

Seeing Things As We Are. Emotional Intelligence and Clinical Legal Education

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Introduction

*We do not see things as they are, we see things as we are.*¹

Is there room for happiness in legal practice? Should lawyers expect to be reasonably satisfied in their work? If we want to answer yes to these questions can we as clinical legal educators help law students to develop the personal skills, not just the legal skills they will need in practice? Some research shows that lawyers tend to be thinkers rather than feelers, and those lawyers who are thinkers are more satisfied in their work than those who are feelers.² Other research shows that many lawyers are unhappy at work and that dissatisfaction can reduce the quality of legal practice.³ What can clinicians do to help students cope with stress after they enter legal practice, to make appropriate decisions about career directions, and to still focus on being good lawyers?

Emotional intelligence is no longer a new concept. Those who have read nothing about it can imagine it probably means an intelligent use of our emotions. In fact few are aware of how much their emotions inform their 'rational' decisions, not just their 'irrational' behaviour. Emotions not only affect how we think but also the values we hold and the attitudes we choose. Becoming aware of the inevitable emotional influences helps us to understand ourselves and others, to anticipate and to interpret behaviour and attitudes in ourselves and others. Developing our emotional intelligence primarily involves improving our self-awareness in ways that will benefit our interactions with clients, judges, juries, colleagues, senior partners, friends and family. It is not too grand to suggest that encouraging law students to improving their emotional intelligence will help them both to be better lawyers and to enjoy their practice.

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1 Anais Nin

2 See Susan Daicoff (1997), 'Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism', 46 *Am. U. L. Rev.* 1337, at pp.1361–62, 1365–66 and 1392–93.

3 See below at nn.3–5, and accompanying text.

This paper considers the relevance of emotional intelligence for the cognitively dominated law school. I describe the crisis in the American legal profession and suggest how those problems are likely to be replicated in Australia. I examine what little we know about the impact of law schools on students and find the extant research is not encouraging. The paper considers how clinical legal education provides the best opportunities to engage with students on levels that could make a difference to their inner wellbeing in practice. I then look briefly at our developing understanding of emotional intelligence and its relevance in clinical legal education. The last part considers specific opportunities already in many clinical programs for encouraging students to develop their emotional capacities.

If we want to produce confident and competent graduates for the long haul, they must also be balanced and happy in themselves. Actively recognising emotional intelligence in clinical legal education will ultimately enhance those personal qualities that help lawyers cope with stressful situations. Helping students to develop their emotional competencies will help them to survive in legal practice, to enjoy their work, and it will make them better lawyers.

Lawyer Burnout

Law is a dangerous profession. Over the past two decades studies in America have shown that lawyers suffer significant levels of depression, other mental illnesses, alcoholism, drug abuse and poor physical health, in addition to high rates of divorce and suicidal ideation.⁴ A Johns Hopkins study in 1990 found that lawyers were 3.6 times more likely to suffer a major depressive disorder than others of the same social demographic.⁵ Some American researchers have described a 'tripartite crisis' in the legal profession, consisting of a decline in professionalism, a decline in the public opinion of lawyers and a decline in the wellness and satisfaction levels of practicing lawyers.⁶

In Australia there is less local data, but what information there is suggests deterioration in the wellbeing of lawyers. High staff turnover is an obvious indicator and a growing concern for law firms who receive the majority of law graduates.⁷ Another signal of problems is the high rate of lawyers leaving the profession. It seems fair in part to blame inflexible working conditions making it difficult for lawyers with parenting responsibilities. In 1989 a survey on the satisfaction of Victorian lawyers showed that in one year 6% of male practitioners and 12% of women practitioners did not renew their practising certificates.⁸ The main reason given by men was 'Lack

4 American Bar Association, 'The Report of "At the Breaking Point": A National Conference on the Emerging Crisis in the Quality of Lawyers' Health and Lives - Its Impact on Law Firms and Client Services' 5-6 April 1991; Amiram Elwork and G Andrew H Benjamin (1995), 'Lawyers in Distress', *Journal of Psychiatry & Law*, (Summer), 205-229; J A Connie, J A Beck et al. (1995-96), 'Lawyer Distress: Alcohol - Related Concerns Among a Sample of Practicing Lawyers', 10 *Journal of Law and Health*, Vol.1, 1995-96, p.50.

5 William W. Eaton et al. (1990), 'Occupations and the Prevalence of Major Depressive Disorder', 32 *Journal of Occupational Medicine*, p.1079, at 1081-83.

6 Susan Daicoff (1998), 'Asking Leopards to Change

Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes, 11 *Geo. J. Legal Ethics* 547; Martin Seligman, Paul Verkuil and Terry Kang (2005), 'Why Lawyers are Unhappy', *Deakin Law Review*, 10(1).

7 Olivia Prodan (2003), 'Turn and turn about: Employee turnover in legal firms can be predicted and steps taken to avert this loss of human capital', 77(4) *Law Institute Journal* (Law Institute of Victoria) 90; John Quinlan, (2003) 'Human Resources: Minding the Family' *Law Institute of Victoria*, 77(12) p.96;

8 Law Institute of Victoria, 'Career Patterns of Law Graduates', *Law Institute Journal*, May 1990, p.342-43.

of Satisfaction' (shared with 'Personal/Lifestyle'). Women gave 'Personal/Lifestyle' as the biggest reason, followed by 'Family Commitments' then 'Lack of Satisfaction'.⁹ Another Victorian study in 1999 showed up to 30% of private practitioners were considering leaving their jobs.¹⁰ By 2000 44% of lawyers in Sydney and Melbourne were considering leaving their present firm.¹¹ Also in 2000 an experienced legal recruiter in Queensland warned that the majority of lawyers were unhappy at work and were looking for change.¹²

An Australian survey of lawyers in 1995 found that their most frequently needed skills were oral and written communication.¹³ Necessary interpersonal skills like communication are not taught in law schools, except for those with good clinical legal education programs. Similarly a study in Western Australia in 1999 identified communication failures within the firm as the biggest cause of dissatisfaction among legal practitioners.¹⁴ The study found also that solicitors had inadequate control over factors which impacted on their work, there was unfair allocation of "interesting work", expectations were not communicated, there was no clear vision and direction from firm partners, and salary was inadequate compared to the level of responsibility.

In New South Wales as early as 1991 the Law Society of NSW was sufficiently concerned about stress levels in the profession it established LawCare, a counselling service for practitioners and their families. By 1998 solicitors were working 'excessively long hours', more than in other professions, and it was impacting on their family and personal lives.¹⁵ In 2001 the Professional Standards Department of the Law Society of NSW found that unacceptable numbers of solicitors faced personal difficulties such as depression, alcohol dependency, gambling, stress and even serious illness.¹⁶

These difficulties impact not only on the quality of life among lawyers but on the quality of their work. Complaints about legal practitioners, including failure to respond to clients' enquiries and excessive delays in handling matters led to the creation of a new service for lawyers called the Lawyers Assistance Program Inc.¹⁷ Subsequent studies commissioned by the Law Society of New South Wales from 2001 to 2004 show between 13% and 18% of responding solicitors were either dissatisfied or very dissatisfied with their jobs.¹⁸ In 2004, 52% of NSW respondents indicated that

9 *Ibid.*

10 Victorian Women Lawyers Association, *Taking up the Challenge*, May 1999, p19

11 Lucinda Schmidt, "Law is hell", *Business Review Weekly*, 29 September 2000, p70; while this statistic does not necessarily indicate dissatisfaction with the practice of law, it reflects poorly on stability in the profession and legal firms' capacity for staff retention. In 2001 the Young Lawyers' Section of the Law Institute published some 'horror stories' from complaints by young lawyers over a number of years about the employment conditions in some Victorian law firms: Law Institute of Victoria, Young Lawyers' Section, *Thriving and Surviving*, April 2001, p1.

12 'Queensland Lawyers Looking to Leave', *Lawyers' Weekly*, 15 December 2000, p.2.

13 Sumitra Vignaendra (1998), *Australian Law Graduates' Career Destinations*, Centre for Legal Education, Commonwealth of Australia. In 2000 another government survey of employers found that

communication skills were still among the biggest deficiencies of graduates: A C Nielsen Research, (2000). *Employer satisfaction with graduate skills*. DETYA: EIP. Report No. 99/7.

14 Law Society of Western Australia & Women Lawyers of Western Australia, (*ibid* 1999), p.22.

15 'Quality of Life in the Legal Profession Report', Law Society of NSW 1999; 'Quality of Life: New Momentum Brought to Legal Workplace Reform', *Law Society Journal* (NSW Australia), September 1999, 37 (8) p.40.

16 Louise Aaron (2001), 'Members Services News: A New Program to Help Members in Difficulty', *Law Society News*, April 2001, p.26

17 http://www.lap.com.au/lap_background.html on 22 February 2006.

18 Law Society of New South Wales, *Remuneration and Work Conditions Report, 2001, 2002, 2003, 2004*, Mercer Human Resource Consulting, Sydney.

stress at work had increased over the previous 12 months and about a third reported experiencing discrimination, harassment, intimidation or bullying.

Stressors on the legal profession include the perceived demands for growth, deregulation and competition and the effects of globalisation and changing technology. Law firms may concentrate on these issues at the expense of their solicitors, many of whom are stressed from high workloads, competitive billing, hierarchical workplaces and inflexible work practices. In addition, some have to cope with distressed clients, aggressive colleagues, hostile lawyers for other parties and difficult judges. Law schools without clinical programs assume that Practical Legal Training, the College of Law or Articles Training Programs are sufficient to provide the skills and personal development for graduates to practise successfully.

In Australia since 1983 the *Lawyers Practice Manual* has helped steer many lawyers in the right direction when they are unsure about legal practice or have a particular type of matter for the first time.¹⁹ However knowing the law, and knowing about legal process is not enough. As Neil Rees indicated in 1980, many lawyers suffer burn-out because they frequently work with people experiencing distressing problems and are often the harbingers of bad news in their advice; they have to communicate with people at a deep level but get no training in interpersonal skills; and some are very sympathetic with their clients but tend to over-commit and take every loss personally.²⁰

Recognition of these problems helped the growth of clinical legal education, which has made inroads in Australia since the 1980s.²¹ Many clinical programs provide students with experiences that help them develop their interpersonal skills. However the combined impact of clinical legal education so far on the Australian legal profession may not be enough to stave off a crisis.

Most academics and practitioners would agree that practical legal training helps graduates entering the profession as well as benefiting their employers and the community they serve. However, the debate has been dominated for too long by a continuum between doctrinal legal education and practical legal training.²² It appears that existing education and training of law students is insufficient to equip graduates adequately to enter the profession without significant distress for the lawyer and risks for clients. There may be no improvement in the levels of satisfaction, the quality of service or the long-term survival rates of practitioners until law schools recognise the importance of personal development in the preparation of law students for the legal profession.

19 *The Lawyers Practice Manual* is an updated loose-leaf service available for most Australian States though Thomson Law Book Co.

