

What Lawyers Should Know About Emotional Intelligence

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Lawyers need comprehensive information to provide the best possible legal advice to their client or to present the best possible case for their client. Factual information is important but so is emotional information and practitioners (particularly younger practitioners) often overlook this.

Research has found a link between Emotional Intelligence (EI) and good interpersonal relationships in other settings.¹ People with high EI are better able to understand how others think, feel and behave and are better able to demonstrate this understanding.² Clients who feel they are understood are more likely to trust their lawyer's advice.³

In the United States over the last 15-20 years a body of literature has emerged looking at the 'intersection' between law and emotion.⁴ In this literature not much attention is directed to helping legal practitioners learn about EI or how to improve their EI.

This paper sets out to plug the gap and to explain the following:

1. A theory of EI which is the most user-friendly for lawyers
2. Why you might be unconsciously resistant to the concept of EI ("your mindset")
3. Why research might change your mindset
4. Ways in which you can improve your EI competency
5. Some tips for your legal practice

A Theory of Emotional Intelligence?

Psychologists have debated whether EI is a separate construct, capable of reliable validation, or just a personality trait.⁵ Fortunately, this debate need not concern lawyers. Salovey and Mayer

¹ Nicola Schutte et al, 'Emotional Intelligence and interpersonal Relations' (2001) 141 (4) *The Journal of Social Psychology* 523-536; Arora et al, Emotional Intelligence in Medicine: A systematic review through the context of ACGME competencies (2010) 44 *Journal of Medical Education* 749

² A quote from Dr Ben Palmer, CEO of Genos International 14 April 2014
<<http://www.genosinternational.com/emotional-intelligence/model>>

³ An assumption we can make from medical research into doctor/patient interactions for example: M K Buller and D B Buller, 'Physicians' communication style and patient satisfaction' (1987) 28 *Journal of Health Social Behaviour* 375; Zeev Ben Sira 'Affective Behaviour and Perceptions of Health Professionals' in David S Grochman (Ed) *Health Behaviours Emerging Research Perspectives* (Springer,1998); Weng et al; 'Doctors' emotional intelligence and the patient-doctor relationship' (2008) 42 *Journal of Medical Education* 703

⁴ For an analysis of this literature see Terry A Maroney, 'Law and Emotion: A proposed Taxonomy of an Emerging Field' (2006) 30 *Law and Human Behaviour* 119

developed a model of EI that recognises an ability to improve competency (as opposed to being stuck with a trait).⁶ Their theory is that EI manifests itself in 4 abilities: the ability to understand emotion, the ability to perceive emotion in oneself and others and the ability to use emotion. In reality, these abilities are all inter-linked but it is helpful to consider them separately when looking at ways to improve competency.

Why you might be unconsciously resistant to the concept of EI

For many 'cognitively' trained lawyers emotion must be eliminated:

[t]raditional legal theory ... mandates that any ... emotions be actively suppressed, reflecting an untested, commonsense wisdom that emotion distorts ... objective legal reasoning.⁷

Lawyers are also trained to believe that emotions are not helpful. For example, Justice Holroyde in the trial of 'Ken Barlow' for indecent assault and rape (81 year old actor from the long running UK soap 'Coronation Street') was reported saying to the jury:

Emotions must play no part in your decisions. It would only distract from your solemn duty in accordance with the oath or affirmation you made at the start of the trial to return true verdicts according to the evidence. You must put to one side any feelings of sympathy or anger you may have, in one direction or another.⁸

Why research might change your mindset

Emotion cannot be eliminated from decision-making and "rational" thinking has the capacity to be flawed. Emotions can be both helpful as well as unhelpful. They can, for example, guide our thinking about what we value. "Negative" emotions such as "anger", "fear" and "anxiety" tend to narrow our thinking and "positive" emotions such as "joy" or "happiness" tend to broaden our thinking.

