it’s just a matter of personality. Lawyers are guilty of being too egocentric. You have the leading role, you’re on center stage, you’re the producer and the director. There’s a danger in that. Trial work has a lot of stress; it attracts you when you’re young and you have a lot of testosterone, but there’s a price to pay. Sometimes it’s your judgment.
- How do I know when I’m getting too emotional? When I can’t see everything—when you can’t see—when you start to believe your own bullshit.
- In the old days, I was more emotional, one way or the other, about each case. I got better over time with controlling my emotions, more analytical, but I still feel like crying sometimes in closing argument. I let my voice crack. That’s as far I can go with the jury, even if I feel like crying.
- It’s my personality—I want to fight everything. I know now to pick my wars.
- It’s hard to know when the jury thinks you’re beating up on a plaintiff. I consider myself to be pretty sensitive, but in one case I misread the jury. Maybe I didn’t think to ask myself, “Will this bother the jury?” Maybe I wasn’t paying enough attention. You have to carefully assess the impact of your words—not just not getting angry but not being sarcastic.
- Some partners are very detail-oriented but have had some very bad results at trial because they lack that emotional sense.⁴⁸

⁴⁵ KISER, HOW LEADING LAWYERS THINK, *supra* note 5, at 84.

⁴⁶ Peter Reilly, *Mindfulness, Emotions, and Mental Models: Theory That Leads to More Effective Dispute Resolution*, 10 NEV. L.J. 433, 433 (2010) (quoting Erwin N. Griswold, *Law Schools and Human Relations*, 8 COLUM. L. REV. 605, 607, 609–10 (1908)).

⁴⁷ DANIEL GOLEMAN, WORKING WITH EMOTIONAL INTELLIGENCE 26 (reissue ed. 2006).

⁴⁸ KISER, HOW LEADING LAWYERS THINK, *supra* note 5, at 84–85.

As indicated by these remarks, the line between constructive and detrimental emotional involvement is opaque, and it is a perpetual challenge to exploit the benefits of emotional commitment and enthusiasm while avoiding the damage of emotional biases and extremism. What seems to distinguish these attorneys from some of their colleagues is not that they avoid this conundrum altogether but that they are thinking about it regularly.

V. LESSONS FROM THE MEDICAL PROFESSION

The medical profession is years ahead of the legal profession in recognizing the importance of emotional intelligence and incorporating psychology into its student admissions process and professional curriculum.⁴⁹ Many of the reforms in medical education reflect fundamental changes in how physicians communicate, coordinate responsibilities, and evaluate their performance on teams; how competence is defined and measured; how medical students develop discrete technical skills and broad problem-solving and communication skills; and how patient outcomes are affected by psychological, cultural, and sociological factors previously deemed extraneous to the practice of medicine. These fundamental changes and the trends they represent are shown in Table 1, with the hope that their counterparts in the legal profession can be readily identified and implemented.

The broad changes in the medical profession—shifts from individual to organizational practices; a focus on outcomes rather than processes; and increasing demands for leadership, communication, problem-solving, and observational skills—closely resemble contemporary challenges to the legal profession. Unlike the medical profession, however, the legal profession has proven to be tardy, if not stymied, in attempting to meet its challenges. The giant upheavals in law school enrollments, entry level employment prospects, and law firm economics will continue to rock the profession until it starts to acknowledge and adapt to decades of technological, pedagogical, demographic, and attitudinal changes.

To demonstrate how medical schools are responding to these challenges, four specific reforms are highlighted below. These reforms illustrate the range of innovation in medical school education, the skills assessed and enhanced by these reforms, and the applicability of the methods and underlying concepts to legal education.

⁴⁹ See Pat Croskerry, *Diagnostic Failure: A Cognitive and Affective Approach*, in 2 ADVANCES FOR PATIENT SAFETY: FROM RESEARCH TO IMPLEMENTATION 241, 246–47 (Kerm Henriksen et al. eds., 2005).