20 Neil Rees (1980), 'Legal Services: Coping With Burnout', *Legal Services Bulletin*, April 1980, pp.80–84.

21 The first clinical legal education program began at Monash University in 1975 and the second through

the University of New South Wales in 1981; Simon Rice with Graeme Ross (1996) refers to several unpublished reports on the early development of legal clinics in Australia *A Guide to Implementing Clinical Teaching Method in the Law School Curriculum*, Centre for Legal Education, Sydney at pp.5–6.

22 Rice cautioned against confusing practical legal education with clinical legal education (*ibid* 1996, p.9).

The Damage of Law School

Education: what is left when the facts are forgotten.²³

There has been increasing concern in America as more researchers conclude that traditional legal education contributes to depression among law students and alienation in the legal profession.²⁴ Krieger and Sheldon found that law students with normal mental health patterns at orientation by second year display significant anxiety, depression and reduced motivation:

The data reveal additional changes that are very troubling, including dulling of student motivation and goal-directed striving, and shifts away from initially positive motivation and altruistic values toward external, imposed values and motives.²⁵

There is little empirical research on the well-being of Australian law students but the similarities between the legal systems in Australia and America are enough for concern. In both countries the conventional and primary role of law schools is to inculcate doctrinal legal theory and to teach legal analysis. Both systems encourage students to ‘think like a lawyer’, without clarifying that that form of critical and pessimistic analysis is a limited tool for specific purposes.²⁶ Both systems focus on academic honours as the primary, if not sole, determinant of success. Neither system addresses the negative public image of lawyers as being fundamentally self-interested nor emphasises the socially positive contributions by lawyers, including community work, human rights and public interest cases and social reform agendas.

There are important differences however, including the significant presence of legal clinics and externship programs in American law schools compared with the Australian system. American legal education is a graduate system involving only three years while most Australian law students enter law school as undergraduates, attending from four to five years, and are typically younger and potentially more vulnerable to stressors.

A 1979 study found that causes of stress among Australian law students included a heavy work load, high level of competition, isolation and loneliness, emphasis on professionalism narrowly defined rather than humanistic or philosophical issues, and ‘a paucity of ongoing positive feedback reinforcement’.²⁷ Since then a significant body of research has confirmed the importance of

23 G. Gibbs, (1990), ‘Twenty terrible reasons for lecturing’, *Oxford Centre for Staff and Learning Development*.

24 Kennon M Sheldon and Lawrence S Krieger (2004), ‘Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being’, 22 *Behavioral Sciences and the Law*, 261–286; Linda G Mills (2000), ‘Affective Lawyering: The Emotional Dimensions of the Lawyer-Client Relation’, in Dennis P Stolle, David B Wexler and Bruce J Winnick (eds) *Practicing Therapeutic Jurisprudence: Law as a Helping Profession*, Carolina Academic Press, Durham NC; Matthew M Dammeyer & Narina Nunez (1999), *Anxiety and Depression Among Law Students: Current Knowledge and Future Directions*, 23 *Law and Human Behavior*, 55 at 63; Duncan Kenndy (1992), ‘Legal Education as Training for Hierarchy’,

in David Kairys (ed.) *The Politics of Law: A Progressive Critique*, Basic Books, New York; William Brennan Jr (1988), ‘Reason, Passion, and The Progress of Law’, 10 *Cardozo L. Rev.* 3; Lynne Henderson (1987), ‘Legality and Empathy’, 85 *Mich. L Rev.* 1574;

25 Lawrence S Krieger (2002), ‘Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence’, 52 *Journal of Legal Education*, 112 at 114.

26 ‘Thinking like a lawyer’ among other things is deeply pessimistic. It includes not just critical analysis of all possibilities, but envisaging the worst case scenario to ensure protection for the client.

27 Phyllis W Bexk, J D & David Burns, MD (1979) ‘Anxiety and Depression in Law Students: Cognitive Intervention’, 30 *Journal of Legal Education*, 270, at 285–86.

feedback to students.²⁸ However in law schools it seems only clinical programs provide enough feedback for students to maximise their opportunities for personal development and minimise the damaging effects of anxiety over performance.²⁹

The new focus in Australian legal education in recent decades is towards practical legal training. Several enquiries have recommended that law schools introduce practical legal training into their curriculum, despite opposition from some universities, some governments and some in the legal profession.³⁰ The most recent report was by the Australian Law Reform Commission in 1999 which called for legal education to focus on what lawyers need to do rather than traditional notions of what they need to know.³¹ Universities were generally unresponsive and by 2001 large law firms had commenced their own in-house practical legal training for newly employed lawyers. However the Law Council of Australia complained there was no coordination or monitoring of standards, and accused the Commonwealth Government of starving law schools of funds at a time when studying law was becoming very popular.³²

In the meantime, Clinical Legal Education was becoming more established in Australian law schools and many of these clinics are part of the community legal centre movement.³³ Arguably the defining characteristic of good clinical legal education in Australia has not been skills training, although that is important, but involves ethical and personal development of the student under legal supervision.³⁴ Because legal clinics embrace the 'real world' of legal practice with live-client situations, they serve as a bridge between the legal academy and the legal profession.

Legal education is only one ingredient in the creation of professional and happy lawyers, although an important one. Personality issues are also relevant and it is likely that law students 'self-select' according to popular preconceptions of what legal practice is about. American research in 1967 showed that while law schools attracted students of all personality types, most law students were inclined towards a 'thinking' perspective rather than 'feeling', and those who were inclined to feeling were more likely to drop out of law school.³⁵ A 1995 study found that 78% of first year

28 A Mutch (2003), 'Exploring the practice of feedback to students', *Active Learning in Higher Education* vol 4 no 1; W Huit (2004), 'The importance of feedback in human behavior', *Educational Psychology Interactive*. Valdosta, GA: Valdosta State University.

29 Victor M. Goode (2000), 'There Is a Method(ology) to This Madness: A Review and Analysis of Feedback in the Clinical Process', 53 *Okla. L. Rev.* 223; Daniel J. Givelber, Brook K. Baker, John McDevitt & Roby Miliano (1995), 'Learning Through Work: An Empirical Study of Legal Internship', 45 *J. Legal Educ.* 1 (1995).

30 The Pearce Report (1987), the McInnis and Margison Report (1994) and the Australian Law Reform Commission Report (1999), see next footnote. Dennis Charles Pearce, Enid Campbell, Don Harding. 'Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission', Canberra, AGPS, 1987; Craig McInnis and Simon Marginson. 'Australian Law Schools After the 1987 Pearce Report', AGPS, 1994.

31 Australian Law Reform Commission Report No.89, 'Managing Justice: A Review of the Federal Civil

Justice System', December 1999 at para 2.21.

32 Law Council of Australia, '2010: A Discussion Paper – Challenges for the Legal Profession', Executive Summary, September 2001, also p.74.

33 Mary Anne Noone (1997), 'Australian Community Legal Centres – The University Connection', Jeremy Cooper and Louise G Trubeck (eds) *Educating for Justice*, Ashgate, Sydney, 257–284. There are currently about 160 members of the National Association of Community Legal Centres, see <http://www.naclc.org.au/>

34 Rice (op cit 1996, pp.30–32) discusses the importance of personal development as a part of professional development.

35 Paul VanR. Miller (1967), 'Personality Differences and Student Survival in Law School', 19 *Journal of Legal Education* 460–467, at 465–66. These findings were supported by research in 1994 finding that lawyers prefer thinking to feeling compared with the general population, in Lawrence R Richard, *Psychological Type and Job Satisfaction Among Practicing Lawyers in the United States*, 22 (1994) (unpublished Ph D dissertation, Temple University, Philadelphia).

law students were ‘thinking types’ as opposed to ‘feeling types’ on the Myers-Briggs Type Indicator.³⁶ Other research on lawyer wellbeing suggests it is precisely the thinking types who need guidance on how to manage their feelings.³⁷

In 2002 Barrette critiqued extant research in legal education for ignoring the importance of self-awareness arising from experiential learning.³⁸ He argued that almost all researchers focused on what he called the lowest level of legal content and legal process; some researchers examined the second level, encouraging students to understand the application of legal theories and making the experience intelligible. The third level Barrette found had received virtually no attention: how our attitudes, beliefs, values and perspectives affect us as lawyers. He asks:

*How can a student learn from an experience when the adrenaline is pumping so strongly that the student does not recall even speaking to the court, oblivious to what or how any dialogue may have taken place?*³⁹

Some may be unconcerned that some students and lawyers who are inclined to ‘feeling’ drop out because they may be unsuited to legal practice. However our failure to support the broad range of aspiring lawyers would aggravate at least two of the problems identified in the ‘tripartite crisis’: the decline in professionalism broadly defined and the decline in the public opinion of lawyers and the legal profession. There is a case for changes in both legal education and legal practice to attract and support broader entry to the profession, perhaps especially for those inclined to feeling, who appear to be at greatest risk.

Law schools collude with legal systems and corporate employers to continue privileging intellect over other human qualities. Most law schools offer academic medals that reward intellectual achievement as the primary goal. They ignore the early research suggesting that IQ differences have no relationship with performance in law schools.⁴⁰ Empirical research is yet to be done measuring the emotional intelligence of law students and graduates, but there are studies in education that demonstrate enhancing emotional intelligence improves academic performance.⁴¹ Should we now ask whether clinical legal education can make a difference?

36 V R Randall (1995), ‘The Myers-Briggs Type Indicator, First Year Law Students and Performance’ 26 *Cumb L Rev* 63 at 108; Randall also found that 68% preferred judgment and 22% preferred perception.

37 Susan Daicoff (1997) discusses several studies in ‘Lawyer Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism’, 46 *Am. U. L. Rev.* 1337, at 1361–62, 1365–66 and 1392–93.

38 Joseph A Barrette (2002), ‘Self-Awareness: The Missing Piece of the Experiential Learning Puzzle’, 5 *T M Cooley Journal of Practical and Clinical Law*, 1–12.

39 *Ibid* p.2.

40 D. Bligh (1977), *What’s the Use of Lectures?* Exeter

DA: *Intellect* (5th ed. 1998); Hugh Brayne (*op cit* 1996), at p.46.

41 Joseph E Zins, Michelle R Bloodworth, Roger P Weissberg and Herbert J Walberg, (2004) *Building Academic Success on Social and Emotional Learning: What Does the Research Say?* Teachers College, Columbia University; R W Blum, C A McNeely and P M Rinehart, (2002) *Improving the Odds: The Untapped Power of Schools to Improve the Health of Teens.* Minneapolis, MN: University of Minnesota, Center for Adolescent Health and Development; K F Osterman, (2000) ‘Students’ Need for Belonging in the School Community’, *Review of Educational Research*, 70; C C Lewis, E Schaps and M S Watson, (1996) ‘The Caring Classroom’s Academic Edge’, *Educational Leadership*, (Alexandria VA) Vol.54, 16–21.

