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**THE SIGNIFICANCE OF EMOTIONAL INTELLIGENCE  
TO TRIAL LAWYERS**

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**INTERNATIONAL EXPERT  
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**THE SIGNIFICANCE OF EMOTIONAL INTELLIGENCE TO  
TRIAL LAWYERS**

(Literature review)

**Pedro Aguiar Morais Barosa**

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To my good friends Phil and Michele, for  
having turned my experience in Italy even  
more special.

*"People generally agree with people they like"*<sup>1</sup>

**Shelly Chaiken**

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<sup>1</sup> Heuristic Versus Systematic Information Processing and the Use of Source Versus Message Cues in Persuasion;  
*Journal of Personality and Social Psychology*, 1980, Vol. 39, No 5, 752-766;

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## I. INTRODUCTION

Having been a trial lawyer for more than a decade, I had the chance to meet hundreds of colleagues in court within criminal proceedings. Smart, clever and bright ones, and sometimes others who were less educated and intelligent. Intellectually, I never considered myself as a very intelligent person. During school and in my university years I was far from being a good student. Thanks to my parents, I studied in the best places in Portugal, and was always surrounded by intellectual, smart and well-read students. However, the best I could achieve was to be considered a very average student.

Of course, at that time, I did not dedicate all my time to studying and I was absent from many classes since my social life was my priority. At Law School, though, there were moments when I looked at some large and heavy law books and I really had trouble understanding what those strange words and thoughts were trying to tell me. As a result, while I was a student I always compared myself to my colleagues and peers and thought that I was less intelligent than they were.

Still, I managed to finish law school and started working. Thus, for the last 12 years, I have been working hard as a lawyer in one of the biggest and most prestigious law firms in Portugal (PLMJ). This was where I became a criminal lawyer. Having a leader who liked me and soon trusted me, I started going to court alone and bringing to our office favourable judicial judgements regarding his clients. More criminal proceedings came and this positive result became common.

Being a trial lawyer is having one goal - to win. The only other option is losing. Regardless of which side we are in criminal proceedings (defence or prosecution), either you want an acquittal, or we need a conviction. From my own experience, I have learned that having a client who is right helps us winning the case, especially if we have the evidence on our side. However, having a client who is wrong doesn't mean it is more likely that we will lose the case.

Moreover, at the beginning of my career, it was not easy for me to understand that, in the courtroom, I was feeling less intelligent than a large number of my opponents, and yet, I was leaving the court with favourable judicial judgements in my briefcase. Observing their mastery of

the law and watching their confidence in court while delivering their legal arguments, most of the times I considered my opponents brighter and more intelligent than me. However, experience in court has shown me that cognitive abilities (the so-called “standard” or “traditional intelligence”) is not our trophy in trial. Emotional intelligence is.

In this paper, I propose to demonstrate the significance of emotional intelligence to trial lawyers, specially within criminal proceedings by pointing out the inherent characteristics of emotional intelligence and its effects on lawyers’ demeanour and performance in trial. I chose this topic not only considering the reasons explained above, but also because, to my knowledge, there is not much scientific literature addressing this specific subject, nor is there much research supporting emotional intelligence as a key tool to a trial lawyer.

I consider cognitive intelligence as a relatively valuable feature in the legal field, however I will be focusing on the great importance of emotional intelligence to achieve the desired judicial outcome. Furthermore, I will not devote this paper to analysing how emotional intelligence is measured or tested. Conversely, I will address how the advantages of having emotional intelligence can aid trial attorneys in achieving their goals in trial and highlight why emotional and social factors are more valuable to trial lawyers than high cognitive abilities.

Based on my analysis of the literature, I wish to provide some practical recommendations on how legal professionals can perfect their rhetoric based on empirical evidence. I referred specifically to criminal lawyers considering my own experience and bearing in mind that in Portugal (and I believe in most inquisitorial legal systems) lawyers have more flexibility in trial’s criminal proceedings – thus more “space” to perform – than in civil proceedings where more technical and strict rules have to be followed by the attorneys.

On the other hand, I will address the role of the judges in courtroom more than the juries since in the Portuguese legal system judges are the decision makers, and it is not common to have juries giving judicial verdicts in court, although this can be accepted in very particular cases if some specific legal rules apply. However, as we will see, that difference is not relevant for the purposes

of this paper since they are all people and one of my goals is also to emphasize the role of emotions, something each and every one of us has.

## **II. EMOTIONAL INTELLIGENCE – CONCEPTUALIZATION**

Since the publication of the science writer Daniel Goleman's first book on the topic in 1995<sup>2</sup>, emotional intelligence has become very popular. However, emotional intelligence is not new. It is based on a long history of research and theory in personality and social, as well as I/O psychology (Cherniss, 2000). In fact, in the last decades many psychologists have written about it and there is no consensus regarding its exact conceptualization. On the other hand, as it is so popular, a lot of non-academic literature as well as the media tend to use the term incorrectly, and often mention emotional intelligence for every skill or ability that is not related to cognitive capacity.

According to Mayer and Salovey<sup>3</sup>, emotional intelligence is the capacity to reason about emotions, and of emotions to enhance thinking. It includes the abilities to accurately perceive emotions in oneself and others, to access and generate emotions and emotional knowledge and to reflectively regulate emotions so as to promote emotional and intellectual growth (Mayer & Salovey, 1997). It is also considered as a kind of intelligence that operates on, and with, emotional information, which concerns the meaning of emotions, emotional patterns and sequences, the appraisals of relationships they reflect (Mayer, Salovey & Caruso, 2004).