TABLE 1: MEDICAL PROFESSION TRENDS AND THEMES

Old	New
Orientation:	
Organs	Organisms
Teaching:	
Lectures	Simulations
Recall; Memory	Critical thinking
Discrete Subjects	Comprehensive problem-solving
Testing	Self-evaluation skills
Credentialing	Perpetual learning
Performance:	
Control	Communication; Leadership; Receptiveness
Certainty	Tolerance of ambiguity
Diagnostic speed	Observational quality
Opining	Listening; History-taking
Advising	Motivating
Directing	Leading
Competence	Effectiveness
Deference	Inquisitiveness
Uniformity	Adaptability; Agility
Procedures	Outcomes
Structure:	
Independent physicians	Health care teams
Hierarchies	Collaboration
Patients:	
Patient behavior	Cultures and contexts
Patient compliance	Cognitive and educational interventions

A. *MCAT*

In 2015, the Medical College Admissions Test (MCAT) will include a new section, “Psychological, Social and Biological Foundations of Behavior,” consisting of fifty-nine questions to be answered within ninety-five minutes.⁵⁰ This new section responds to public opinion research indicating that “physicians have a strong medical background but lack bedside manner” and recent findings that “integrating social and behavioral sciences into medical education can

⁵⁰ *What’s on the MCAT2015 Exam? Psychological, Social, and Biological Foundations of Behavior*, ASS’N AM. MED. COLLEGES, <https://www.aamc.org/students/download/374014/data/mcat2015-psbb.pdf> (last visited May 13, 2015).

improve health care.”⁵¹ As Darrell Kirch, the president of the Association of American Medical Colleges notes, “bedside manner is a complex mix of understanding people, where they come from, how they think, and why they behave the way they do We think this shift in emphasis will help us round out that dimension of a good doctor.”⁵²

The subjects tested in the new MCAT extend beyond conventional assessments of scientific knowledge and proficiency in working with scientific data to the “soft” skills that often are determinative of patient satisfaction and outcomes. Recognizing that “approximately half of all causes of morbidity and mortality in the United States are linked to behavioral and social causes,”⁵³ the new MCAT contains a broad range of topics from the behavioral and social sciences: perception, attention, cognition, memory, emotion, stress, personality, psychological disorders, motivation, attitudes, heuristics, intuition, culture, socialization, learning, behavior change, identity, bias, status, self-presentation, and social class.⁵⁴ These broad topics in psychology, sociology, and biology reflect this overall distribution: 60 percent psychology, 30 percent sociology, and 10 percent biology.⁵⁵

In incorporating the behavioral and social sciences, the new MCAT appears to recognize that scientific knowledge alone is sometimes ineffective in improving patient health and that technical proficiency can be ineffectual absent an understanding of persuasion, motivation, and risk assessment. Illustrative of this new emphasis on the psychological determinants of health and illness and the advantages of combining sound advice with effective persuasion are these two new MCAT questions:

Which statement is NOT compatible with the hypothesis that self-serving bias can account for participants’ explanations of their body weights?

- A. Obese participants view their unhealthy weight as a result of having too many fast food restaurants near home.
- B. Non-obese participants view their healthy weight as a result of having strong will power.
- C. Obese participants view their unhealthy weight as a result of not having time to exercise regularly.
- D. Non-obese participants view their healthy weight as a result of not having any fast food restaurants near their home.

Answer: D

⁵¹ Sarah Mann, *AAMC Approves New MCAT® Exam with Increased Focus on Social, Behavioral Sciences*, AAMC REP. (Mar. 2012), <https://www.aamc.org/newsroom/reporter/march2012/276588/mcat2015.html>.

⁵² *Id.*

⁵³ Richard Lewis, *MCAT Revision Anticipates Psychological Science*, APS OBSERVER (Apr. 2013), <http://www.psychologicalscience.org/index.php/publications/observer/2013/april-13/mcat-revision-anticipates-psychological-science.html>.

⁵⁴ ASS’N OF AM. MED. COLLS., PREVIEW GUIDE FOR THE MCAT2015 EXAM 94–98, 101–08, 113 (2d ed. 2012).