The Hope of Clinical Legal Education

*The lawyer who behaves like a jerk in court is not an 'aggressive advocate' with an 'assertive strategy', but a jerk.*⁴²

Good legal clinics encourage students to fully engage with the complexities and ambiguities of legal practice, and to think about the political situation of their clients, including opportunities for addressing the public interest and the need for law reform. As Hugh Brayne opined: 'It is not enough to teach law students how legal concepts and arguments fit together, they should be encouraged to question why.'⁴³

Currently there are 30 law schools in Australia, of which less than half offer clinical legal education and less than half of those have an in-house legal clinic.⁴⁴ The School of Law at Murdoch University for example runs a strong clinical program at the Southern Communities Advocacy and Legal Education Service Inc. (SCALES), at Rockingham, Western Australia, which guides students in managing their own cases under supervision in a general legal practice and an advanced clinical program in immigration law.⁴⁵ Another very successful clinical program is offered by the University of Newcastle Legal Centre which engages students on major public interest cases, involving not just the gathering and analysis of facts but reflecting on their implications in systemic failures and drafting submissions to inquiries, commissions, law reform bodies and coronial inquests.⁴⁶

The Australian experience suggests the closer supervision, focus on reflection and regular feedback of the in-house legal clinic can provide the best opportunities of *integrating* the personal, theoretical, analytical, and ethical goals with the cognitive knowledge and practical skills necessary for a rounded legal education.⁴⁷ The integration is critical because if law students practised the way we conventionally taught them doctrinal law, they would tend to ignore everything except the basic facts. In order to deliver the 'correct' legal answer some would ignore the client's background and cultural context, the opportunities for 'non-legal' assistance, the influence of policy and current developments, personal nuances involving the client's situation, perhaps even what the client wants.⁴⁸

Brayne argues we can encourage 'deep learning' by creating opportunities for students to feel a

42 Daniel R Coquillette (1994), 72 N C L Rev 1271

43 Hugh Brayne (1996), 'Getting By With a Little Help From Our Friends', 2 *Contemporary Issues in Law*, No.2, pp.31–51.

44 Law Council of Australia (*op cit* 2001); Edith Cowan University in Western Australia has opened a law school since this report listed 29 law schools in Australia at p.79.

45 On 10 December 2002 SCALES was awarded the Human Rights Award in Law from the Human Rights and Equal Opportunity Commission. See http://www.hreoc.gov.au/media_releases/releases_2002.html

46 Ray Watterson, Robert Cavanagh and John Boersig (2002), 'Law School Based Public Interest Advocacy: An Australian Story', *International Journal of Clinical Legal Education*, June 2002, 7–36.

47 Mary Anne Kenny, Irene Styles and Archie Zariski (2004), 'Looking at You Looking at Me: Learning

Through Reflection in a Law School', *E Law No 1*, Vol 11, <http://www.murdoch.edu.au/elaw/issues/v11n1/kenny111.html>; 'No other learning experience in law school combines the extraordinarily varied and dramatic context of real cases and problems with the opportunity for intensive teaching, supervision, growth and reflection', Robert D. Dinerstein (1992), Report of the Committee on the Future of the In-House Clinic, 42 *Journal of Legal Education*, 511, 517.

48 Peter B Knapp (2003) observed that some students were unable to prepare advice for a client because they were so conditioned by concentrating on the historical facts of appeal court cases in class they could not anticipate future outcomes because the facts had not happened yet. 'From the Law School to the Classroom: Or What I Would Have Learned if I Had Been Paying More Attention to My Students and Their Clients', 30(1) *William Mitchell Law Review*, pp.101–108.

need to make sense of the world.⁴⁹ Clinical legal education does this by exposing students to the chaotic or ‘built in dissonance’ of life, where nothing is predictable, unlike facts in legal text books. The many elements of real-life legal problems often do not make sense at first, yet we pretend otherwise in the doctrinal classroom. Brayne’s description of the highest form of educational development that can happen in the legal clinic evokes emotional intelligence:

*It might involve a new outlook on life, a change in political direction, a re-ordering of personal priorities, an increase in judgment and wisdom. A lot of growing up takes place in higher education... The challenge is to introduce the students to curricular experiences while learning law that matures them.*⁵⁰

The more mindful we as clinicians are of the student experience the better we can support them through stressful experiences and help them to reflect, to learn and develop competence and confidence. Ideally students should be informed and engaged in the process, so that personal development is no longer in the background, happening unconsciously or by default. Whether we call it deep learning, personal growth, or a maturing process, it involves developing emotional intelligence.

The Discovery of Emotional Intelligence

*The emotions are not skilled workers.*⁵¹

Emotions were largely ignored during the first century of modernist science.⁵² After 1912 when Wilhelm Stern proposed the term ‘intelligence quotient’ (IQ) as a universal measure of intelligence, others began to dissect it into components.⁵³ One part, called ‘social intelligence’, was defined in 1920 by the American scientist Thorndike as ‘the ability to understand and manage men and women, ... to act wisely in human relations’.⁵⁴

Thorndike’s notion of social intelligence was overlooked for several decades although scientists seemed perplexed about why many people with high IQ performed poorly at work and were less happy than people with average IQ.⁵⁵ Some argued that personality types explained the differences in how people used their intelligence. During the 1950s various personality tests were created to help explain individual propensities but like theories of IQ, most theories behind personality tests were rigid and tended to assign people into categories.⁵⁶

49 Hugh Brayne (*op cit* 1996), at p.45.

50 *ibid*

51 Ern Malley (*aka Harold Stewart and James McAuley*)

52 The word ‘emotion’ does not appear in the index of the 1978 edition of *Abnormal Psychology* by G C Davison and J M Neale, New York, Wiley; K T Strongman provides a good summary of the main theories of emotion in *The Psychology of Emotion: From Everyday Life to Theory*, 5th ed. 2003, Wiley, Chichester.

53 Wilhelm Stern (1912), *The Psychological Methods of Intelligence Testing* Baltimore, Warwick & York, 1914; other important works included Alfred Binet, Théodore Simon and Clara Harrison Town (1912), *A Method of Measuring the Development of the Intelligence of Young Children*, Lincoln, Ill., Courier; Baltimore, Williams & Wilkins, republished by

Williams Printing Co. Nashville, Tenn. 1980; Lewis Terman (1906), *Genius and Stupidity*, Arno Press, New York, 1975.

54 E I Thorndike (1920), ‘Intelligence and its Use’, 140 *Harper’s Magazine*, pp.227–235, 228.

55 David C McClelland, ‘Testing for Competence Rather than Intelligence’ (1973) 46 *American Psychologist*; see also Ronald E Walker and Jeanne M Foley (1973), ‘Social Intelligence: Its History and Measurement’ 33 *Psychological Reports*, 839–864.

56 There are at least six theories of personality in Western psychological discourse, each providing its own set of measurements: Bender-Gestalt Test, Californian Psychological Inventory, Maudsley Personality Inventory, Minnesota Multiphasic Personality Inventory, Myers-Briggs Type Indicator and Repertory Grid Technique. R M Ryckman (2000, 7th ed.), *Theories of Personality*, Belmont, CA., Wadsworth.

A breakthrough came in 1990 when Salovey and Mayer published their concept of emotional intelligence based on a set of social skills and abilities.⁵⁷ However, the concept did not capture the public mind until 1995 when psychologist Daniel Goleman published his best-seller *Emotional Intelligence: Why it can matter more than IQ*.⁵⁸ Goleman's book popularised the concept of emotional intelligence, although it has been Salovey and Mayer's definition that has most influenced the scientific community.

Currently there are as many theories of emotion as there are different schools in psychology. Some focus on biological and physiological notions and others are based on cognitive assumptions, relating to what and how we think.⁵⁹ Some consider emotions to be a product of culture or the social environment.⁶⁰ Other theories are about specific emotions such as anger, anxiety, happiness, sadness, grief, love and shame, although there appears to be a lot more research done on the negative emotions than positive ones.⁶¹

The popular view of emotions sees them as 'feelings', but this ignores their cognitive components which tie them strongly to our values and beliefs.⁶² Emotions appear to arise in the limbic system of the brain which includes the amygdala and the hippocampus. Daniel Goleman and others pointed out that when we sense something our logically competent cortex never receives pure

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- 57 P Salovey and J D Mayer (1990), 'Emotional Intelligence', 9(3) *Imagination, Cognition and Personality*, pp.185–211. The authors adapted the last two of Howard Gardner's 'multiple intelligences' from his *Frames of Mind*, Basic Books, New York, (1983) 1993, which were inter-personal and intra-personal intelligence. See also J D Mayer, M T DiPaolo & P Salovey (1990), 'Perceiving affective content in ambiguous visual stimuli: a component of emotional intelligence', 54 *Journal of Personality Assessment*, pp.772–782. The first use of the term 'emotional intelligence' seems to be in a 1985 doctoral dissertation by Wayne Leon Payne titled 'A Study of Emotion: Developing Emotional Intelligence; Self-Integration; Relating to Fear, Pain and Desire (Theory, Structure of Reality, Problem-Solving, Contraction/Expansion, Tuning In/Coming Out/Letting Go)', The Union for Experimenting Colleges and Universities, Cincinnati, OH 45206-1925.
- 58 Daniel Goleman (1995), *Emotional Intelligence: Why it can matter more than IQ*, New York, Bantam Books. Many authors have applied Goleman's concept of EI to management practices in the workplace: Hendrie Weqsinger (1998), *Emotional Intelligence at Work*, San Francisco: Jossey-Bass; Emily Sterrett (2000), *The Manager's Pocket Guide to Emotional Intelligence*, Amherst, Mass.: HRD Press; Robert Cooper and Aymen Sawaf (2000), *Executive EI : Emotional Intelligence in Business*, Texere: London and New York.
- 59 For examples of biological and physiological theories see R M Nesse, 'Evolutionary explanations of emotions', *Human Nature*, 1990, Vol.1 pp.2651–289; R Plutchik, 'The Nature of Emotions', *American Scientist*, 2001, Vol.89, pp.344–356. For examples of cognitive theories see S Schachter J Singer 'Cognitive, Social and Physiological Determinants of Emotional State', *Psychological Review*, Vol 69, pp.370–399; R S Lazarus, *Emotion and Adaption*, New York: Oxford University Press, 1991; K Scherer, 'Neuroscience Projections to Current Debates in Emotion Psychology', *Cognition and Emotion*, Vol.7, 1, pp.1–41.
- 60 S A Shields, *Speaking from the Heart: Gender and the Social Meaning of Emotion*, Cambridge, Cambridge University Press, 2002; N M Ashkanasy, C E J Hartel & W J Zerbe (eds), *Emotions in the Workplace*, Westport, CT: Quorum Books, 2000; M Hjort and S Laver (eds) (1997), *Emotion and the Arts*, Oxford: Oxford University Press.
- 61 Theoretical and empirical research on discrete emotions can be found in M Lewis & J M Haviland-Jones (eds), *Handbook of Emotions*, New York: Guilford Press, 2000 and other references can be found in Chapter 8 'Specific Emotions Theory' in K T Strongman, *The Psychology of Emotion: From Everyday Life to Theory*, 5th ed., 2003, John Wiley & Sons, Chichester.
- 62 Adele B Lynn (2005) argues unpersuasively that emotions have three components, cognitive, physiological and behavioural, in *The EQ Difference: A Powerful Plan for Putting Emotional Intelligence to Work*, Amacom, NY, see Chapter 4.

stimuli, but information via the amygdala which contributes an emotional meaning to the data, and can change the hormonal balance, further influencing the cortex.⁶³

Sometimes in an emergency our emotions seem to take over; fear can cause a ‘panic attack’ such as a ‘fight or flight’ reaction, and anger can cause one to want to ‘shoot the messenger’. Goleman called this ‘amygdala hijacking’.⁶⁴ In these cases the amygdala ‘causes’ a person to act irrationally, contrary to their initial intention or how they would normally act, and sometimes contrary to their values. Extreme hijacking can cause a traumatic experience with long-term consequences, but can sometimes be resolved with the help of psychotherapy, cognitive or behaviour therapy. Some theories claim that people can develop and refine their emotional responses to improve their lives, to be more resilient or to achieve an improved level of personal fulfillment, or ‘self-actualisation’.⁶⁵

So what is emotional intelligence? One way to view it is as a partnership between our rational brain and the limbic brain. A working definition would be that emotional intelligence is what enables us to manage ourselves and our relationships with others so that we truly live our intentions.⁶⁶ Understanding that emotions inform every decision, it makes no sense to talk of isolating emotions from ‘rational’ thought. Our emotional intelligence is our level of awareness of how our emotions affect all our thoughts and behaviour.