Why we cannot eliminate emotion and need emotion to make decisions

Antonio Damasio, neuroscientist, discovered that when a patient damages the neuro-frontal cortex of the brain, the patient's capacity to make decisions is disrupted. His most famous study is that of a patient named Eliot who suffered damage to a discrete area of his brain from a tumour.⁹ Eliot could not make planning decisions. Many of Eliot's cognitive functions were intact. He was able to understand options open to him and to predict the consequences of making choices but he was unable to see the big picture and got lost in the detail. He did not display emotion to his family or to researchers when shown distressing pictures. Damasio therefore concluded that damage to this part of the brain had induced an inability to feel and express emotion and this in turn had caused an inability to reason.

⁵ NS Schutte et al, 'Development and Validation of a Measure of Emotional Intelligence' (1998) 25 Journal of Personality and Individual Differences 167; Kevin R Murphy (ed) *A Critique of Emotional Intelligence, What the are the Problems and How Can They Be Fixed* (Psychology Press, 2006)

⁶ JD Mayer & P Salovey 'What is emotional intelligence?' in P Salovey and D Sluyter (eds) *Emotional Development and emotional intelligence: Educational implications* (Basic Books, 1997)

⁷ Above n4, 132

⁸ Daily Mail, 3 February 2014 < <http://www.dailymail.co.uk/news/article-2551096>>

⁹ A Damasio, *Descartes Error: Emotion Reason and the Human Brain* (Vintage, 2006)

Emotions are likely to play a part in “gut feeling” or intuition that a decision is the right one. The “reward” centres in our brain help us generate predictions about what may happen next. This is linked to our ability to remember similar events. If we think a poor outcome is likely our dopamine levels drop but if the forecast is good then our dopamine levels rise. This process helps us form preferences and helps us make decisions when the ‘outcomes are uncertain or when the information available to make the decision is incomplete’.¹⁰ The role of memory means that this automatic or “gut” response is linked to the acquisition of a skill through practice or training.¹¹

Emotions shape our values

Emotions play an important part in our ability to make value judgments.¹² Joshua Greene has conducted experiments in which participants are exposed to moral dilemmas.¹³ The areas of the brain which are illuminated (on fMRI scanning) when he conducts his experiments has led him to conclude that emotion plays a part when people are making “moral” or value-laden decisions.

When emotions can be helpful

Emotions can be motivators. Anger in particular can motivate a person to take action although judging the right amount of anger is difficult.

Daniel Kahneman suggests that in order to make the most reasonable decisions we should engage in “system 2” thinking which involves broadening our outlook.¹⁴ Positive psychologists believe that this broadening occurs when we make ourselves happy (the “broaden and build” theory).¹⁵ When we are happy we are therefore likely to be creative. When we are unhappy we are likely to be narrow down our options (see below) and this can be helpful if we need to focus on detail.

When emotions are not helpful

Emotions can cloud a person’s judgment and cause people to react inappropriately and to say things they may later regret. Scientists believe that there is a complex interaction between the “limbic” system of our brain and our pre-frontal cortex and that in moments of heightened

¹⁰ Hayley Bennett and GA (Tony) Broe, ‘Judicial neurobiology, Markarian synthesis and emotion: How can the human brain make sentencing decisions?’ (2007) 31 *Criminal Law Journal* 75, 84

¹¹ See, for example, Jonah Lehrer, *How we Decide* (Houghton, Mifflin Harcourt, 2009)

¹² See, for example, J Haidt, ‘The emotional dog and its rational tail: A social intuitionist approach to moral judgment’ (2001) 108 *Psychological Review* 814

¹³ For example, the trolley dilemma: the participant can choose to divert a railway trolley (by pulling a lever) away from a track to which 5 people are tied. In doing so the participant will save these 5 lives but will kill one person in the process. Participants are then faced with a variant of the dilemma. Instead of pulling a lever, they can choose to throw a live person onto the track to stop the train. When faced with the need to push another person onto the track the majority of participants prefer not to do so even though the outcome would be the same.