The most widely accepted scientific definition of emotional intelligence is the subset of social intelligence that involves “the ability to monitor one's own and other's feelings and emotions, to discriminate among them and to use this information to guide one's thinking and actions” (Salovey & Mayer, 1990). Conversely, Bar-On (1997) defines emotional intelligence as “an array of non-cognitive capabilities, competences and skills that influence one's ability to succeed in coping with

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<sup>2</sup> Emotional Intelligence. Why It Can Matter More than IQ (1996);

<sup>3</sup> The psychologists and researchers John Mayer and Peter Salovey were the first ones to define emotional intelligence;

environmental demands and pressure.”<sup>4</sup>. Evidence about emotional intelligence was presented involving studies from many different laboratories and employing thousands of participants who have had their EI levels assessed by two proper ability measures, the MSCEIT<sup>5</sup> and the MEIS<sup>6</sup> (Mayer, Salovey & Caruso, 2004).

The same authors postulate that emotional intelligence, as measured by the latest test, meets the three classical criteria of a standard intelligence and thus is considered scientifically legitimate: First, it should be capable of being operationalized as a set of abilities; second, it should meet certain correlational standards: the abilities defined by the intelligence should form a related set and be related to pre-existing intelligences; third, the abilities of the intelligence should develop with age. According to Mayer, Caruso and Salovey’s studies, emotional intelligence represents an important candidate to enlarge the group on which general intelligence is based. Moreover, emotional intelligence has been considered as a hot intelligence (Mayer, Caruso, & Salovey, 1999).

### **III. EMOTIONAL INTELLIGENCE – CHARACTERISTICS**

Despite being related, cognitive and non-cognitive abilities are not the same thing. A person may have a high IQ and an amazing capacity for reasoning but be a complete disaster regarding emotional intelligence. Among several examples that we could think of, an illustrative one, in my opinion, would be a situation where someone who is generally considered “bright” is bragging about how great he is to one or more acquaintances in order to impress them, without being aware that they are actually thinking “how pathetic this guy is?!”.

How many times does this happen in our lives with “intelligent” people? Did this person mean to cause a bad impression? Was that negative impact what he wanted to achieve? People who possess the ability of accurately analysing emotions in oneself and in others, have adaptive regulation of

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<sup>4</sup> Bar-On, R. (1997). The emotional intelligence inventory (EQ-I): Technical manual. *Toronto, Canada: Multi-Health Systems*;

<sup>5</sup> Mayer-Salovey-Caruso Emotional Intelligence Test;

<sup>6</sup> Multifactor Emotional Intelligence Scale;

emotion and appropriate expression of emotion are considered emotionally skilled and well-adjusted individuals.

People with emotional intelligence comprehend and express their own emotions, are aware of their own feelings and recognize them in others (P. Salovey, & J. D. Mayer, 1990). As pointed out by Susy Fox and Paul E. Spector (2000), Salovey and Mayer used the term “emotional intelligence” since it requires processing of specific emotional information from within the organism.

Three different mental processes involving emotional information are differentiated by these authors: 1) appraising and expressing emotions in the self and others; 2) regulating emotions in the self and others; and 3) using emotions adaptively to achieve one’s goals. In addition, the above-mentioned processes can be linked to three research themes in the psychological and social psychological literature: empathy, self-presentation and self-regulation of mood (Susy Fox & Paul E. Spector, 2000).

Empathy is the ability to understand another’s feelings and to re-experience them oneself. As we will see further, it is a particularly important aspect of emotionally intelligent behaviour, especially for trial lawyers (Cherniss, 2000; Salovey & Mayer, 1990). A good and simple example where emotional intelligence is on display is given by Marjorie A. Silver: when a baby cries, and another infant, watching him, cries too.

Now transposing this to an adult situation – and more related to what we will talk about – is a client breaking down in tears during a meeting on his divorce (or criminal) lawyer. The lawyer gives him a box of tissues and tells him he knows how he’s feeling and says “take your time”, and adds “how about I do some paperwork until you feel like you can talk again, okay?” (Marjorie A. Silver, 1990).

These empathetic responses are not so common as we would think, and a lot of people with high cognitive skills do not know how to handle situations like these. Many of them feel very uncomfortable and don’t know what to do or how to respond. Conversely, others easily deal with it and respond appropriately to those emotions. As to self-presentation concerns, Susy Fox and

Paul E. Spector explain that in social interactions between two individuals, each one uses information about the other to help define the situation and clarify their expectations.

The problem is that the “true” attitudes, beliefs and emotions of another individual can be ascertained only indirectly. Non-verbal behaviours are generally taken as “authentic” or “ungovernable” representations of true feelings. Therefore, as the authors state, the individual who is skilful in controlling these ungovernable behaviours is at a distinct advantage in the exchanges that serve to create impressions and define social situations (Susy Fox & Paul E. Spector, 2000).

Regulation of mood is also linked to emotional intelligence. Affective states influence many types of decisions that people usually confront. Positive and negative moods have been shown to bias many decision process (D. DeSteno, R. E. Petty, D.T. Wegener & D.D. Rucker, 2000). Indeed, individuals in negative moods tend to process information carefully whereas when with positive moods tend to do is less carefully (N. Feigenson, 2009).

In addition, there is evidence showing that emotional people are more able to get advantages by inducing positive affect on others (Isen AM & Baron RA, 1991). Also Salovey and Mayer (1990) included regulation of emotion in the construct of emotional intelligence since it may lead to more adaptive and reinforcing mood states.

The high EI individual can better perceive emotions, use them in thought, understand their meanings and manage emotions better than others. These people also tend to be higher in verbal, social, and other intelligences (Mayer, Salovey & Caruso, 2004) qualities which, as we will see, are most precious for trial lawyers.

Moreover, emotional intelligent individuals are also less apt to engage in problem behaviours and more likely to have possessions of sentimental attachment and more positive social interactions. On the other hand, solving emotional problems requires less cognitive effort for those people. Such individuals may also be more skilful in describing motivational goals and missions (Mayer, Salovey & Caruso, 2004).

Emotional intelligence promotes positive social functioning by helping individuals to identify and other's emotion states, behave accordingly and improve communication. Generally, people with more emotional intelligence are socially more competent, sensitive and interact with others easily (M. Brackett, S. Rivers & P. Salovey, 2011).