A common analogy is that when life hands you lemons, your emotional intelligence determines whether you get stuck in bitterness or make lemonade. While IQ can measure skills in analysis and strategic thinking, it is emotional intelligence that motivates a person, helps determine their values and attitudes, enables empathy, understanding of others, effective communication and drives the ‘X factor’ that holds it all together. There are some analogies here with Maslow’s early theory of self-actualisation, which he described as the coming together of the person.⁶⁷

Salovey and Mayer claimed in 1990 that emotional intelligence involved three categories of adaptive abilities: appraisal and expression of emotion, regulation of emotion and utilisation of emotion in solving problems.⁶⁸ In 1997 they revised their model by emphasising the cognitive components of emotional intelligence.⁶⁹ The new model has a different focus and consists of four parts:

- perception, appraisal and expression of emotion

63 Daniel Goleman (*ibid* 1995). p.297; Joseph E LeDoux and Elizabeth A Phelps (2000) distinguish the ‘high road’ taken by stimulus that travels from the thalamus through the cortex to the amygdala, from the ‘low road’, the short-cut when the thalamus communicates directly with the amygdala, for example in threatening situations; ‘Emotional Networks in the Brain’, in Lewis and Haviland-Jones (*op cit* 2000), pp.157–172, at 159–160.

64 Goleman (*ibid* 1995) pp.94–95; others have called it ‘emotional hijacking’, or ‘limbic hijacking’.

65 Abraham Maslow coined the term ‘self-actualisation’ as the apex of his pyramid of human needs. A H Maslow (1943), ‘A Theory of Human Motivation’, 50 *Psychological Review*, pp.370–396.

66 Lynn (*op cit* 2005), p.2.

67 Maslow described the self-actualised person as ‘more integrated and less split, more open for experience,

more ... fully functioning, more creative, ... more ego-transcending, more independent of his lower needs, etc.’ Abraham H Maslow (2nd Ed, 1968), *Towards a Psychology of Being*, Princeton, NJ, Van Nostrand, p.97.

68 Salovey and Mayer (*op cit* 1990), p.190–91, Figure 1.

69 J D Mayer & P Salovey (1997), ‘What is Emotional Intelligence’, in P Salovey & D Sluyter (eds) *Emotional Development and Emotional Intelligence: Educational Implications*, New York, Basic Books, pp.3–31. The 1997 Mayer and Salovey model has been recognised as the standard by ‘scholars working in the field of emotions’ according to Australian management academics Peter Jordan, Neal Ashkanasy and Charmine Hartel (2003), in ‘The Case for Emotional Intelligence in Organizational Research’, 29(2) *Academy of Management Review*, pp.195–197.

- emotional facilitation of thinking
- understanding, analysing and employing emotional knowledge and
- reflective regulation of emotions to further emotional and intellectual growth.

In the intervening years Salovey and Mayer became convinced through further research that people's emotional processes are intrinsic to their cognitive processes and neither should be understood as operating in isolation from the other. Their revised model is more process-oriented and incorporates continuing emotional development as part of intellectual growth and personal development. However the original model is favoured by some researchers as suitable for measuring an individual's current level of emotional development.⁷⁰

Having established the new discourse of emotional intelligence the scientific community is now investigating how to use it to improve our understanding of human experience.⁷¹ A significant body of research is growing on the application of emotional intelligence in management and business studies as well as education.⁷² While some remain sceptical, defending their intellectual high ground, there is little doubt that emotional intelligence is now 'a pivotal area of contemporary psychology'.⁷³ Some education researchers claim it offers opportunities for significant reform across primary, secondary and tertiary levels of schooling, while others more cautiously acknowledge it has at least accelerated recognition of emotional literacy into education programs.⁷⁴

Emotional Intelligence in Clinical Legal Education

*The professional practice of law often requires non-legal answers to human problems whose very existence seems not to be recognised by the legal curriculum.*⁷⁵

Given the apparent dangerousness of legal practice one could argue that law schools have an obligation not to just teach legal units, but to prepare students for legal practice at emotional as well as intellectual levels. Consequently there is a growing body of research on incorporating

70 Lynn (op cit 2005) proposed a simpler model using five components: Self-awareness; Empathy; Social Expertness; Personal Influence and Mastery of Purpose and Vision, p.28; see also Nicola S Schutte et al, (1998), 'Development and Validation of a Measure of Emotional Intelligence', 25 *Personality and Individual Differences*, 167–177.

71 John D Mayer, David R Caruso and Peter Salovey, 'Emotional Intelligence Meets Traditional Standards for an Intelligence', (2000) 27 *Intelligence*, 267–298.

72 For empirical research on emotional intelligence in managerial and educational psychology see: Jordan, Ashkanasy and Hartel (op cit 2003); M Zeidner, R Roberts and G M Matthews (2002), 'Can emotional intelligence be schooled? A Critical Review', 37 *Educational Psychologist*, pp.215–231; Peter J Jordan et al (2002), 'Workgroup emotional intelligence scale

development and relationship to team process effectiveness and goal focus', 12 *Human Resource Management Review*, pp.195–214; Abraham Carmeli (2003), 'The relationship between emotional intelligence and work attitudes, behavior and outcomes', 18(8) *Journal of Managerial Psychology*, pp.788–813.

73 Moshe Zeidner, Gerald Matthews and Richard D Roberts (2004), 'Emotional Intelligence in the Workplace: A Critical Review', 53(3) *Applied Psychology: An International Review*, pp.371–399, at 372.

74 Zeidner, Roberts and Matthews (2002 et al), pp 221 and 229.

75 Bernard L Diamond (1997), 'Psychological Problems of Law Students', in Stephen Gillers (ed.) *Looking at Law School*, pp.69–70.

emotional awareness in legal education, most of which relates to the activities that typically occur in legal clinics.⁷⁶

In the conservative legal profession many practitioners would construe emotions conventionally as a potential distraction from clear thinking or the intellectual use of reason.⁷⁷ However they would be more open to accepting that legal practice involves fundamental issues of human rights and discrimination between individuals, including the world of beliefs and principles. Philosopher Martha Nussbaum argues for a strong cognitive view of emotions, saying that ‘emotion is identical with the full acceptance of, or recognition of a belief’.⁷⁸ We often call our strong beliefs principles and while both principles and emotions influence the decisions we make, neither has inherent priority.

It is irrational to critique emotions for being irrational, because emotions do not eschew cognitive influence. It is only the ‘hijacked’ eruption of intense emotion that is irrational in that sense. It is also irrational to try to deny emotional input in our decisions, as all decisions involve both cognitive and emotional influence. It would seem wiser, in legal practice for example, to be aware of how we feel about our client, the witness, or the judge, so we can know the influences on the decisions we make about the case.

Personally, we may prefer our own lawyer to work on a cognitive analysis of our legal situation rather than emotive, but we would also prefer that our lawyer empathised with our life situation, agreed with our principles and felt strongly about the same things as we do. The good lawyer then would have a sound knowledge of the law, be very skilful in legal practice, and importantly have the ability to communicate, empathise, understand and relate. Lawyers can be emotionally open with clients in helpful ways that do not compromise the ‘objective’ fiduciary and professional qualities of the relationship.⁷⁹ Rarely are such topics discussed in doctrinal law school courses.

Clinical legal education can provide ideal opportunities for broad and deep discussions with

76 Peter Reilly (2005), ‘Teaching Law Students How to Feel: Using Negotiations Training to Increase Emotional Intelligence’, 21 *Negotiation Journal*, pp.301–314; Ann Juergens (2004), ‘The Role of Emotion and Community in Lawyer’s Professional Excellence’, *New York Law School Clinical Research Institute, Research Paper Series No 04/05-2*; Hugh Brayne (2002), ‘Learning to think like a lawyer: one law teacher’s exploration of the relevance of evolutionary psychology’, 9(3) *International Journal of Legal Education*, 283–311, where he suggests that much of what purports as rational thought is really rationalisation of emotional preference; Marjorie A Silver (2000), ‘Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship’, in Stolle, Wexler and Winnick, (op cit 2000), pp.357–417; Linda G Mills (2000), ‘Affective Lawyering: The Emotional Dimensions of the Lawyer-Client Relation’, Stolle, Wexler and Winnick, (op cit 2000), pp.419–446; Larry Richard (2000), ‘The Importance of Hiring ‘Emotionally Intelligent’ Associates’, 18 *Pennsylvania Lawyer*, pp.1–5; Marjorie A Silver (1999), ‘Emotional Intelligence in Legal Education’, 5(4) *Psychology, Public Policy and the Law*, pp.1173–1203; Melissa L Nelken (1996), ‘Negotiation and Psychoanalysis: If I’d

Wanted to Learn About Feelings, I Wouldn’t Have Gone to Law School’, 45(3) *Journal of Legal Education*, pp.420–429; Sandra Janoff (1991), ‘The Influence of Legal Education on Moral Reasoning’, 76 *Minnesota Law Review*, 193–238.

77 Thomas L Shaffer and James R Elkins (3rd 1997), *Legal Interviewing and Counseling*, St. Paul, Minn. West Pub., p.56; see also Daicoff (op cit 1997). p.1405; however Carrie Menkel-Meadow (1989) argues that women entering the legal profession have introduced an ethic of care that is more responsive to clients’ needs, ‘Portia Redux: Another Look at Gender, Feminism and Legal Ethics’, 2 *Virginia Journal of Social Policy and the Law*, p.75.