¹⁴ Daniel Kahneman *Thinking Fast and Slow* (Farrar, Straus and Giroux 2011)

¹⁵ Barbara Fredrikson, ‘The Role of Positive Emotions in Positive Psychology’ (2001) 56(3) *Journal of American Psychology* 218

arousal, such as anxious moments or moments when we feel under threat, our “limbic system” stops “talking” to our pre-frontal cortex and prevents us from regulating our responses.¹⁶ In order to successfully deal with a perceived threat our brain needs to narrow down our options and to prepare our body for action (fight, flight or freeze). This reaction has been coined “amygdala hijacking” by Daniel Goleman because this is the region of the brain which is believed to be responding.¹⁷ Once a person experiences an amygdala hijack anecdotally it takes about 20 minutes for a person to be receptive to thinking more expansively again (unless the person has spent time training for perceived threats).

Why “rational” thoughts can be flawed

Our concept that objective legal reasoning is “good” and emotions are “bad” does not take into account that our capacity to think “rationally” is not as strong as we might like to believe. Thinking can be skewed, for example, by judgment shortcuts (heuristics) such as “anchoring” and by biases (such as aversion for losses or confirmation bias).¹⁸

Summary

Whilst we have a tendency to distrust our emotional responses research tells us that our emotional responses can usefully influence our thinking. In addition research suggests that we should be wary of our so-called “cognitive” responses, which may require further scrutiny.

Becoming more emotionally intelligent as a lawyer-using the Salovey/Mayer model

Understanding Emotion

In general, people are not emotionally literate and are often unable to name the emotion they are feeling and are not able to distinguish “thinking” from “feeling”.¹⁹ The “basic” emotions are said to be: happiness, sadness, fear, disgust, anger, and surprise but there are many more identified in the literature. The ability to name emotions is made harder by the fact that emotions are typically fleeting and can be mixed together. We might feel both happy that our untidy teenager is leaving home for a 12 month stay overseas but also sad at the same time. The first step in becoming more emotionally intelligent is to become aware of all possible human emotional responses.²⁰

Emotions are felt physiologically and so being clear about the common physical responses to emotion helps in the process of understanding emotion. Similarly, it is helpful to understand

¹⁶ This is a necessarily simplistic view of neuro-scientific research borrowing from concepts by Joseph E LeDoux, ‘Emotion and the amygdala’ in John P Aggleton (Ed), *The amygdala: Neurobiological aspects of emotion, memory, and mental dysfunction* (Wiley Press, 1992)

¹⁷ Daniel Goleman is the author of many books on Emotional Intelligence his first book being *Emotional Intelligence Why It Can Matter More than IQ* (Bloomsbury, 1995). He borrowed from Salovey and Mayer’s research when reporting about EI.

¹⁸ For a full discussion of these “cognitive biases” see Jennifer K Robbennolt and Jean R Sternlight ‘Psychology for Lawyers Understanding the Human Factors in Negotiation Litigation and Decision Making’ (ABA, 2012)

¹⁹ Try asking someone what they feel about their loved ones, people tend to reply cognitively for example “I think s/he is great” rather than “I love them very much” (observation from Trevor Waring, Psychologist)

²⁰ One way to do this is to buy “emotion” cards. The author purchased a pack containing 150 emotions from the Langley Group
http://www.langleygroup.com.au/images/Langley_Group_Services_Programmes.pdf

the role of chemicals such as oxytocin, cortisol and dopamine in the feeling and management of emotion.²¹ Emotions tend to start automatically and escalate if not managed. For example, a person might start out mildly irritated before moving through upset and anger and then become “enraged”. Different emotions can be aroused depending upon our appraisal of a situation. We might be angry if a gas leak caused an explosion, which destroyed our house, but sad if a hurricane did the same damage.

Perceiving Emotions

Once we have a better understanding of emotions it is easier to work on how we perceive emotion in ourselves and in others to become better than average in this process. Like anything, training helps.