Almost one hundred years ago, the psychologist Edward L. Thorndike stated that there were three classes of intellectual functioning: abstract intelligence, which is the ability to understand and manage ideas, mechanical intelligence, which is the ability to understand objects, and social intelligence, which is the ability to understand people (Edward L. Thorndike, 1920).

That last one is, in my strong opinion, the clearest definition of emotional intelligence. Particularly regarding lawyers, as we will see later, those who combine emotions with cognition are more able to problem solve, reason, communicate with people and make more effective decisions (C. Kelton, 2014).

#### **IV. THE MYTH OF ACADEMIC PERFORMANCE TO SUCCESS**

Scientific findings also support that emotional intelligence is positively correlated to several factors of workplace performance and that “emotions are functional when the information they provide is attended to, interpreted accurately, integrated into thinking and behaviour, and managed effectively”<sup>7</sup> (M. Brackett, S. Rivers & P. Salovey, 2011). On the other hand, as H. Gardner and T. Hatch correctly stated, most definitions of intelligence emphasise the abilities that are significant for academic success, in school or in the university.

Problem solving is recognized as an important factor, but the abilities to do things as fashion a product, to write a symphony, paint or carry out an experiment are not included, because the abovementioned capacities cannot be probed effectively in short-answer tests (Howard Gardner & Thomas Hatch, 1990).

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<sup>7</sup> Emotional intelligence: Implications for personal, social, academic, and workplace success. Brackett, M. A., Rivers, S. E., & Salovey, P. (2011), *Social and Personality Psychology Compass*, 5(1), p. 98;

Cognitive and emotional processing are linked and interdependent. And specific emotions affect processing. In fact, emotions can affect the way people think about and how they process information (L. Z. Tiedens & S. Linton, 2001). Academic intelligence does not offer real and complete preparation for life.

However, our schools and universities do not care about emotional intelligence. Still, I will address this point later on. In Portugal (and in almost all Europe), people often consider “traditional” intelligence as a very important quality because they associate it with success in life and in the workplace.

There is a culture and general opinion that having good grades and attending good schools or universities will give you a ticket for a successful career. And that happens particularly in the legal field. However, as by M. A. Silver posits, that is only a small part of what ultimately determines success in life (Marjorie A. Silver, 1990).

According to Gibbs “IQ gets you hired but EQ gets you promoted”<sup>8</sup> (N. Gibbs, 1995) and for Goleman, emotional intelligence can be even more important than conventional analytical intelligence (IQ) (Goleman, 1995). In fact, there is a considerable amount of evidence indicating that the ability to identify, perceive and regulate emotions provides the basis for social and emotional competences which are important for having success in almost any job (Cherniss, 2000). Moreover, other studies support that emotional intelligence and job performance becomes more positive as cognitive intelligence decreases (S. Cote & C. T. Miners, 2006).

Researchers argue that emotional intelligence has implications on work behaviours, namely employment commitment, teamwork, innovation, quality of service, development of talent and customer loyalty (Zeidner, Matthews & Roberts, 2004), on one hand, because individuals with emotional intelligence are more able to communicate assertively their ideas and goals causing more pleasant environments (Goleman, 1998), and on the other hand, because emotional intelligence is linked to social skills needed for teamwork (Mayer & Salovey, 1997). Furthermore,

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<sup>8</sup> What's your EQ. Gibbs, N. (1995). *Time*. October, 2, p 59;

individuals with emotional intelligence have the capacity to influence one's ability to succeed in coping with environmental demands (Bar-On, 1997).

As Cary Cherniss posits after naming several studies, it wouldn't make sense to state that "cognitive ability is irrelevant for success in science. One needs a relatively high level of such ability merely to get admitted to a graduate science program at a school like Berkeley"<sup>9</sup>. He adds, however, that once you are admitted, what really matters in terms of how you are compared to your peers has less to do with IQ differences and more with social and emotional aspects (Cherniss, 2000).

In his paper<sup>10</sup>, he points out the value of emotional intelligence at work and the role that non-cognitive abilities play in the workplace. Moreover, other studies carried out by M. Ono, D. Sachau, W. Deal, D. Englert and M. Taylor show that cognitive ability and emotional intelligence were positively correlated with job performance (Ono, M., Sachau, D. A., Deal, W. P., Englert, D. R., & Taylor, M. D., 2011).

Emotional intelligence is seen as an ability, not a personality trait, and higher EI correlates with better relationships at work and better social outcomes, which is justified since emotional intelligent people are more able to recognize and reason about their emotions as well about the emotional consequences of their decisions and the emotions of others. Conversely, lower EI predicts interpersonal conflicts (Mayer, Salovey & Caruso). Other empirical research does supports the existence of a relationship between emotions and performance on cognitive tasks.

Hence, people with higher EI perform better on a cognitive task and when they face problems in working on a cognitive task they are more able to avoid harmful effects of such obstacles and keep

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<sup>9</sup> Emotional intelligence: What it is and why it matters; Cherniss, C. (2000, April); In *annual meeting of the Society for Industrial and Organizational Psychology, New Orleans, LA* (Vol. 15);

<sup>10</sup> Presented at the Annual Meeting of the Society for Industrial and Organization Psychology, New Orleans, LA, April 15, 2000;

on doing it<sup>11</sup> (N. S. Schutte, E. Schuettpelez, & Malouff). Similarly, Salovey and Mayer also posit that “when people approach life tasks with emotional intelligence, they should be at an advantage for solving problems adaptively. And it is for this reason that such skills are included within the construct of emotional intelligence”<sup>12</sup> (P. Salovey & J.D. Mayer, 1990).

Contrarily to what many people think, it takes more than traditional or standard intelligence to perform well in an interview. In fact, Individuals “with high emotional intelligence may use buffering techniques to internally encapsulate and segregate emotions so that they do not interfere with task performance”<sup>13</sup> (L. T. Lam, & S. L. Kirby, 2002).

In fact, there is substantial evidence supporting that emotional traits influence not only job performance but also the employment interviews and its outcome. These interviews are a complex social interaction between two or more people (the job applicant and the interviewers) and emotions influence the result of said interaction, namely by affective responses between both of them and trait affect (Suzy Fox & Paul E. Spector, 2000).