78 Martha Nussbaum, ‘Narrative Emotions: Beckett’s Genealogy of Love’, in *Love’s Knowledge: Essays on Philosophy and Literature*, New York, Oxford University Press, 1990, pp.286–313, at 292.

79 Simon Tupman (2000) discusses several creative examples of how lawyers can connect better with their new and existing clients in *Why Lawyers Should Eat Bananas: Inspirational Ideas for Lawyers Wanting More Out of Life*, Byron Bay, Simon Tupman Presentations.

students on the emotional issues of legal practice. Students in clinical programs will feel their own anxiety and probably notice the stress of their clients. Supervisors should seize these opportunities to talk with students about the happiness of 'winning', the grief of 'losing', the anxiety of confusion and the common frustrations and satisfactions of legal practice as they arise in the student, or as the student reports noticing them in the client.

Since the 1950s there have been several attempts to 'humanise' legal education in America by introducing to law schools courses on 'human relations',⁸⁰ and 'psychotherapeutic insights',⁸¹ course texts on the psychology of legal interviewing,⁸² supplementary texts on legal interviewing incorporating transference,⁸³ counter-transference,⁸⁴ informing students on cognitive stress-management techniques⁸⁵ and familiarizing clinical law students with the various schools of psychotherapy.⁸⁶ The benefits of these modifications of legal education have been modest at best, given the current statistics of lawyer's depression, dropping out, suicide and divorce rates.

There have been more significant reforms in legal practice which have reduced the negative effects of the adversarial system of dispute resolution. These developments are reflexive, open to the emotional implications of real life disputes, and come from the intersections between alternative dispute resolutions,⁸⁷ therapeutic jurisprudence,⁸⁸ preventive lawyering,⁸⁹ affective lawyering,⁹⁰ lawyering with an 'ethic of care',⁹¹ and 'Creative Problem Solving'.⁹² Legal education typically

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- 80 Howard R Sacks (1959), 'Human Relations Training for Students and Lawyers', 11 *Journal of Legal Education*, 316, p.317.
- 81 Andrew S Watson (1958), 'The Law and Behavioural Science Project at the University of Pennsylvania: A Psychiatrist on the Law Faculty', 11 *Journal of Legal Education*, 73; (1963), 'Teaching Mental Health Concepts in the Law School', 22 *American Journal of Orthopsychiatry*, 115 at p.120.
- 82 Andrew S Watson (1976), *The Lawyer in the Interviewing and Counselling Process* (Contemporary Legal Education Series), Bobbs-Merrill.
- 83 Thomas L Shaffer (1976), *Legal Interviewing and Counseling in a Nutshell*, St. Paul, Minn. West Pub..
- 84 Thomas L Shaffer and James A Elkins (1987), *Legal Interviewing and Counseling in a Nutshell*, St. Paul, Minn. West Pub..
- 85 Lawrence et al (1983), 'Stress Management Training for Law Students: Cognitive-Behavioral Intervention', 1(4) *Behavioral Sciences & The Law*, 101-110.
- 86 Melissa L Nelken (1996), 'Negotiation and Psychoanalysis: If I'd Wanted to Learn About Feelings, I Wouldn't Have Gone to Law School', 46 *Journal of Legal Education*, p.420; Robert M Bastress and Joseph E Harbaugh (1990), *Interviewing, Counseling, and Negotiating*, Little Brown & Co Law & Business.
- 87 Lani Guinier, Michelle Fine and Jane Balin (1997), *Becoming Gentlemen: Women, Law School, and Institutional Change*, Beacon Press, Boston, referring to law schools' need to start emphasizing the teaching of mediation and negotiation, not just litigation, at p.69-70.
- 88 David B Wexler (1993), 'New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Law Scholarship', 10 *N Y Law School J Human Rights*, 759; Dennis P Stolle, David B Wexler and Bruce J Winnick, (eds), *Practicing Therapeutic Jurisprudence: Law as a Helping Profession*, Carolina Academic Press, Durham NC.
- 89 Dennis P Stolle, David B Wexler, Bruce J Winick and Edward J Dauer (1997), 'Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering', 34 *Cal W L Review*, p.15.
- 90 Linda Mills (1996), 'On the Other Side of Silence: Affective Lawyering for Intimate Abuse', 81 *Cornell Law Review*, 1225; Carrie Menkel-Meadow (1994), 'Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report - Of Skill, Legal Science and Being a Human Being', 69 *Washington Law Review*, 593 at pp.606-07.
- 91 Daicoff (op cit 1997), at n.30, see pp.1398-1400; Theresa Glannon (1992), 'Lawyers and Caring: Building an Ethic of Care into Professional Responsibility', 43 *Hastings Law Journal*, p.1175; 'Ethic of Care' derives from Carol Gilligan (1982), In *A Different Voice*, Cambridge, Mass. : Harvard University Press, pp.62-63.
- 92 Janeen Kerper (1998), 'Creative Problem Solving vs. The Case Method: A Marvellous Adventure in Which Winnie-the-Pooh Meets Mrs Palsgraf', 34 *Cal W L Rev*, p.351; James M Cooper (1998), 'Towards a new Architecture: Creative Problem Solving and the Evolution of Law' 34 *Cal W L Rev*, p.297.
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continues to privilege and emphasise litigation-as-law and has not kept pace with these initiatives in legal practice. Improving our educational strategies to acknowledge the emotional side of legal practice may not only help lawyers survive better in the profession but ultimately provide clients with better legal services.

It is likely that emotional intelligence can be ‘taught’ in the sense that we can encourage individuals to develop their emotional capacities. We can improve our self-awareness, our emotional regulation and our appraisal of emotional states in others by training and practice, providing we have first accepted the value of emotional awareness.⁹³

On the basis it can be taught, many schools especially in the United States have integrated programs on ‘Social and Emotional Learning’ and ‘Service-Learning’.⁹⁴ While it is not clear to what extent such programs could be adapted to non-American societies and contexts, research suggests that improved emotional intelligence leads to enhanced academic performance.⁹⁵ Consequently about one third of American schools are combining service-learning with social and emotional learning to maximize students’ academic achievements and to ensure their learning is based on an understanding of real-life issues.

In legal education we can no longer assume personal competencies will develop spontaneously in those who are meant to survive in legal practice. The next step is to recognise that clinical legal education programs offer ideal opportunities for teaching in ways that encourage students to develop self-awareness and the related capacities that make up emotional intelligence.

Methods of Incorporating Emotional Intelligence into Clinical Legal Education

*Emotion and passion signify evil, danger, and threat of disorder.*⁹⁶

Ideally we should introduce clinic students to the concept of emotional intelligence at the beginning as part of the curriculum. Some students may be sceptical; however they may be more interested when they learn of the connections between emotional intelligence and academic performance, and how it may help them to be better lawyers. We should also inform students of the dangerousness of legal practice, and why many lawyers suffer depression and many drop out. We could also discuss the popular image of lawyers as self-serving, untrustworthy and lacking

93 Zeidner, Roberts and Matthews (*op cit* 2002).

94 SEL programs teach five core competencies: self-awareness, social awareness, self-management, relationship skills and responsible decision making. Joseph E Zins, Michelle R Bloodworth, Roger P Weissberg and Herbert J Walberg, (2003) ‘The Scientific Base Linking Social and Emotional Learning to School Success’, in Zins et al, *Social and Emotional Learning and School Success*. New York, Teachers College Press. Service Learning is based on community service, but it is more structured, diverse and integrated into the classroom curriculum. Shelley Billig, (2000) *Service-Learning Impacts on Youth, Schools and Communities: Research on K-12 School-Based Service-Learning 1990–1999*, Denver, CO: RMC Research Corporation.

95 Joseph E Zins, Michelle R Bloodworth, Roger P Weissberg and Herbert J Walberg, (2004) *Building Academic Success on Social and Emotional Learning: What Does the Research Say?* Teachers College, Columbia University; R W Blum, C A McNeely and P M Rinehart, (2002) *Improving the Odds: The Untapped Power of Schools to Improve the Health of Teens*. Minneapolis, MN: University of Minnesota, Center for Adolescent Health and Development; K F Osterman, (2000) ‘Students’ Need for Belonging in the School Community’, *Review of Educational Research*, 70; C C Lewis, E Schaps and M S Watson, (1996) ‘The Caring Classroom’s Academic Edge’, *Educational Leadership*, (Alexandria VA) Vol.54, 16–21.

96 Martha L Minow & Elizabeth V Spelman (1988) ‘Passion for Justice.’ *10 Cardozo Law Review* 37–68.

integrity, and ask if that is a reputation we should laugh about, endure or change.⁹⁷ Just discussing emotional intelligence openly in terms of human experience and competencies may have a positive effect on some students.⁹⁸

It may help also to overcome the anti-emotion bias in those students who like to see themselves as 'thinkers' by suggesting they consider the research on emotion showing we never make purely cognitive decisions, that emotion informs everything we do.⁹⁹ When confronted with the science on emotional intelligence even 'thinkers' may reconsider their position and begin thinking about how they're feeling.

This section considers specific opportunities in many clinical programs for encouraging students to develop their emotional capacities. As they become more emotionally aware they will better understand what lies behind their intellectual decisions and eventually those of other people. These insights may help the students to continue developing in ways that lead to identifying and changing what they can in their lives, including their professional lives, and to accepting what they can't.

(a) Reflection

*Reflection makes the difference between thirty years of experience, and one year of experience repeated thirty times.*¹⁰⁰

What makes clinical legal education so valuable from a developmental perspective is the opportunity for students to reflect on real-client experiences and role-plays. Reflection leads to self-awareness which is fundamental in all models of emotional intelligence.¹⁰¹ It is highly likely that reflection on clinical experiences improves self-awareness and fosters the kind of integration that further develops emotional intelligence.

The value of experiential learning is well known, but it seems the learning actually happens through the reflection during and after the activity.¹⁰² Students need guidance on reflective

97 In the 2002 Lawyer's Lecture at the St James Ethics Centre Chief Justice of the Supreme Court of NSW <http://tinyurl.com/ooxvh> The Hon J J Spigelman AC asked 'Are Lawyers Lemons?' and said inter alia 'it was time that time-based charging which rewards inefficiency, became ubiquitous.' On the public opinion of lawyers and the decline in professionalism among lawyers in America see the references and discussion in Daicoff (op cit, 1998) from nn.34 to 48.

98 Lawrence S Krieger (1998) found that students responded quickly to the theories of self-actualisation when espoused by a role model, 'What We're Not Telling Law Students, and Lawyers, that they Really Need to Know', 13 *Journal of Law and Health*, 1 at p.22.

99 Charles Lawrence (1987) discussed why lawyers may be especially resistant to acknowledging the power of the unconscious, 'The Id, the Ego, and Equal

Protection: Reckoning with Unconscious Racism', 39 *Stan. L Rev*, 317, p.329.

100 Adele B Lynn (2005) *The EQ Difference: A Powerful Plan for Putting Emotional Intelligence to Work*, Amacom, NY.

101 Self-awareness was fundamental to Maslow's (op cit 1968) theory of self-actualisation and Herzberg's (1959) theory of motivation. (New York, Wiley; London, Chapman & Hall.) See Barrette (op cit 2002) who emphasised the need for research on ways to develop self-awareness through experiential learning.