Perceiving emotion in yourself

It is helpful to become a “student of you”. It is common to be unclear about yourself: why did I say that? Becoming a “student of you” means being aware of your feelings, how your body responds to emotion, your upbringing and your values.

Michael Kirby, quoting Andrew Watson, has similar advice for judges:

At the very least, judges should work conscientiously to become intuitively and then cogitatively, sensitive to the kinds of issues that cause them emotional conflict with all of its potential for stress²²

If you were wearing a T -shirt today with your emotions on it what would it say?²³ If a perceived threat is coming your way such as a derogatory comment or a poor performance review- what are you doing? Can you stop an escalation of emotion? Do you get any advanced warning that you are about to “hit the roof”? If so, what is it? What is your default mode to conflict? Do you tend to over-react?²⁴

Are you feeling burned out?²⁵ Those helping others can tend to respond to emotional situations by suppressing their own emotions and denying that they exist. Research suggests that this type of response may lead to significant health risks and can lead to compassion fatigue.²⁶ Barnett et al observe that continual reliance on debriefing in a practice area, which is constantly stressful, is unlikely to prove effective in the long term.²⁷ Acknowledging and managing emotions is a healthier alternative. Research findings in other disciplines suggest that workers who, on

²¹ A good textbook to read is Dacher Keltner Keith Oatley and Jennifer M. Jenkins , *Understanding Emotions* (Wiley, 3rd Ed, 2013)

²²Kirby M, Judging: Reflections on the Moment of Decision, Fifth International Conference on Reasoning and Decision-Making (Charles Stuart University, Wagga Wagga, 4 December 1998)

²³An idea from Alan Mortiboys ‘*Teaching with Emotional Intelligence*’ (Routledge, 2011)

²⁴ Martin Seligman’s learned optimism technique suggests that you should try to put events into perspective by asking yourself questions about the event to which you are over-reacting. For example if someone behaves badly towards you, like cutting you up in traffic, don’t assume they did this deliberately just to upset you- keep an open mind see M. E. P. Seligman, *Learned Optimism* (Knopf, 1990).

²⁵ See Colin James who discusses burn out in the legal profession: ‘Seeing Things As We Are. Emotional Intelligence and Clinical Legal Education’ (2005)(6) *International Journal of Clinical Legal Education* 123

²⁶ K D Killian Helping Till it Hurts? A multi-method study of burnout, compassion fatigue and resilience in clinicians working with trauma survivors (2008) 14 *Traumatology* 31

²⁷ Barnett et al, ‘Psychological and Ethical Issues in the Relationship between Lawyers and Mentally Ill Clients’(2007)1 *University of Western Sydney Law Review* 63,76

testing, score well for emotional intelligence also score well for resilience to stress.²⁸ Suggestions from positive psychology are extremely helpful about ways to “turn off” damaging emotional responses and to take time to enjoy life.²⁹ Some researchers suggest using a journal to track patterns in feelings can help with management of emotions.³⁰ Others suggest practising “mindfulness” can be helpful.³¹

Perceiving emotion in others

Emotional responses are often not verbalised. According to some studies only about 7% of emotional communication is conveyed verbally, whilst the rest is conveyed by voice tone (about 22%) and by visual cues such as eye contact and body positioning (approximately 55%).³² This means that as well as listening to their clients, lawyers need to take care to appraise their clients fully to understand how they are feeling.

Paul Ekman believes that facial expressions are universal and that it is relatively easy to master the way in which “basic” emotions are portrayed in the face.³³

Looking at people closely, listening to them closely, asking them questions and using empathy may encourage a person to respond by telling you how they are feeling but sometimes this may not be enough. We tend to make assumptions that people are feeling the same way as we are and we tend to believe that are we more perceptive than we really are. If in doubt it is best to challenge assumptions by asking for information: “Your Honour looks confused” or “You seem unhappy with my advice”.