⁵⁵ *Id.* at 114.

Under which conditions would people be most likely to experience comparative optimism regarding their own likelihood of contracting HIV?

- A. When an in-group member has been diagnosed with HIV
- B. When an out-group member has been diagnosed with HIV
- C. When a public figure has been diagnosed with HIV
- D. When a credible physician has been diagnosed with HIV

Answer: B⁵⁶

These questions also represent a shift from process to outcomes, as professional performance is now measured not simply by the soundness of the diagnosis and the appropriateness of the recommendations but also by the actual effects on the patient. In law practices, clients now place a similar emphasis on outcomes and expect their attorneys to be both knowledgeable and effective. Technically correct legal advice that neither solves a problem nor guides future action is ignored and unpaid, as law firm collection rates plummet from 92 percent in 2007 to 83.5 percent in 2013.⁵⁷

B. *Multiple Mini Interviews*

In addition to modifying the MCAT, the medical profession has implemented more realistic, comprehensive methods to assess the problem-solving and decision-making styles and capacities of medical school applicants. One proven technique, adopted by more than thirty-five medical schools in the United States and Canada, is the Multiple Mini Interview (“MMI”).⁵⁸ An MMI usually consists of six to ten sessions—each approximately eight minutes long—in which a medical school applicant is asked to read a scenario posted outside the interview room door and then meet with a trained interviewer to discuss her opinions and decision-making strategies. The scenarios include ethical quandaries and current policy problems and sometimes require the candidate to interact with another candidate or relate to an actor in a simulated patient/physician discussion. At the conclusion of the interview, the candidate moves to another station with a different scenario and interviewer. Between interviews, the interviewers score each candidate’s performance on an evaluation form with a seven-point scale.

The MMI scenarios are designed to assess skills and characteristics that otherwise evade analysis in a conventional medical school application process: listening, problem solving, maturity, creativity, persuasion, tolerance of ambiguity and dissident opinions, flexibility, resilience, and empathy.⁵⁹ Specific medical knowledge is not required, and the scenarios generally present a prob-

⁵⁶ *Id.* at 116, 122.

⁵⁷ Jennifer Smith, *Law Firms Press to Get Bills Paid by Year-End*, WALL ST. J. (Dec. 22, 2013, 6:47 PM), <http://www.wsj.com/articles/SB10001424052702304773104579270470475326780/>.

⁵⁸ See *Multiple Mini Interview Preparation*, ASTROFF, <http://astroffconsultants.com/multiple-mini-interview-mmi/> (last visited May 18, 2015).

⁵⁹ *Id.*

lem that requires analytical reasoning complemented by sound communication skills and defensible insight into human behavior, as illustrated by this sample question:

Clostridium Difficile (*C. difficile*) is a type of bacteria that increases its activity with most antibiotic use, and is therefore very difficult to treat. Research shows that the most effective way to prevent the spread of infection is frequent handwashing. However, many people have flat-out refused to wash their hands in hospitals. The government is contemplating passing a policy to make it mandatory for people entering hospitals to wash their hands or else risk not being seen by doctors and being escorted out of the building against their will. Do you think the government should go ahead with this plan? Consider and discuss the legal, ethical or practical problems that exist for each action option and conclude with a persuasive argument supporting your decision.⁶⁰

The decision-making process employed by the candidate is often more important than the candidate's substantive response. Some scenarios replicate clinical crises demanding multiple levels of expertise and probe whether the candidates would recognize their limitations and seek advice from other professionals. In those scenarios, acknowledging that one does not know the answer but knows how to obtain it is preferable to the overconfident expressions that frequently precede rookie errors.