102 David A Kolb for example found that effective learning requires 'reflective observation', (1984), *Experiential Learning: Experience as the Source of Learning and Development*, Englewood Cliffs, NJ: Prentice-Hall, p.30.

practices to find out what works best for them and to develop good habits of reflection as part of their legal practice.¹⁰³

Reflection is not about regret; it is not about rationalising or justifying; nor is it about reflecting solely on our feelings. We should reflect on the facts: what happened, what we did, including what we perceived, which includes what we perceived about how others felt about what happened. Reflecting on the facts enables us to analyse and connect disparate parts, to see how possible answers might fit the question. ‘Brainstorming’ is one method of using elimination that can produce answers that would rarely be considered feasible by ‘rational’ processes. Our feelings help us use intuition about possibilities and provide answers that are not obvious to our logical intellect.

Opportunities for retrospective reflection are common. One analysis states that good reflective practice involves:

- a. direct experience of a situation
- b. thoughtful examination of existing beliefs, knowledge or values, and
- c. the systematic contemplation of observations and potential actions.¹⁰⁴

However reflection is not always retrospective. Donald Schön distinguished between spontaneous reflection-in-action and retrospective reflection-on-action.¹⁰⁵ The former often happens when a lawyer comes upon a new situation and decides that routine or familiar responses are not appropriate. The lawyer might try new methods to test new insights and understandings.

Another theory recognises three levels of reflection:

1. technical – the application of skills and technical knowledge
2. conceptual – the understanding of theoretical bases for practice, and
3. critical – the examining of moral and ethical implications of decisions.¹⁰⁶

Both these theories are useful but inadequate because they ignore opportunities for reflection on feelings. Reflection on feelings and emotions helps us to understand the choices we make ‘not thinking’ and why we think as we do when we are. Good reflective practice that includes reflection on feelings does not diminish the value of cognitive processes but helps to prioritise our ideas because we know more about their source. It may involve attempts to answer the ‘why’ question: why do I – why does the client – feel this way? We may not be aware of the *reasons* for our emotive responses at the time. It is sufficient at first to be aware of the feelings as they arise. Thinking, for example: ‘I’m feeling angry. I’m not sure why yet, but I better be careful what I say.’

103 Kimberly E. O’Leary, ‘Evaluating Clinical Law Teaching – Suggestions for Law Professors Who Have Never Used the Clinical Teaching Method’, 29 *N. Ky. L. Rev.* 491 (2002); Gerald F. Hess, ‘Learning to Think Like a Teacher: Reflective Journals for Legal Educators’, 38 *Gonz. L. Rev.* 129 (2003–03); Donald A. Schön, ‘Educating the Reflective Legal Practitioner’, 2 *Clin. L. Rev.* 231 (1995). Linda G Mills (2000) ‘Affective Lawyering: The Emotional Dimensions of the Lawyer-Client Relationship’, in Stolle, Wexler and Winnick, (*op cit* 2000), pp.419–446.

104 Dawn Francis (1995), ‘The Reflective Journal: A Window to Preservice Teachers’ Practical Knowledge’, 11 *Teaching and Teacher Education*, 229 at 230.

105 Donald A Schön (1987), *Educating the Reflective Practitioner: Toward a New Design for Teaching and Learning in the Professions*, San Francisco : Jossey-Bass, c1987, p.26.

106 Max Van Manen (1992), ‘Linking Ways of Knowing with Ways of Being Practical’, 6 *Curriculum Inquiry*, 205 at 226–27.

In clinical practice students would benefit from discussing how reflective practice works, such as helping make the unconscious conscious, and helping lawyers to be more mindful of their assumptions before acting on them. Reflective practice could help a lawyer to acknowledge a bias or other emotional response that could lead to difficulties and jeopardise the fiduciary relationship, ideally before a problem develops. A lawyer may feel 'uncomfortable' about a client, and upon reflection decide it may be countertransference, such as a strong attraction or feelings of hostility towards the client. In either case, discussing the feelings with a trusted colleague might be useful, or with a therapist, and if the emotional response continues it may be necessary to cease acting and refer the client elsewhere.

Marjorie Silver gives the example of a psychiatrist who, when during his analysis of a patient whom he described as a highly attractive young woman, became aware of his unusually correct posture, his formal approach and lack of spontaneity.¹⁰⁷ On deeper reflection he found he was defending against his patient's charms by creating physical and emotional distance that led to a sterile analytic stance that would produce an inadequate analysis of the patient's situation. When he recognised how he was treating her differently to his other patients, he was able to resolve his anxiety enough to work with her more effectively.

Silence plays an important role in legal practice that can be best understood through reflection.¹⁰⁸ Lawyers are not known for their capacity to be silent, however used carefully, silence is a powerful tool in negotiation, mediation and litigation. It gives time for both sides to reflect, enabling deeper communication and understanding of the other's position. Reflective silence has interpersonal and 'textual' functions and can be used strategically in litigation and compassionately in interviews.¹⁰⁹

Joint reflection among students in small groups enables the students to discuss their inner experiences, sharing their opinions, ideas, observation, and feelings on particular events and situations. Peer sharing helps them discover they may not be alone in having an emotional reaction or sympathetic response to a client's situation. It is an opportunity for the students to discuss their attitudes and values, and the reasons for them, and can lead to very productive learning situations and long-lasting relationships.

Students in clinical legal education courses sometimes have confronting experiences that contradict their expectations about legal practice. The experience may be challenging and can cause them to re-evaluate their attitudes or even their world-view. Education theorists refer to a process called cognitive dissonance, where a person learns from having to work with the tension of two apparently contradictory 'facts'.¹¹⁰ These learning opportunities have been discussed by Hugh Brayne: 'Change is up to the student; but the more experiences he or she has in which their sense of reality is tested, the more likely it is that, at some point, personal growth will occur.'¹¹¹

107 Marjorie A Silver (2000), 'Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship', in Stolle, Wexler and Winnick, (op cit 2000), pp.405-406.

108 Stefan H. Krieger, 'A Time to Keep Silent and a Time to Speak: The Functions of Silence in the Lawyering Process', 80 Or. L. Rev. 199 (2001).

109 The textual function refers to establishing the relevance of communications by giving them a context. See Michael A K Halliday (1978), *Language as*

Social Semiotic: The Social Interpretation of Language and Meaning, Baltimore, MD: University Park Press, pp.112-13; Adam Jaworski (1992), *The Power of Silence: Social and Pragmatic Perspectives (Language and Language Behavior)* SAGE Publications, Thousand Oaks, Ca..

110 See Leon Festinger, Henry W. Riecken, and Stanley Schachter (1956), *When Prophecy Fails*, New York: Harper and Row, pp. 27-28.

111 Hugh Brayne (op cit 1996), p;45.

The unpredictability of a clinic provides ideal opportunities for emotional development through reflection with the support of a supervisor.¹¹² For some the best kind of reflection is when the individual student and teacher reflect together, especially in the early stages of practice. It can improve student motivation and the student can model the process later to develop more independent reflection.¹¹³ The successful ‘teaching’ of reflective practice could be demonstrated by for example the students showing how awareness of their feelings or emotional responses helped by producing a better or deeper understanding of a particular case.

(b) Negotiations

*Stupidity is not a lack of intelligence, it is a lack of feeling.*¹¹⁴

Negotiation is a core skill and fundamental to legal practice. The large majority of disputes are resolved through negotiation techniques at some level. The standard legal skills may not be helpful in negotiations, such as logical analysis, memorised case law and forceful advocacy. However a good negotiator will have well-developed personal capacities such as integrity, reliability, honesty, communication skills and persuasiveness. A very good negotiator will have a highly developed emotional intelligence, especially self-awareness and a capacity to understand another’s emotional position.

Most clinical legal education programs give students practical experiences in negotiating, either in role plays or in real-client situations, and students often enjoy the activity and many report how much they learned from it. I submit that students will learn better and develop more quickly if they understand the importance of self-awareness and the capacity for understanding the emotional position and inner motivations of the other party.

Negotiation is not a new skill as we negotiate all the time to get what we want. Law students will have many years of experience to draw on. However negotiation role-plays can help students learn a lot about themselves, as well as how to identify other people’s feelings and intentions. Specifically, negotiation practices teach about the cost of being too assertive: alienating the other party or achieving a short-term victory at the expense of other more substantial gains or a potential long-term relationship.¹¹⁵ An aggressive approach might cause the other party to react and ‘stone wall’ by adopting a rigid position or refusing to continue discussions. Even when winning, a good negotiator will sense the feelings of the other party and gauge the need to make concessions to allow them to ‘save face’ in accepting a potential loss.

Rather than encouraging students to be assertive and ‘tough negotiators’, which can lead to bullying behaviours, reactive responses, bad relationships, inoperable solutions and even failures to

112 *The Brazilian educator Paulo Friere advocated the ‘dialogical empowerment’ of the student through the student and teacher working together and reflecting on their observations; Paulo Freire (1974) Education for Critical Awareness, NY, Crossroad Publishing Company. Roy Reekie (1991), ‘Creating Partners: The Art of Being a Clinical Law Teacher (Part 1): Towards a Counter-Socratic Method, via Dialogical Empowering for Critical Awareness’, 9(2) Journal of Professional Legal Education, pp.137–148.*

113 *The most important factor for student motivation is frequent student-teacher contact, according to the*

empirical research in America in the 1980s and 1990s examined by Gerald F Hess (1999), ‘Seven Principles for Good Practice in Legal Education: History and Overview’, 49(3) Journal of Legal Education, pp.367–370.

114 - Robert Musil.

115 *Leonard Greenhalgh (1987), ‘The Case Against Winning in Negotiations’, 3 Negotiations J.,167; Melissa L. Nelken (1996), ‘Negotiation and Psychoanalysis: If I’d Wanted to Learn About Feelings I Wouldn’t Have Gone to Law School’, Journal of Legal Education, Vol 46, No 3, 420.*

reach outcomes, a more enlightened approach would frame the process as a conversation.¹¹⁶ Many disputes can be resolved in part, if not wholly, by the cooperative approach of exchanging information to assist each side to understand the issues from the other point of view. On the other hand, assertiveness is necessary on occasions. Negotiators can use their emotional intelligence to decide what approach is best in each case and how to change tack during the negotiation without losing credibility.

Psychoanalysis theory suggests that everyone develops mechanisms for suppressing awareness of their inner conflicts which are typically ambiguous in their meanings and ambivalent in their affects.¹¹⁷ When law students interact in negotiation role-plays, their inner conflicts including hopes and fears are aroused at some level, often creating new experiences and opportunities for insight. Most are unaware of how much their own personal needs and conflicts inform their decisions and behaviour in the negotiation process.¹¹⁸ If negotiators have more self-awareness, they may find the process easier, avoid reacting to provocation, and be better able to understand the position of the other party. That could improve communication, increase the level of trust, improve the integrity of the process and the chances of a mutually beneficial outcome.