The most traditional definition of intelligence is what people measure by a standardized intelligence quotient (IQ) examination. It has been considered as the qualities people need to have success in academics which are mostly measured by standardized and short-answer examinations (Marjorie A. Silver, 1999). However, as Cooper and Sawaf stated several years ago, “if the driving force of intelligence in twentieth century business has been IQ, then...in the dawning twenty-first century it will be EQ” (Cooper & Sawaf, 1998).

How many successful people do we know that didn't have good grades in college? Or how many of them we know that actually attended college and have a degree? Now let's think about law

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<sup>11</sup> In this regard, see also *Emotional Intelligence Cognitive Intelligence and Job performance*; Cote, S., & Miners, C. T., 2006);

<sup>12</sup> Emotional intelligence. Imagination, Cognition, and Personality, Salovey, P., & Mayer, J. D. (1990), 9, 185-211. Salovey 1859, Imagination. *Cognition, and Personality*1990, P. 200;

<sup>13</sup> Is emotional intelligence an advantage? An exploration of the impact of emotional and general intelligence on individual performance. L. T. Lam, & S. L. Kirby, 2002, *The journal of social Psychology*, 142(1), p. 141;

school. Once a student graduates from law school, what kind of emotional skills does he or she develop? Lawyers can technically be masters in law, but what about gaining their clients' trust? How to be persuasive before the decision makers, the ones who are going to decide their cases? How can they empathize with judges and also with their (future) clients? And how will they manage their own emotions during legal proceedings, namely (and especially) in the courtroom? What will be their demeanour in trial? And what about judges, witnesses' and their opponents' emotions? Are they able to accurately appraise, perceive, regulate, deal and use the appropriate and demanded emotions in trial?

Being graduated with good grades and following an outstanding academic performance may not be enough in order to become a successful trial lawyer. In the courtroom especially, the qualities that matter in lawyers are not their cognitive abilities alone. Emotional intelligence is as important as the standard one. As we will examine below, persuasion, empathy, non-verbal communication and credibility are all aspects correlated with, and inherent to emotional intelligence, and people can have high levels of cognitive capacities but be very poor in emotional intelligence.

It is clear for us that some jobs call for different levels of emotional and social involvement or activity. A math teacher or a science researcher will rarely need the skills that emotional intelligence provides to succeed in professional area. Conversely, for trial attorneys, having emotional intelligence can be the difference between the good lawyer and the successful one.

Like Marjorie A. Silver reminds us, law firms do care (a lot) about academic accomplishment in assessing law graduates for jobs, but the skills that college grades measure are only a part of the skills necessary to becoming successful lawyers (M. A. Silver, 1999). And as Cedric Ashley states, "without doubt, competence and lawyering skills are the threshold attributes that will get you invited to the party. However, EQ is the differentiating factor what will have everyone asking you to dance"<sup>14</sup> (C. Ashley, 2017).

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<sup>14</sup> Emotional Intelligence (EQ): Why Lawyers Need it to succeed. Ashley. C (2017). *American Bar Association*, Vol 34, n.º 4, p. 5;

Until now we approached emotional intelligence in general and its predictions on job success. What about in lawyers specifically?

## V. LET'S GET INSIDE THE COURTROOM

A trial is a room with people. Everyone there who is wearing a strange black garment<sup>15</sup> has a role and each one of them has a task to do. Generally, in criminal trial, the prosecutor wants the defendant to be found guilty by proving the facts listed in his indictment<sup>16</sup>; the defence lawyer wants his client to be acquitted by proving his innocence or merely showing the lack of evidence in the case; the victim's lawyer will try to assist the prosecutor in his task; and the judges have the duty to decide the case impartially.

They are the only ones who have that power. Thus, among everyone who is there and has a job to do, lawyers (either defence or accusation) are the only ones who are asked (and paid) by someone specifically to get a specific judicial judgement. Besides, most of the times that same person is there, inside the room, watching them working. Being right or having the truth (and law) on his client's side helps them getting the decision they need. But the opposite doesn't mean they must lose.

When lawyers are in the courtroom, they want to reach to a specific outcome, either a conviction or an acquittal (it would depend on which side they are). However, the path to that judgement is persuading one person and one person only – the judge<sup>17</sup>. How would they do it? That's the challenge. And as Goleman posits, having emotional intelligence gives you an advantage before others. Having amazing intellectual abilities can make people excellent fiscal analysts or legal

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<sup>15</sup> In Portuguese courtrooms, lawyers wear "toga";

<sup>16</sup> The state's invocation of criminal sanctions demands a high degree of proof that the accused has committed the offence charged. To express the requisite standard of proof, common lawyers speak of the prosecutor's duty to prove his case beyond a reasonable doubt. And continental lawyers invoke the maxim "in dubio pro reo" – a percept requiring triers of fact in cases of doubt (G. P. Fletcher, 1968);

<sup>17</sup> In Portuguese criminal system, in case of serious crimes (when the penalty is five or more years in prison) the court is composed by three judges;

scholars, but individuals with higher emotional intelligence can become brilliant trial lawyers (Goleman, 1997).

Lawyers can be very clever and have a deep mastery of law. Nevertheless, if they don't have the skills to persuade the one who decides the outcome of their case, those capacities are not so relevant in order to get what they want and for what they are being paid for. It is important to understand the following: "Legal reasoning is typically directed towards the resolution of some disagreement.

Sometimes it may be a matter of fact that is in dispute: such matters are resolved by presenting evidence to a jury [or judges, we add]. But when the dispute turns on a point of law, there is no fact of the matter: the court must choose which arguments they will follow, which position they will adopt. In this situation persuasion, not demonstration of proof, is the central notion"<sup>18</sup> (T. Bench-Capon, K. Atkinson & A. Chorley, 2005).