The MMI initially was designed to provide multiple samples of a candidate's abilities, to afford candidates an opportunity to recover from a negative performance in one interview, and to avoid the demonstrated subjectivity of traditional, single medical school interviews.⁶¹ Years after its adoption by leading medical schools, the MMI has proven to be a highly reliable predictor of clinical performance, far superior to traditional interviews.⁶² The benefits of this more comprehensive assessment tool extend beyond the medical profession and directly affect society in general, as the developers of the MMI explain: "Health sciences programmes do, after all, have an ethical obligation to do everything in their power to make appropriate and accurate admissions decisions because these decisions will have a large impact on the quality of health care received by society."⁶³ Improved assessment tools, if adopted by law schools,

⁶⁰ *Sample MMI Questions*, MULTIPLE MINI INTERVIEW, <http://multipleminiinterview.com/mmi-questions/> (last visited May 14, 2015).

⁶¹ Kevin W. Eva et al., *An Admissions OSCE: The Multiple Mini-Interview*, 38 MED. EDUC. 314, 323 (2004). See generally Clarence D. Kreiter et al., *Investigating the Reliability of the Medical School Admissions Interview*, 9 ADVANCES HEALTH SCI. EDUC. 147 (2004).

⁶² Eva et al., *supra* note 61; Kevin W. Eva et al., *The Ability of the Multiple Mini-Interview to Predict Preclerkship Performance in Medical School*, 79 ACAD. MED., at S40, S42 (2004); Koshila Kumar et al., *Experiences of the Multiple Mini-Interview: A Qualitative Analysis*, 43 MED. EDUC. 360, 361 (2009); Harold I. Reiter et al., *Multiple Mini-Interviews Predict Clerkship and Licensing Examination Performance*, 41 MED. EDUC. 378, 383 (2007). Some researchers express concern that MMI interviews favor extrovert personalities. See Anthony Jerant et al., *Does Applicant Personality Influence Multiple Mini-Interview Performance and Medical School Acceptance Offers?*, 87 ACAD. MED. 1250, 1255 (2012).

⁶³ Eva et al., *supra* note 61.

could have a similarly broad impact on the quality of legal services delivered to clients throughout society.

C. *Emotional Intelligence Assessment and Development*

After admission to medical school, students participate in a wide range of new programs designed to assess and improve their emotional intelligence. The recent emphasis on emotional intelligence results from the Accreditation Council for Graduate Medical Education's decision to include "interpersonal and communication" skills as one of the six core competencies.⁶⁴ Medical school graduates now are required to demonstrate skills "that result in the effective exchange of information and collaboration with patients, their families, and health professionals," and they are expected to "work effectively as a member or leader of a health care team or other professional group."⁶⁵

The imperative to improve physicians' interpersonal and communication skills is grounded in extensive research indicating that (1) diagnostic errors are the most common malpractice claims; (2) poor communication and teamwork are the leading causes of diagnostic errors; (3) communication failures among doctors, patients, and nurses often result "because some doctors, while technically competent, are socially inept;" and (4) improved communication is correlated with patient adherence to medication, willingness to seek care, and openness in disclosing information.⁶⁶ As Alicia Monroe, the University of South

⁶⁴ Daisy Grewal & Heather A. Davidson, *Emotional Intelligence and Graduate Medical Education*, 300 J. AM. MED. ASS'N 1200, 1200 (2008); Susan R. Swing, *The ACGME Outcome Project: Retrospective and Prospective*, 29 MED. TCHR. 648, 648 (2007).

⁶⁵ ACCREDITATION COUNCIL FOR GRADUATE MED. EDUC., ACGME COMMON PROGRAM REQUIREMENTS 9 (rev. ed. 2014), available at http://www.acgme.org/acgmeweb/Portals/0/PFAssets/ProgramRequirements/CPRs_07012015.pdf. The ACGME Competencies include:

IV.A.5.d) Interpersonal and Communication Skills

Residents must demonstrate interpersonal and communication skills that result in the effective exchange of information and collaboration with patients, their families, and health professionals.

Residents are expected to:

- (1) communicate effectively with patients, families, and the public, as appropriate, across a broad range of socioeconomic and cultural backgrounds;
- (2) communicate effectively with physicians, other health professionals, and health related agencies;
- (3) work effectively as a member or leader of a health care team or other professional group;
- (4) act in a consultative role to other physicians and health professionals; and,
- (5) maintain comprehensive, timely, and legible medical records, if applicable.