Even if you think your communication skills are good they can be improved. Taking note of how emotion may be influencing a client’s thinking is important. In addition, Linda Smith has identified that even experienced lawyers tend to demonstrate active listening skills by only reflecting back factual information rather than emotional information.³⁴ Gay Gelhorn found that lawyers tend to miss the opening remarks by a client when engaging in pleasantries at the

²⁸ Gail Kinman and Louise Grant ‘Exploring Stress Resilience in Trainee Social workers: The Role of Emotional and Social Competencies’ (2011) 41 *British Journal of Social Work* 261 (this study was of 240 trainee social workers and the test of resilience was the Wagnild and Young scale (self report measure) and the Goldberg and Williams General Health Questionnaire. The authors concede that longitudinal studies and greater gender, age and cultural mix are desirable for further research.

²⁹ See, for example Christopher Peterson, *Primer in Positive Psychology* (Oxford University Press, 2006)

³⁰ J W Pennebaker, *Writing, social processes, and psychotherapy: From past to future* in S.J. Lepore and J.M. Smyth (Eds.), *The writing cure: How expressive writing promotes health and emotional well-being* (American Psychological Association, 2002).

³¹ Jon Kabat Zinn, ‘*Coming to Our Senses: Healing Ourselves and the World Through Mindfulness*’ (Hyperion, 2006). Mindfulness as a technique includes noticing what you are feeling and thinking without judgment and to learn to focus on one thing at a time in great detail

³² L M L Ong et al, ‘Doctor Patient Communication: A review of the literature’ (1995) 40(7) *Journal of Social Science Medicine* 903, 908

³³ There are tests online which can test your ability to read facial expressions see http://greatergood.berkeley.edu/ei_quiz. For Paul Ekman’s research see inter alia: Paul Ekman, ‘Facial Expressions’ in T Dagleish and M Power (eds) *Handbook of Cognition and Emotion* (Wiley,1999) Note: Lisa Barrett of Northeastern University has recently been arguing against Ekman’s hypothesis that facial expressions are universal see M Gendron et al ‘Perceptions of emotion from facial expressions are not culturally universal: Evidence from a remote culture’ ((in press) *Journal of Emotion*.

³⁴ Linda Smith, Was it Good for you Too? Conversational Analysis of Two Interviews (2007) 96 *Kentucky Law Journal* 579

beginning of an interview. She suggests that these opening remarks often contain crucial information about the client's feelings and concerns.³⁵

Suggestions for using EI abilities in legal practice

1. Ask yourself: "What is the client feeling?" Then ask yourself "How are the client's feelings influencing their thinking?" Take steps to manage the client's thought processes. For example, if the client is only able to see one option, take steps to broaden their outlook by introducing more positive thoughts. Take them back to happy memories or challenge their perspective. "When you look back later, what will you be able to say about the kind of divorce you had?" or "What do you think your ex is thinking right now?" etc.
2. Even if your clients are never emotional when giving you instructions because their instructions are of a transactional nature, remember that with EI you can build more trusting relationships. Take time to think about how your client might be feeling, thinking and behaving about their competitor or their business.
3. Notice if people are displaying emotion towards you. Someone displaying anger may be hoping to "hijack your amygdala" and confuse your decision-making. If we can recognise this early we can work to manage our reaction. Just noticing what is happening "I think he is trying to make me angry" can be sufficient to give us time to react more carefully.
4. If we can see a client about to become extremely emotional we may be able to de-escalate their emotional response with a distraction technique. Simply naming their response can be sufficient to cause a momentary pause, which might allow their limbic brain to reconnect with their pre-frontal cortex.
5. If a client is extremely emotional it may be worth delaying important decisions. This has relevance in mediations where often it is seen as imperative to "sign up" the client. A prudent lawyer might recognise the signs when their client is not capable of making important decisions and allow for "cooling off" time.
6. Creating a "positive" environment is more effective for "brainstorming". In meetings, playing some quiet classical music, offering warm beverages, putting flowers in the room will encourage people to think more effectively and make people more open to discussion. (This is probably done best openly since the cynics in us react badly to attempts at manipulation!)
7. In terms of file management, tackling files, which need creative thinking, is best done in a good mood and files requiring close attention to detail (narrower thinking) in less happy moods. (Do your bills when you are feeling sad!)
8. We may not see the need for apologies. Thinking more broadly and tapping into the client's feelings may mean we should not concentrate wholly on legal rights.³⁶
9. Working to understand the client's emotions is an important skill. Active listening (including repeating back the emotions you hear), empathy, asking questions, listening to opening remarks made by the client are all important.