### **1. Emotional Intelligence and Persuasion in Trial**

Every lawyer wants to craft a persuasive argument on behalf of the client. In the criminal court the barristers' entire profession hinges on their ability to convince the judges that their version of the facts is the truth. "The key to success for any attorney lies not in the mastery of law or in the serendipity of a perfect fact pattern, but in the ability to persuade" (B. McAuliff, L. Ellis & M. Phillips, 2011)<sup>19</sup>.

Most trial advocates disregard the emotion component in court. Thus many good legal arguments can fail because lawyers disregard the non-rational aspects which influence persuasive communication (M. Frost. 1994). The fact is, using emotional words and intense arguments in trial is more effective than the rational approach (H. B. Hayes, 1972).

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<sup>18</sup> Persuasion and value in legal argument, Bench-Capon, T., Atkinson, K., & Chorley, A. (2005). *Journal of Logic and Computation*, 15(6), 1075;

<sup>19</sup> "May It Please the Court..." A Social-Cognitive Primer on Persuasion in Legal Contexts. McAuliff, B. D., Ellis, L., & Phillips, M. (2011), *Handbook of trial consulting*, Springer US, pp 33 and 52;

In dealing with their everyday cases, most trial advocates focus on non-emotional aspects. They usually dedicate all their time and attention to the evidence and to the substantial and logical integrity of their arguments. Of course that's crucial in trial. Lawyers should know the files, dedicate their time to get familiar with all the facts and with the evidence of the case in order to get the desired verdict from the judges. Nevertheless, the point is how lawyers do it, and, in my opinion, that is what separates the successful trial lawyers from the average ones.

Research indicates that emotions influence legal judgments in many ways, namely (i) biasing perception, recall and interpretation of information in the direction of the emotion (ii) changing the depth of information processing and (iii) providing informational cues to judgment (Feigenson, N. (2009). In this author's paper<sup>20</sup>, a deep reflection is made about the role of emotions in legal judgements. And as we will see later, judges have emotions and are incapable of eliminate them inside their courts.

Moreover, studies also indicate that emotions can change the persuasive impact of the message as a function of the emotional framing of persuasive appeals and these appeals, as sources of leverage in persuasion, are venerable strategies (D. DeSteno, R.E. Petty, D.D. Rucker, D.T. Wegener & J. Braverman, 2004).

Criminal trials are organized around storytelling. They involve the recounting of human events which must be understood before judges give their verdict. Emotions have a particular role in this task and the challenge of trial lawyers is to present those events to judges in a certain way (J.C. Rideout, 2008).

The more persuasive they are, the more likely it is for them to have a favorable outcome. Cicero emphasized the power of emotions when he observed that one important aspect in the successful argument in court is "the feelings of a tribunal" and recommended playing on the court's emotions.

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<sup>20</sup> Emotional influences on judgments of legal blame: How they happen, whether they should, and what to do about it. Feigenson, N. (2009). In *Emotion and the Law* (pp. 45-96). Springer New York;

Aristotle and other rhetoricians identified love, hate, anger, hope or pity as being some powerful emotions in creating persuasive arguments. Particularly in the opening statements<sup>21</sup> and specially in closing arguments<sup>22</sup>, emotions have to be visible. Each of them have a special purpose and must suit the specific context in which they are used and most important it must suit the audience to whom they are addressed (M. Frost, 1994).

Furthermore, trial lawyers (specially the criminal ones) have valuable aspects of their clients' lives in their hands. Some of the cases involve their clients' money or properties and some others involve their client's freedom (and in some countries or legal systems even their own lives). The court is the place where the case will be decided. Judges (or juries, in some cases) are the ones who are going to give them the verdict and, as we will see, they are not robots and cannot eliminate emotions to make their decisions.

Lawyers shouldn't deny the powerful persuasive effect of appeals to emotion. These appeals are unavoidable and just as significant as appeals to reason (M. Frost, 1994). It is "the art of persuasion, and not the science of persuasion"<sup>23</sup> (H. B. Hayes, 1972). On the other hand, researches indicate that what you say is not what makes the difference. "How and when you present your arguments can make or break your persuasive attempts"<sup>24</sup> (E. Burkley & D. Anderson, 2008).

Therefore, in criminal trials, arguments without emotions are not so persuasive. And without disregarding the importance of evidence (which is crucial in trial), the right emotions expressed at the right time while looking into the judges' eyes can determine the favorable outcome. As Michael Frost argues, "flexibility is the key theme throughout their analyses. Each moment has a particular

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<sup>21</sup> "Both classical and modern authorities agree that a strong and emotionally engaging opening statement may determine the outcome of the case" (M. Frost, 1994, p. 13). "The opening statement is the first real opportunity to tell the jurors [and judges] what the case is all about. Attorneys must also take this opportunity to tell jurors [and judges] why they should care" (B.D. McAuliff, L. Ellis & M. Phillips, 2011, p. 56);

<sup>22</sup> "Like the classical rhetoricians, modern authorities attach a great deal of importance to the closing argument and regard it as one of the best opportunities for playing on the court's emotions" (M. Frost, 1994, p. 14);

<sup>23</sup> Applying Persuasion Techniques to Trial Proceedings. Hayes, H. B. (1972), *SCL Rev.*, 24, p. 380;

<sup>24</sup> Using the science of persuasion in the courtroom. Burkley, E., & Anderson, D. (2008), *The Jury Expert*, 8, p. 1;

purpose and must suit the particular context in which it appears and, above all, it must suit the audience to whom it is addressed”.<sup>25</sup>

Opening statements are the first detailed exposure to the facts of the case and thus to emotion sources (N. Feigenson, 2009) and the moment when lawyers mostly try to “set the emotional tone of the trial and begin to orchestrate the audience’s emotions”<sup>26</sup>. The way trial lawyers tell his/her clients’ story in the courtroom is another important tool in order to explore emotions and try to establish empathy between judges and their clients (M. Frost, 1994).

Furthermore, closing arguments is the best moment to emphasize emotions and to amplify emotion effects on judgments. At this particular phase of the trial, however, despite the necessary focus on emotions, lawyers should also never disregard the appeal to reason (N. Feigenson, 2009). Thus, a lawyer with high cognitive abilities may have prepared brilliant arguments before going to court.