Law schools may expect students to develop a competitive approach to problem solving, given the adversarial system and the doctrinal focus on litigation. On the other hand students are confronted with the reality that most disputes are resolved through negotiations and other more cooperative practices. Ideally students will come to understand through clinical practice that the central purpose of all advocacy is persuasion, and self-awareness and skilful use of other emotional capacities contribute significantly to successful dispute resolution.

(c) Journal keeping

*The best advice I can possibly give if you are interested in developing greater emotional intelligence is to begin to journal every morning.*¹¹⁹

First used pedagogically by the ancient Greeks, student reflective journals have become accepted practice in many legal clinics since the early 1990s.¹²⁰ A journal is typically a regular, written communication from a student to a teacher about the student's experiences in the course. Students may write an entry daily, weekly or as agreed, and the contents may be factual, analytical, philosophical or emotional.

Keeping a journal helps students to reflect on the learning potential of their experiences in a clinic placement and to develop habits of self-directed learning. It can also assist the assessment process, especially in externships where the clinician is not in regular contact with the student.

116 Peter Reilly, 'Teaching Law Students How to Feel: Using Negotiations Training to Increase Emotional Intelligence', (2005) *Negotiation Journal*, April 2005, 301–314 at 308.

117 General introductory texts on psychoanalysis include Sigmund Freud (1933), *New Introductory Lectures on Psychoanalysis*, trans. James Strachey, London 1964, and Charles Brenner (1913), *An Elementary Textbook of Psychoanalysis*, (revised editions 1957, 1974) New York, International Universities Press.

118 William L F Felstiner & Austin Sarat, (1992),

'Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions', 77 *Cornell L. Rev.* 1447.

119 Bernard L Diamond (2005), *op cit*.

120 Den Autrey (1991), 'Toward a Rhetoric of Journal Writing', 10 *Rhetoric Review* 74 at 75; J P Ogilvy (1996), 'The Use of Journals in Legal Education: A Tool for Reflection', 3 *Clinical Law Review*, 55–107, and Michael Meltsner (1999), 'Writing, Reflecting and Professionalism', 6 *Clinical Law Review*, 435–467.

Journals have many developmental functions. They can help people cope with stressful experiences as well as maximise the benefits of positive experiences. Reflection in writing helps students to acknowledge their emotional responses to events, such as anger, frustration, joy, embarrassment, attraction, repulsion, or annoyance. Their self-awareness is likely to develop as a result of simply acknowledging their experiences, and will happen more to the extent they can reflect on and have insights into these emotional responses.

Clinic students may need to resolve issues that arose during an interview or a court appearance. Sometimes the anxiety can cause the reflective thoughts to be circular and unproductive. Exploring the feelings by writing them down can relieve frustration and help the student reach a degree of clarity on what happened.

Journals can help creativity and original thought.¹²¹ They can also promote skills in critical thinking.¹²² Some clinical programs set students optional topics for writing about such as a title and some anecdotal guidance to get them thinking.¹²³ Other programs are relatively unstructured and allow students to write about what is important to them. Students may explore their deeper thoughts about the implications of cases and new avenues to explore.

Journals can be used in conjunction with ‘mind-maps’ for solving problems, exploring possibilities and learning new methods of thinking. Journals provide some students with a safe space to explore issues they feel less confident about and unable to raise in a class. They can also help a teacher identify difficulties with particular students such as anxiety, confusion or misunderstandings before they lead to bigger problems.

After more than a decade of teaching clinical legal education using student reflective journals J P Ogilvy proposed what he called an ‘idiosyncratic and tentative’ list of goals for his students’ journal assignments:

- To encourage the exploitation of the demonstrated connection between writing and learning
- To nurture a lifetime of self-directed learning
- To improve problem-solving skills
- To promote reflective behaviour
- To foster self-awareness
- To allow for the release of stress
- To provide periodic student feedback to the teacher.¹²⁴

Most of these goals are relevant to developing emotional capacities in students. Many students learn to use a journal for their own purposes, and they realise enough benefits to continue journaling during their careers.

121 Julia Cameron (1992) *The Artist’s Way; A Spiritual Path to Higher Creativity*, Tarcher (Penguin).

122 C Degazon and M Lunney (1995), ‘Clinical Journal: A tool to foster critical thinking for advanced levels of competence’, 9(5) *Clin Nurs Special*, pp.270–274

123 Meltsner (*op cit* 1999) suggests topics like: *How Did I Get Here? On Friendship? How Have I Changed? What do I think about working with someone I don’t like?* – at p.460.

124 Ogilvy (*op cit* 1996), p.63.

(d) Interviewing

*In the last analysis, skilful interviewing is intimately related to self-awareness.*¹²⁵

Good interviewers know themselves well. In *The Lawyering Process*, Bellow and Moulton argue that a good lawyer will bring her own values and emotions into her practice, rather than deny them in favour of cognitive analysis and decision making.¹²⁶ She will be able to understand the subjectivity of her client so as to practise with empathy. Students should be encouraged to remain open to the client's values and attitudes in order to accept the client and empathise with their situation. Rigid views or narrow beliefs will stifle a student's capacity to accept the client and may lead to the student becoming judgmental. Empathy can't be forced and students have to work through these obstacles personally.

Emotional intelligence is crucial for the good interviewer, because she must be sensitive to nuance, and be ready to accept or resolve the ambiguities in the narrative and the ambivalence in the feelings that arise in herself and the client. The interviewer 'owns' the interview, because there is a professional responsibility to obtain the information necessary to help the client. However legal interviews should be 'client centred' and not structured for the comfort of the lawyer.¹²⁷

Several techniques can be employed. When a client is distressed for example, the interviewer may decide to share something of her own life, to help the client realise the interviewer's humanity and allow for a more positive connection. The interviewer might say that she still feels ambivalent about a similar or related experience in the past, or that the process was difficult or stressful, or how hard it was to decide. This may help the client accept the reality of her own situation and the normality of her feelings. However, it is essential the interviewer doesn't feel a need to disclose to the client.

Most clients are very emotional about their case. Just as emotions can't be separated from cognitive processes, they can't be kept out of the interview room. An 'objective' interview is not possible, and interviewers will always have an emotional response or range of responses to every interview situation. Interviewers need to exercise their emotional intelligence carefully in revealing their responses to the clients. However, attempts to hide all emotional responses will likely alienate the client who will be unimpressed by the lack of engagement for their case and uninspired by the lack of confidence for a resolution.

Practising mindfulness, or conscious reflection on the current moment, during the interview can help the student concentrate, remain focused, and really hear what the client means to say. It involves simultaneous deep listening while observing non-verbal communications and being self-aware. The interviewer not only hears the client's words but notices the attitude and apparent values of the client, all while remaining sensitive to her own inner state, being relaxed but aware should something arise such as anger, fear, hostility or attraction. None of these are a problem in themselves unless they dominate the interviewer and distract her from listening.

Emotional intelligence involves trust and trust is crucial. The student must learn to trust the client and not give in to feelings of doubt that may be based on her attitudes or prejudices. If the student

125 Andrew S Watson (1965), *op cit*.

126 Gary Bellow and Bea Moulton (1978), *The Lawyering Process: Materials for Clinical Instruction in Advocacy*, Mineola, NY: Foundation Press, pp.158-162.

127 Linda F Smith, 'Interviewing Clients: A Linguistic Comparison of the "Traditional" Interview and the "Client-Centered" Interview', 1 *Clin L Rev* 541 (1995).

has good reasons to doubt the client she should discuss it with her supervisor with a view to confronting the client with those reasons.¹²⁸ As well, the clinician must determine how much to trust a student's capacities without compromising the client's interest. In addition, the student has to trust herself, acknowledging her feelings and not criticising herself for various feelings that may arise, such as over-sympathising or being angry. Arguably the client has the biggest task as she must trust the student, the student's supervisor and the clinic's processes.

(e) Empathy

*Knowing others is wisdom, knowing yourself is enlightenment.*¹²⁹

Empathy is essential in a client-centred practice. It forms part of the professional relationship with the client and should pervade all legal practice with personal clients. Practising empathy is an exercise in emotional intelligence because it involves feeling and understanding the world from the client's point of view. Lawyers need to be aware of their own biases, attitudes, beliefs and values in order to be able to put them aside to enter partly into the experience of the client and understand their decisions and behaviour.¹³⁰

Ideally empathy has both emotional and cognitive elements. It requires an understanding of the client's position from both a factual and a feeling level and then a communication of that understanding to the client. Medical schools teach doctors to develop skills in empathic communication with patients because an emotionless and detached stance creates a distorted perspective of the information needed for effective and appropriate action.¹³¹ Similarly with legal practice, clients may not be forthcoming if they sense the lawyer is not affected by their instructions so far. They may distort their narrative by exaggeration, or hold something back in embarrassment. Developing empathy will facilitate the information flow and help the client relax, feeling more supported and affirmed.

Clinical students can learn about empathy through group reflections and journal assignments on their experiences in role-plays. Interview role-plays for example will give students genuine opportunities to 'practise' empathy, because in many cases empathy will arise if the students participate with sincerity.¹³²

Empathy is likely to happen when lawyers practise with an ethic of care. It is an important feature of therapeutic jurisprudence where legal practice is oriented more towards solving problems than winning cases. Empathy is a nuanced quality, and yet it can be a strong force in empowering the lawyer to assist the client and strengthen the professional relationship. The client will appreciate the lawyer's empathy if it is genuine and will have confidence that the lawyer understands her situation.

128 Evans, Powles, Fagg and James 2005, 'Dishonest or Misleading Client' section in chapter titled 'Interviewing', *Lawyer's Practice Manual New South Wales*, Redfern Legal Centre, Thomson Law Book Co.

129 Lao Tzu

130 David A Binder, Paul Bergman and Susan C Price (1991), *Lawyers as Counselors: A Client-Centred Approach*, St. Paul, Minn. West Pub. Co., p.40.

131 Jodi Halpern (2001), *From Detached Concern to Empathy: Humanizing Medical Practise*, Oxford University Press, pp.39-77.

132 Dan Page (2003), 'UCLA Imaging Study Reveals How Active Empathy Charges Emotions; Physical Mimicry of Others Jump-Starts Key Brain Activity', *UCLA News*, April 7 2003. J F Kremer and L L Dietzen (1991), 'Two Approaches to Teaching Accurate Empathy to Undergraduates: Teacher-Intensive and Self-Directed', *Journal of College Student Development* 32, pp.69-75. Hugh Brayne (1998), 'Counselling Skills for the Lawyer: Can Lawyers Learn Anything From Counsellors', *32 The Law Teacher*, 137-156.