Id. at 7, 9.

⁶⁶ Boon How Chew et al., *Emotional Intelligence and Academic Performance in First and Final Year Medical Students: A Cross-Sectional Study*, 13 BMC MED. EDUC., art. 44, at 1, 1 (2013); Swing, *supra* note 64, at 652; Ali S. Saber Tehrani et al., *25-Year Summary of US Malpractice Claims for Diagnostic Errors 1986–2010: An Analysis from the National Practitioner Data Bank*, 22 BMJ QUALITY & SAFETY 672 (2013); Anita R. Webb et al., *Emotional Intelligence and the ACGME Competencies*, 2 J. GRADUATE MED. EDUC. 508, 508–09 (2010); Gardiner Harris, *New for Aspiring Doctors, the People Skills Test*, N.Y. TIMES, July 10, 2011, at A1.

Florida College of Medicine's Vice Dean for Educational Affairs, notes, "We teach students the technical and academic side of medicine, but we don't necessarily help them cultivate mindfulness, self-awareness, empathy, and other personality traits equally critical to their success as physicians."⁶⁷

Specific methods of measuring and developing student self-awareness and empathy include participating in 360-degree evaluations by nurses, professors, faculty advisors, and residents; attending workshops on communication and empathy; writing about emotional responses to traumatic medical events; taking self-report tests like the Bar-On Emotional Quotient Inventory ("EQ-I") and the Self-Report Emotional Intelligence Test ("SREIT"); ability-based tests like the Mayer-Salovey-Caruso Emotional Intelligence Test ("MSCEIT"); and physician-specific assessments like the Jefferson Physician Empathy Scale, and the thirty-four-item instrument developed by Carrothers, Gregory, and Gallagher; and studying videotaped discussions between a patient and the student during which the patient's galvanic skin responses (moisture level fluctuations signaling periods of emotional arousal) are simultaneously displayed.⁶⁸

The initial results from these programs indicate that "interventions can be successful in reducing the effects of stress and in enhancing medical students'/junior doctors' empathy skills."⁶⁹ Other studies, however, report uneven results and a lack of interest and commitment among medical students.⁷⁰ Although "best practices" for developing medical students' emotional intelligence have yet to be established, the benefits of enhanced emotional intelligence appear to be well documented.⁷¹ A 2010 literature search, for instance, reported that higher emotional intelligence was positively correlated with better "doctor-patient relationship[s], increased empathy, teamwork and communication skills, and stress management, organizational commitment and leadership."⁷²

⁶⁷ Mike Martin, *New Medical Education Program Selects Students for "Emotional Intelligence,"* AAMC REP. (Dec. 2011), <https://www.aamc.org/newsroom/reporter/december2011/268876/emotional-intelligence.html>.

⁶⁸ See, e.g., Elizabeth J. Austin et al., *A Preliminary Study of Emotional Intelligence, Empathy and Exam Performance in First Year Medical Students*, 39 PERSONALITY & INDIVIDUAL DIFFERENCES 1395, 1399 (2005); Robert M. Carrothers et al., *Measuring Emotional Intelligence of Medical School Applicants*, 75 ACAD. MED. 456 (2000); Grewal & Davidson, *supra* note 64, at 1201.

⁶⁹ Eva M. Doherty et al., *Emotional Intelligence Assessment in a Graduate Entry Medical School Curriculum*, 13 BMC MED. EDUC., art. 38 at 1, 1 (2013); accord M. Gemma Cherry et al., *What Impact Do Structured Educational Sessions to Increase Emotional Intelligence Have on Medical Students? BEME Guide No. 17*, 34 MED. TCHR., 2012, at 11, 11.

⁷⁰ Webb et al., *supra* note 66, at 510–11.