Nevertheless, if they are delivered in a dispassionate way or without any emotion, he cannot achieve that level or persuasiveness that sometimes challenging criminal cases entail. Not that I agree with it, but some lawyers even go so far as bursting into tears while in trial (see R. L. Carlson, 1988). However, as this Author argues, “there remains room for colorful and creative advocacy within the bounds of good taste (...). The challenge to the trial lawyer is to be a little pyrotechnic without becoming pyromaniac”.<sup>27</sup>

## **2. Emotional intelligence and empathy**

We already defined empathy as the ability to understand another’s feelings and to re-experience them oneself. Empathy is a component and a dominant characteristic of emotional intelligence

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<sup>25</sup> Ethos, pathos and legal audience. *Dickinson Law Review. Dickinson School of Law*; Frost, M. (1994). 99 Dick. L. Rev. 85;

<sup>26</sup> Ethos, pathos and legal audience. *Dickinson Law Review. Dickinson School of Law*; 99 Frost, M. (1994). Dick. L. Rev. 85, p. 8;

<sup>27</sup> Argument to the jury: passion, persuasion, and legal controls. Carlson, R. L. (1988). *Louis ULJ*, 33, pp. 820 and 821;

behaviour (P. Salovey & J. D. Mayer 1990) and studies indicate that people who “behave in an emotionally intelligent fashion should have sufficient social competence to weave a warm fabric of interpersonal relationships.”<sup>28</sup>

Trial advocates have the task to present their clients’ story to the court. And as we analyzed, in order to do it effectively they should try to persuade judges (also) with emotions or in an emotional way. However, the direct interaction between the trial attorney and the judge is not only during the opening statements or the closing arguments. Rather, it starts as soon as lawyers get inside the courtroom and at the very first moment when they encounter one other.

For all that time, since the beginning of trial until the verdict is delivered, lawyers should try to cause good impression<sup>29</sup>: being polite and respectful. Not only with judges but with everyone else inside the courtroom. Being humble without showing ignorance; being funny without looking like a clown. Smile without laughing out loud. There are no specific rules. It’s only a matter of acting “accordingly” and “appropriately” to what different situations and environments demand. And poor emotional intelligence people will not have the correct answers each time some of these situations come up.

In trial, lawyers should always take the opportunities that naturally arise to create rapport with those who are going to decide their cases - judges. As we all know, “people generally agree with people they like” (Chaiken, 1980) and we are also aware that in mimicry, for instance, people are more persuaded buy people they like (E. Burkley, & D. Anderson, 2008).

In this regards, like Michael Frost recalls<sup>30</sup>, many lawyers forget such friendly but relevant gestures as smiling. I add, for instance, small things as getting up spontaneously at the very moment when judges enter inside the courtroom and even before the clerk asks lawyers to do it; never forgetting

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<sup>28</sup> Emotional intelligence. *Imagination, cognition and personality*, 9(3), Salovey, P., & Mayer, J. D. (1990), p. 194;

<sup>29</sup> Good impressions become last impressions. And trial, as Gregory J. Morse recalls, “is described as a series of impressions” (G. J. Morse, 2009), p. 244;

<sup>30</sup> Ethos, pathos and legal audience. *Dickinson Law Review. Dickinson School of Law*; Michael Frost, 1994, 99 Dick. L. Rev. 85; p. 12;

to greet the judges' courts' clerk before addressing the court in your closing arguments<sup>31</sup>; avoiding being sited while delivering their arguments, reading it or even only looking at their notes – this last one would make lawyers lose the great opportunity of being persuasive and making eye contact with the judges (M. Frost, 1994).

It is crucial to try to establish empathy with judges and witnesses in trial<sup>32</sup>. It is referred by psychiatrists and psychologists as a condition for effective counseling. Specifically regarding cross-examiners, “if the attorneys are psychosensitive, they have developed the skill to know what subjects to introduce into the conversation to evoke one’s attention, identification and cooperation”<sup>33</sup>. Furthermore, the more affective the lawyer is within the interaction with the participants, higher will be their cooperation with him (Henry B. Rothblatt, 1984).

It is sometimes however impossible to create any kind of rapport or even a slight connection with judges. How many times lawyers encounter the judge for the first time in the courtroom and they immediately feel that that person is totally “blocked” to any kind of (good) connection or social interaction? In those situations, the task of a trial lawyer becomes harder and they will have less space to persuade. Nevertheless, in order to detect those specific situations and feelings, to deal with it and to behave accordingly, that is an easier task for emotional intelligent individuals.

Emotional intelligence is a predictor of empathy (Mayer, Caruso & Salovey, 1999) and is connected to empathy – “the quality that invokes positive responses in others, the absence of which provokes the opposite”<sup>34</sup>. Research indicates that emotional intelligence depends on the qualities

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<sup>31</sup> Many times, trial lawyers only greet the judges, prosecutors and other lawyers in the courtroom, without greeting the clerks (courts' assistant). Besides being rude or impolite, they are ignoring the role and eventual significance of the clerk in judges' everyday life and although lawyers try to impress judges or seem nice to them in court, judges may still find them not caring if they forget about their assistants;

<sup>32</sup> That obviously doesn't mean that trial attorneys shouldn't express their anger or indignation before judges, witnesses or their colleagues whenever they feel something unfair is happening in trial (for instance when some witness is offensive or when judges constantly interrupt lawyers during their witnesses' examination or cross-examination);

<sup>33</sup> Psychological Techniques of Persuasion in the Trial Process; Rothblatt, H. B. (1984), *Ohio NRL Rev.*, 11, p. 763;

<sup>34</sup> Emotional intelligence and legal education. *Psychology, Public Policy, and Law*, 5(4), 1173. Marjorie A. Silver, p. 1177;

necessary to appropriately regulate and express emotion (Marjorie A. Silver, 1999; Salovey & Mayer, 1990) and it requires correct identification of emotional responses at other people (Mayer, DiPaolo & Salovey, 1990).