³⁵ Gay Gelhorn, 'Law and Language: An empirically-based model for the opening moments of client interviews' (1998) 4 *Clinical Law Review* 321

³⁶ Tamara Relis, 'It's not about the money: A Theory on Misconceptions of Plaintiffs' Litigation Aims (2007) 68 (2) *University of Pittsburg Law Review* 1 –clients wanted assurances that medical negligence would not happen again and were more keen on this outcome than compensation.

10. If you are responding negatively towards someone see if you can identify any preconceived judgments you may have which is making you respond in that way. You may be making assumptions about what they are thinking and feeling and you should ask questions first.
11. If emotions are running high then disputes about values may be at stake.
12. A person high in EI may be more sensitive to emotional displays in an interview or negotiation setting and be more likely to acquire useful information about a party's true interests.³⁷
13. Interacting with clients is time consuming and you may be tempted to create shortcuts by having other people interview the client first or by having the client fill out an extensive questionnaire or by interrupting clients when they speak. Spending time with the client earning their trust and respect and using affective skills is not time wasted and in fact clients left to their own devices usually provide the most important information quickly and of their own accord.³⁸
14. When interacting with another person a sudden outburst of emotion may signal that the conversation is going off the rails. Often the key to rescuing the situation is to pull back and keep to your central message: "you seem to be upset by my last remark, let me try again: what I am saying is that I am concerned that we will not meet budget if we spend money on this trip to Fiji".
15. Whilst you may not be keen to keep a journal, it is very useful to reflect upon your interactions with people so that you can learn how to improve. Making a note of when interpersonal communication goes well and when it does not may provide you with some useful guidance.

SUGGESTED READING LIST IN ORDER OF MOST USEFUL

Jennifer K Robbenolt and Jean R Sternlight, *Psychology for Lawyers* (ABA, 2012)

Chapter 8, Nadjie Alexander, Jill Howieson, *Negotiation: Strategy Style Skills* (Lexis Nexis, 2010)

David R Caruso and Peter Salovey, *The Emotionally Intelligent Manager: How to Develop and Use the Four Key Emotional Skills of Leadership* (Jossey Bass, 2004)

Dacher Keltner Keith Oatley and Jennifer M. Jenkins, *Understanding Emotions* (Wiley, 3rd ed, 2013)

Paul Brest and Linda Hamilton Kreiger, *Problem Solving, Decision Making and Professional Judgment, A Guide for Lawyers and Policymakers* (Oxford University Press, 2010) - (Note: this is a large book with an interesting all-round discussion -more about decision-making than emotions but does contain a section on emotion as an influencing factor).

Douglas Stone, Bruce Patton, Sheila Heen, *Difficult Conversations* (Penguin, 2010)

³⁷ Ingrid Fulmer and Bruce Barry, 'The Smart Negotiator: Cognitive Ability and Emotional Intelligence in Negotiation (2004)15 (3) *International Journal of Conflict Management* 245

³⁸This is the case in the medical field: Kim Marvel et al, 'Soliciting the Patient's Agenda: Have we Improved? (1999) 281 *Journal of American Medical Association* 285 in Stephen Ellman "Fast Talking" (2005) New York Law School Research Paper series