⁷¹ Chew et al., *supra* note 66 ("[I]n clinical practice, [emotional intelligence] has been related to improved empathy in medical consultation, doctor-patient relationships, clinical performance and patient satisfaction."); see Doherty et al., *supra* note 69; Hui-Ching Weng et al., *Associations Between Emotional Intelligence and Doctor Burnout, Job Satisfaction and Patient Satisfaction*, 45 MED. EDUC. 835, 835 (2011).

⁷² Sonal Arora et al., *Emotional Intelligence in Medicine: A Systematic Review Through the Context of the ACGME Competencies*, 44 MED. EDUC. 749, 749 (2010) (citations omitted).

D. Enhanced Observation Skills

The “Observational Skills Workshop,” designed to enhance medical students’ perceptions and diagnoses, began as a collaboration in 1997 between Linda Friedlaender, the Curator of Education at the Yale Center for British Art, and Irwin Braverman, M.D., Professor of Dermatology at the Yale School of Medicine.⁷³ More than twenty-five other medical schools (and business schools like the Yale School of Management and the Wharton School at the University of Pennsylvania) have implemented similar programs.⁷⁴

In a typical enhanced observation program, a group of four medical students view a pre-selected painting, chosen for its rich gestures, vivid expressions, and ambiguous setting, for fifteen minutes and then are asked to describe it “in a way that if someone is listening but doesn’t see the painting they will get a mental image of it.”⁷⁵ (This is remarkably similar to an attorney’s challenge in depicting a scene for a judge or jury). After relating their perceptions, the students are asked to create the narrative of the picture and to form a hypothesis “as to what you think this is all about.”⁷⁶ Before a curator describes the actual background of the painting, the students often are asked whether something has been left out of their descriptions, narratives, or hypothesis. As Ms. Friedlaender notes, “Sometimes, interestingly enough, the elephant in the middle of the room is not addressed. And I will say to them, ‘Would you like to say something about the person in the middle of the painting?’”⁷⁷

Medical students participating in these enhanced observation programs demonstrate a significant improvement in detecting and diagnosing diseases.⁷⁸ The paintings, as Dr. Braverman explains, “are a surrogate for the patient This allows for differential diagnosis and highlights the problem of premature

⁷³ See Jacqueline C. Dolev et al., *Use of Fine Art to Enhance Visual Diagnostic Skills*, 286 J. AM. MED. ASS’N 1020, 1020 (2001).

⁷⁴ See Yale Univ., *The Art of Medicine*, YOUTUBE (May 5, 2009), <https://www.youtube.com/watch?v=oL1b1tMNI4E>.

⁷⁵ *Id.*; see Jacqueline C. Dolev et al., *Observational Skills*, YALE SCH. MED., <http://medicine.yale.edu/dermatology/education/obvskills/> (last visited May 30, 2015).

⁷⁶ Yale Univ., *supra* note 74.

⁷⁷ *Id.*

⁷⁸ Dolev et al., *supra* note 73; Sheila Naghshineh et al., *Formal Art Observation Training Improves Medical Students’ Visual Diagnostic Skills*, 23 J. GEN. INTERNAL MED. 991, 995 (2008) (“[O]bservation skills, including those directly relevant to clinical medicine, can be successfully acquired through active, structured study of works of art and medical imagery.”); Pamela B. Schaff et al., *From Contemporary Art to Core Clinical Skills: Observation, Interpretation, and Meaning-Making in a Complex Environment*, 86 ACAD. MED. 1272, 1272 (2011) (“[S]tudents were able not only to apply their observational and interpretive skills in a safe, nonclinical setting but also to accept the facts that ambiguity is inherent to art, life, and clinical experience and that there can be more than one answer to many questions.”); see Johanna Shapiro et al., *Training the Clinical Eye and Mind: Using the Arts to Develop Medical Students’ Observational and Pattern Recognition Skills*, 40 MED. EDUC. 263, 263 (2006) (“In the arts-based conditions, students also developed skills in emotional recognition, cultivation of empathy, identification of story and narrative, and awareness of multiple perspectives.”).