Empathy is also significant between lawyers and clients, especially trial advocates because to be able to effectively assist them, better persuade and perform well in trial they should be able to feel (or to put themselves in their clients' shoes). Lawyers who are more skilled in interpersonal relations are more able to discern clients' needs (S. Daicoff, 1997).

In addition, as Steven Keeva states, "lawyers who make it a point to really listen understand that too much talking and not enough listening throws things off balance. They realize that listening is how they bring a client's world into their own. When more of that world gets in, their chances of being successful counselors and advocates increases. In a profession in which most practitioners are pretty strong technically, being a good listener can be a way to distinguish yourself".<sup>35</sup>

### **3. Emotional intelligence and non-verbal communication**

There is a considerable amount of evidence supporting that the face is the primary signal system for expressing emotions (Mayer, Dipaulo & Salovey, 1990). Most people never read or learned about it but they are used to recognize emotions in others by merely observing their faces and expressions. It is true that "word is the attorney's paramount tool"<sup>36</sup>. Nevertheless, non-verbal expressions are generally taken as genuine and more hard to control representations of feelings.

Hence, people who are skilled in monitoring these behaviours have an advantage in interpersonal relationships and social situations (Susy Fox & Paul E. Spector, 2000). Several studies indicate that non-verbal communication such as posture, smiling, eye contact, voice inflection<sup>37</sup>, body

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<sup>35</sup> Beyond the Words. Keeva, S. (1999). *ABAJ*, 85, p. 61;

<sup>36</sup> Applying Persuasion Techniques to Trial Proceedings. Hayes, H. B. (1972). *SCL Rev.*, 24, p. 380;

<sup>37</sup> Voice tone "is related to perceived credibility, the trait of dominance". Nonverbal communication in the courtroom; Sannito, T. (1983). *Trial Diplomacy Journal*, 35, 28;

orientation or head and hand moving influence important outcomes in peoples' lives, including job interviews (R. D. Arvey & J. E. Campion, J. E., 1982).

To lawyers, trial can be considered a kind of a stage, a place where they perform and play their role. In most criminal courtrooms, many psychological tricks can be played<sup>38</sup>. Courtroom style techniques contain physical appearance, demeanour toward the judges, body movement and small gestures and is an extra-legal basis for decision-making because the demeanour of lawyers or witnesses usually has no connection to the legal or factual issues that should be the basis for the jury's [or judges'] verdict"<sup>39</sup>.

Appraising and expressing (all) emotions accurately is a part of emotional intelligence, which means that individuals who have it are in an advantage comparing to others, namely in trial. There is a large number of studies carried out by psychologists regarding the influence of nonverbal behaviour on perceive impressions and judgements (B. R. Schlenker, 1980).

Thus, non-verbal communication skills of a trial advocate can be as effective to success as the verbal ones. A kind smile to a hostile witness, eye contact with one judge in a specific moment or even a small gesture as picking up his/her pen from the floor can sometimes have particular significance and help lawyers to create more empathy with judges.

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<sup>38</sup> In this regard, Henry B. Rothblatt posits that "attorneys, particularly the trial advocates, must take advantage of all the sciences, especially psychology, psychoanalysis, and sociology in the preparation and presentation of the case before the court". He also states that "the successful trial lawyer should attempt to utilize psychological techniques of persuasion in every facet of the trial. It is no longer acceptable to cross-examine a witness concerning their story alone. The trial attorney must delve deeper and try to discover how the witness's mind works. From the moment the pleadings are filed until the conclusion of trial, the advocate must be aware of the tools available and those tools include psychological considerations" (Psychological Techniques of Persuasion in the Trial Process; Rothblatt, H. B. (1984); *Ohio NRL Rev.*, 11; p. 764;

<sup>39</sup> Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom. Gold, V. (1986). *NCL Rev.*, 65, p. 484;

Another clear illustration would be the so-called “chameleon effect”<sup>40</sup>. This term refers to people’s “nonconscious tendency to mimic the postures, mannerisms, facial expressions and other behaviors of those with whom we interact”<sup>41</sup>. In fact, in everyday interactions we adopt plenty of behaviors in response to others – when people smile to us we automatically smile back (E. Burkley & D. Anderson, 2008).

If this effect is in the courtroom, then judges (or juries) possibly adopt the same non-behaviors that they observe on others and they may be affected by judges (or juries) attitudes and reactions to persuasive messages (B. D. McAuliff, I. Ellis & M Phillips, 2011). Lastly, correlated to the ability to appraise and perceive these kind of non-verbal behaviours is the significant relationship between emotional intelligence and the ability to detect deception<sup>42</sup>, which in trial, for obvious reasons, is as powerful as useful for an attorney.

#### **4. Emotional intelligence and credibility**

None of the abovementioned aspects are strong or effective for lawyers in court if they do not generally have credibility. How many “brilliant” (and famous) lawyers do we watch on television before they are getting inside the court with their (also famous) clients, and when questioned by reporters about the case, they show anger with the legal system and claim (or “swear”) that his clients are innocent?

Now let’s imagine that one specific and well-known trial lawyer – who is seen in the community as very intelligent – does that all the time on television? Unless his clients are always innocent and he is only contacted by innocent people (which is very unlikely to happen) the assumption would be that some of these times he might be lying – on national television – and that thought would easily turn into a conclusion by many people as soon as some of his clients were convicted.

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<sup>40</sup> T. L. Chartrand & J. A. Bargh, 1999; Chartrand, T. L., & Bargh, J. A. (1999). The chameleon effect: the perception–behavior link and social interaction. *Journal of personality and social psychology*, 76(6), p. 893;

<sup>41</sup> “May It Please the Court...” A Social-Cognitive Primer on Persuasion in Legal Contexts. McAuliff, B. D., Ellis, L., & Phillips, M. (2011). In *Handbook of trial consulting* (pp. 33-61); Springer US; p. 52;

<sup>42</sup> M. O’Sullivan (2005); C. F. Bond Jr & B. M. DePaulo (2006); M. Fiori (2009);

Now let's think about this from the judges' perspective, considering they also have television at home. What would a judge think if or when that same lawyer (and specially about all his clients' eventual responsibility in the case) came inside his courtroom in a case in which he had to decide?