Empathy can be developed also through reflection on a client's case and appreciating the client's world view, whether or not it is shared by the lawyer. Some theorists have argued that feeling empathy for a client is not just another skill but should incorporate making a political commitment to side with the client by rejecting the economic or policy environment that contributed to the client's situation.¹³³ Others have argued that lawyers should extend their empathy to include expressions of *approval* in their communications with clients.¹³⁴ Yet others have critiqued both those positions as misuses of empathy because they could be misinterpreted and lead to actions not sought by the client.¹³⁵

Engaging clinical law students with this debate would help them decide how they can best develop empathy in their practice and require them to reflect on their own emotional capacities to do so. That reflection itself would help them develop their skills and propensities to incorporate their emotional intelligence into their legal practice.

The lawyer's responsibility to the client may include encouraging the client to reconsider her motivations for taking legal action, and to consider broader interests, such as those of society or of other people who may be affected. Marjorie Silver cites the case of a man who challenged his mother's will which gave the house to his sister.¹³⁶ The man was relatively rich and his sister, with whom the mother was living when she died, was relatively poor. In dismissing the case the judge told the man that just because his mother did not include him in her will doesn't mean she did not love him very much. Upon which the man broke down in court and cried. Silver says that a lawyer advising the mother from the perspective of 'therapeutic jurisprudence' would have encouraged her to explore the likely effect on her son of being excluded from her will without explanation. A similar approach in advising the son would have encouraged him to explore his motivation for challenging the will.

(f) Mentoring

*Wisdom is not a product of thought.*¹³⁷

Mentoring is an efficient way to monitor and guide a student's emotional development in their legal practice. It enables students to discuss their anxieties and confusions about their practice with someone who has more experience, and who cares. Consequently it can help students identify every experience in their clinic placement as an opportunity to develop their professional skills, including especially their emotional capacities.

Ideally the mentor will be willing and able to discuss with students what is important to them, be committed to listening with empathy, encourage reflection and be able to give constructive feedback. The mentor relationship can help clinical students make sense of their thoughts and feelings which may be confusing or overwhelming. In some cases the mentor can motivate the student by serving as a model of best practice and demonstrating empathy.

133 Peter Margulies (1999), 'Re-Framing Empathy in Clinical Legal Education', 5 *Clinical Law Review*, p.605, 616.

134 Stephen Ellmann (1992), 'Empathy and Approval', 43 *Hastings Law Journal*, 991, 993.

135 Laurel E Fletcher and Harvey M Weinstein (2002),

'When Students Lose Perspective: Clinical Supervision and the Management of Empathy', *Clinical Law Review*, 9:135, 140.

136 Silver (*op cit* 2000), p.396.

137 - Eckhart Tolle (2003) *Stillness Speaks*, Hodder.

The mentor can be an academic¹³⁸, a practitioner¹³⁹ or a more experienced student.¹⁴⁰ The role of the mentor can be wide and flexible, providing feedback and guidance, coaching particular activities and serving as a confidant and guide in times of personal crisis.

Mentors should be genuine, relaxed and willing to learn from their experience with students. Ideally the mentor relationship should not be too formal, and the mentor should not pose as a fount of all knowledge. They should be open minded, sensitive to context and able to engage with students' experiences to show there are often several ways to address a problem. Mentors should be able to identify students who are struggling or depressed and help them decide if professional counselling is indicated.

There are obvious advantages to peer mentoring, since student-to-student communication allows for more trust, shared values and freedom of expression. The University of Newcastle Legal Centre runs a mentoring program that provides every first year student with a fifth year student to guide them in preparation for a first year moot. Many first year law students report feeling isolated and some are alienated by the heavy work demands. The mentor is available to discuss issues generally and help resolve problems and anxieties that first year law students often experience. The mentor's role is assessable by a reflection exercise, and they are provided with a training workshop and a written mentor's guide.

So far the UNLC mentoring program is proving to be beneficial for both mentors and first year students. The first year student receives guidance and moral support from an experienced student who has 'been through the ropes' and is prepared to listen to their concerns. The fifth year students get personal satisfaction from seeing the other student develop and improve as a result of their influence.¹⁴¹

(g) Mindfulness

*Wherever you go, there you are.*¹⁴²

Practising mindfulness means to maximise awareness, to be fully conscious of the current moment: being here and now. Mindfulness is more than just concentrating, which involves mostly cognitive

138 *In-house clinical supervisors (typically lawyer/ academics) are often in the role of mentoring clinical students individually, although many students would benefit from having a mentor who is not their supervisor to enable them to more freely reflect on their experiences including their relationship with their supervisor.*

139 Liz Ryan Cole (1994) describes a program at Vermont Law School where 20 students were selected by ballot to spend a semester with a judge or an attorney as a mentor, who ensured the students were exposed to a wide range of activities in their area of practice: 'Lessons from a Semester in Practise', 1 *Clinical Law Review*, 173–185. Similarly in externships, legal supervisors are expected to mentor the students working with them, although often supervisors have difficulty with that task, as discussed by Cynthia Batt and Harriet N Katz (2004) in 'Confronting Students: Evaluation in the Process of Mentoring Student

Professional Development', 10 *Clinical Law Review*, 581–610.

140 *The program at the University of Newcastle Legal Centre involves peer mentoring of first year students by fifth year students. See Jenny Finlay-Jones and Nicola Ross (forthcoming), 'Peer Mentoring for Law Students – Improving the First Year Advocacy Experience'.*

141 A Brockbank (1998) discusses the often unrecognised benefits to the mentor in 'Mentoring', in I McGill and A Brockbank (eds), *Facilitating Reflective Learning in Higher Education*, Buckingham, Philadelphia: Society for Research into Higher Education and Open University Press. Finlay-Jones and Ross (*op cit*) report the experience of the large majority of fifth-year student mentors in the Newcastle program was very positive: 'excellent experience for all involved', 'I thoroughly enjoyed the mentoring experience', 'most worthwhile', 'very fulfilling'.

142 - Jon Kabat-Zinn, *supra*.

effort. It engages both cognitive and emotional functions so that the mind is fully present, open and awake. Mindfulness includes sensitivity to the context of the situation, which may include the environment, the background, the history, and the personalities involved especially the emotional state of both the self, that is the person practising mindfulness, and any others involved. Understood this way, *actual* mindfulness would require enlightenment, however 'practising' mindfulness is the best way to approach every aspect of legal practice.

Mindfulness offers benefits similar to those of yoga and meditation, which help people to relax and to identify what is important in their lives.¹⁴³ Mindfulness leads to a high level of personal integration through awareness of the body, mind and emotions. Clinic students can learn through mindful practice that by taking care of themselves, they are taking care of business. As they learn to manage their emotional responses, they can improve their powers of concentration, among other things. Steven Keeva refers to the work of Tarthang Tulku, who wrote *Skillful Means*, and who developed specifically for lawyers a successful stress-reduction course that was approved for credit by the continuing legal education authority in California.¹⁴⁴

Practising mindfulness can help us not only improve our work but cope better when things go wrong. Eckhart Tolle advises people who are overworked or in emotional distress not to identify with the anxiety but to stay present: 'Become aware not only of the emotional pain but also of "the one who observes"'.¹⁴⁵ The same process can be used in mentoring students, encouraging them not to identify with their feelings of fear, anxiety or confusion as these emotions will pass. Recognising the emotion enables it to be named and observed as separate from oneself, contingent and temporary. Once identified: 'Ok, that is the anxiety', the student/lawyer will be better able to get on with the job, reflect on the issues, note the dilemma, be aware of the context (including the feelings of anxiety), make a decision to get help or not, and make a decision to act or not, rather than be paralysed with indecision or confusion.

Some legal education discourages mindfulness by concentrating on single-goal directed behaviour. While goal-directed behaviour is a powerful motivator, its over-use or abuse can be destructive. A significant part of the enculturation of lawyers involves maximising ambition, promoting egos and winning the case at all cost. As there can never be a perfect lawyer, the closer the goal gets to being perfect, the greater will be the disappointment. Rather than winning every case or becoming a High Court Judge, we could encourage law students to develop their *intentions* for how they practise law, as part of how they live their life. Whether or not it contains specific goals, it should always be a work-in-process.

143 Jon Kabat-Zinn (1995) founder of the Stress Reduction Clinic at the University of Massachusetts Medical Center explores the connections between mind and body and describes how to use 'practiced mindfulness' to calm anxieties without blunting feelings and emotions. *Full Catastrophe Living*, Piatkus, London.

144 Steven Keeva (1999), *Transforming Practices: Finding Joy and Satisfaction in the Legal Life*, Contemporary Books, Chicago, 1999, p.78-79; Tarthang Tulku (1978), *Skillful Means: Patterns for Success* (Nyingma Psychology Series, 5), Berkeley, Calif.: Dharma Pub.

145 Tolle (*op cit* 1999), p.33.

Conclusions

Optimism and a positive attitude not only distinguishes happy lawyers from unhappy ones, it may also typify truly professional lawyers from those simply meeting their obligations. Emotional competency is a good indicator of positive attitude, and while it does not preclude a healthy scepticism, ironic appreciation or sense of humour, it is necessary for successful, happy and enduring legal practice. Consequently, helping lawyers improve their emotional intelligence will impact on the quality of their work and their overall wellbeing.

Initially, clinicians should inform students of the risks of practising law. We should then discuss how it is possible to survive happily, as both a good lawyer and satisfied in the profession. We could discuss the concept of emotional capacities and introduce students to emotional intelligence, not as a new discovery but perhaps a new perspective, and something we should consider carefully. We could then discuss options for looking after one's own intellectual, emotional and physical wellbeing.

The students could then be introduced to the clinic's practices such as reflecting, journaling, interviewing, negotiation role-plays and mentoring, as opportunities to develop their emotional capacities, among other specific benefits. Even doctrinal law units have opportunities for students to exercise their insight, to imagine and discuss how case law and principles may impact on the lives of real people. We can be guided to some extent by the experience of others, and there are many publications that help us understand the problems of legal practice and provide guidance on how to teach students about surviving them.¹⁴⁶

On a cautionary note: given the economically 'rationalist' trend towards Quality Assurance, clinicians should take seriously the suggestion by Brayne and Evans to devise clinical QA processes before they are imposed.¹⁴⁷ There is a growing need to demonstrate in institutional terms that clinical aims and objectives are consistent with planned outcomes. The ideal outcomes of clinical legal education can be clearly described and would include not only the conventional skills but capacities like emotional intelligence that reflect the student's inner development. Difficulties with identifying and assessing these outcomes using 'objective minimum standards' should be addressed broadly and directly, and not used to deny their relevance.

146 I recommend Keeva (*op cit* 1999, 2004); Tulku (*op cit* 1978, 1991); Kabat-Zinn (*op cit* 1996); Tupman (*op cit* 2000); Lani Guinier, Michelle Fine and Jane Balin (1997), *Becoming Gentlemen: Women, Law School, and Institutional Change*, Beacon Press, Boston; Hugh Brayne, Nigel Duncan and Richard Grimes (2002), *Clinical Legal Education: Active Learning in Your Law School*, Blackstone Press.

147 Hugh Brayne and Adrian Evans (December 2004), 'Quality-Lite for Clinics: Appropriate Accountability within 'Live-Client' Clinical Legal Education', 6 *International Journal of Clinical Legal Education*, 149-161.