conclusions.”⁷⁹ In addition to improving their diagnostic skills, the medical students learn critical communication skills as they listen to and discuss other students’ perceptions and interpretations. “They begin to see things they ordinarily would have passed over,” Dr. Braverman relates. “And what we realized afterwards is that we’ve actually taught them something about teamwork, what it means to communicate with one another over some issue.”⁸⁰

At the conclusion of an enhanced observation program, a medical student commented, “Being a doctor is all about seeing everything that’s in front of you and not just seeing it but really looking and watching and observing. And to be a better observer, is to be a better doctor.”⁸¹ In the practice of law as well, better observers are better lawyers. An attorney’s ability to accurately perceive and describe people and conditions, to discern the emotions of clients, judges, witnesses, and other attorneys and to divine and convey the narrative of a dispute or transaction is central to effective communication and successful client relationships. Just as physicians lose diagnostic acuity as their attention shifts from patient observation to laboratory tests, lawyers lose evaluative capabilities as their attention shifts from human expression to contracts and briefs. In both professions, we are at risk of losing our “visual literacy.”

CONCLUSION

Our inability to reconcile emotions with the legal order has retarded improvements in law school education and the practice of law. In our quest for dispassion, impartiality, and predictability, we have divorced ourselves from the realities of human behavior. Like Ulysses strapping himself to the ship’s mast to avoid the Sirens’ temptations, we have abjured emotions to escape the troublesome tensions between fairness and compassion, equality and individuality, uniformity and discretion, knowledge and wisdom, and objectivity and discernment. Our unease with emotions leads to serious misunderstandings and erroneous predictions about how clients, judges, and juries react to loss, disrespect, neglect, conceit, unfairness, frustration, and deceit.

Effective attorneys understand their personal motivations, biases, convictions, habits, and weaknesses, and they develop integrity, credibility, humility, and maturity by embracing all dimensions of their personalities. They also know that their clients’ positions ultimately will be evaluated by imperfect judges and juries attempting to impose their individual sense of justice under a canopy of law. Recognizing that jurors’ decisions are an admixture of facts, common sense, formal law, and expert witness testimony, effective attorneys

⁷⁹ John Jesitus, *Studying Fine Art Enhances Clinical Observational Skills*, DERMATOLOGY TIMES (Feb. 1, 2012), <http://dermatologytimes.modernmedicine.com/dermatology-times/news/modernmedicine/modern-medicine-feature-articles/studying-fine-art-enhances-cl>.

⁸⁰ Yale Univ., *supra* note 74.

⁸¹ *Id.*

skillfully integrate emotions, evidence, and arguments.⁸² Since they have learned to respect rather than shun emotions, their advocacy more closely tracks jurors' reasoning processes, and they impress jurors as being both more likeable and more persuasive.

The role of emotion in case evaluation and the importance of emotional commitment in trial representation are synthesized in this email to the author from John V. Hager, one of the attorneys interviewed for *How Leading Lawyers Think*:

I wanted to add a couple points after thinking about our discussion.

Maintaining a professional distance is important to accurate evaluation, as I said. But a lawyer really serves two roles: that of an advocate, putting the client's best case forward to the outside world, and, on the other hand, serving as a neutral (this is the real point for evaluation) advisor about the likely outcome of the case. I am not sure many lawyers appreciate this distinction or realize that they have these two roles that must be separated.

In the advocate's role, feeling the emotion of the case, even for a defendant who will not pay a dime [because of insurance coverage] if the case is lost, is important to the best advocacy. Letting oneself feel the emotion, without being overcome by it, helps trial advocacy. During almost every trial, I end up crying sometime, away from court, not because of unhappiness or fear of loss, but just from the overwhelming emotion I feel during trial. I don't know if I am unique in this respect. I do think some lawyers lose this as they age—a sort of cynicism can creep in. I consider myself lucky that I can genuinely feel the emotion in every case.

This is probably beyond your topic of interest, but your inquiry prompted me to have these thoughts that I felt I should share with you.⁸³

⁸² NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* 5 (2000).

⁸³ KISER, *HOW LEADING LAWYERS THINK*, *supra* note 5, at 85.