Or even more illustrative, let's imagine that somehow the same lawyer now has another client and as he enters in the courtroom he finds the same exact judge who found guilty his past client in the last case where he assertively and categorically claimed that he was innocence?

The pattern here is a lack of credibility. And in my opinion, in order to make an effective defence, lawyers don't need to lie<sup>43</sup> for their clients and specially should be very careful before asserting that their clients are innocent (specially where and in which circumstances they do it) unless they are absolutely sure about it.

Lying on television before everyone's eyes or doing it frequently inside the courtroom before the judge's eyes can be very harmful for a lawyers' credibility and therefore for their clients' cases. One thing is storytelling, narrating their version of the facts and in the right way. Another one is to put themselves in a position before the public and judges that could compromise their image of honest and ethical person and therefore, inevitably, their clients' cases.

Lawyers "are far more interested in logical and organizational coherence than in the emotional climate within which they argue or in their own credibility while arguing a case"<sup>44</sup>. Having emotional intelligence is also being able to regulate and control their own emotions. And that has also to do with demeanour.

Trial lawyers can have a high level of cognitive abilities but if they are not able to address the court or the general public in a credible way it becomes harder to achieve the goals they aim for. Inside

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<sup>43</sup> One thing is to lie, which means knowing the truth and stating false facts. If lawyers are sometimes convinced about the veracity of some of their client's stories, then they will not be lying;

<sup>44</sup> Ethos, pathos and legal audience; Frost, M. (1994). *Dickinson Law Review*. *Dickinson School of Law*; 99 Dick. L. Rev. 85; p. 1;

the courtroom even if advocate lawyers have strong and convincing arguments, it still need to be delivered by a credible source (E. Burkley & D. Anderson 2008).

As the social science researchers Bennett and Feldman postulate, the “way which a story is told will have considerable bearing on its perceived credibility regardless of the actual truth status of the story. This means that the symbols chosen, the structural elements (scene, act, agent, agency, and purpose) that are defined and left undefined, and the amount of detail provided to facilitate connections between story symbols, will have a significant bearing on audience judgements about stories”<sup>45</sup>.

Several empirical data confirm that the higher the credibility judges allot to the source, the more persuasive his message seems to them (H. B. Hayes, 1972). Lawyers should project character and credibility. Classical rhetoricians emphasised the ethical appeal of credibility (“Ethos”) as precious to lawyer’s effective persuasion and in order to be a successful trial advocates.

Aristotle pointed that emotional arguments (“Pathos”) usually depend on the lawyer’s “ethos” and he underlined the importance of the linkage between emotion and credibility before judges. He considered that the skill of controlling “ethos” was an important quality to lawyers.

Moreover, Cicero underlined the significance of projecting good character as much as advocates possessing it. Quintilian had the same thoughts and noted that the most powerful tool for an orator is being a good man and he even recommended false humility as a technique to create credibility<sup>46</sup>.

Overall, the success of trial lawyers also depends on the judge’s perception of their credibility.

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<sup>45</sup> Reconstructing reality in the courtroom: Justice and judgment in American culture. Bennett, W. L., & Feldman, M. S. (2014); Quid Pro Books; p. 89;

<sup>46</sup> As M. Frost recalls, “many experts think that an advocate’s credibility is increased by the frank confession of a weakness in the case” (Ethos, pathos and legal audience. *Dickinson Law Review. Dickinson School of Law*; M. Frost (1994); 99 Dick. L. Rev. 85);

## VI. JUDGES ARE NOT ROBOTS

In court, judges have the task to reach their verdict and decide the cases at hand. Additionally, they should be impartial and ground their decisions based on the evidence and the law, on the strength of the case and correct interpretation of legal texts, avoiding engage in emotional labor (S. R. Anleu & K. Mack, 2005).

On the other hand, Thomas Hobbes once said that judges should be “divested of all fear, anger, hatred, love, and compassion.”<sup>47</sup> However, judges are (“only”) human beings. They are not robots who aren’t able to feel<sup>48</sup>.

As Cicero posited <sup>49</sup>, “men decide far more problems by hate, or love, or lust, or rage, or sorrow, or joy, or hope, or fear, or illusion, or by some other inward emotion, than by reality, or authority, or any legal standard, or judicial precedent, or statute”, and this necessarily applies to judges as well since it is impossible to think without our emotions.

Unlike many other professions, although their decisions can be appealed to appeal courts, judges have significant autonomy in their everyday work and in their decision-making process, which also means more space to emotions.<sup>50</sup> It is clear for us that emotions conflict with the rational nature of legal reasoning. But that’s simply inevitable for everyone including judges.

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<sup>47</sup> Leviathan. T. Hobbes; 1904 (A. R. Waller, Ed.). Cambridge, UK: Cambridge University Press (Original work Published 1651) / Hobbes, 1651/1904, p. 203;

<sup>48</sup> Judges with no emotions are like “Santa Claus or Uncle Sam or Easter bunnies” (US v. Ballard, 1944, p. 94).

<sup>49</sup> Cicero, 106-43 B.C. (see also C. C. Kelton, 2014);

<sup>50</sup> In his book, A. R. Hochschild lists lawyers and judges as some of the occupations that involve significant amount of emotional labour (*The managed heart: Commercialization of human feeling*); Univ of California Press (2012). p. 153, 234-8;

Research has shown that moods and emotions can influence legal judgements in many ways – “by altering depth of information processing; by biasing judgements in the direction of the emotion’s valence or appraisal structure, and/or by providing informational cues to the ultimate decision.”<sup>51</sup>

In court, judges are exposed to several potential sources of emotional influence<sup>52</sup> (N. Feigenson, 2009). “The courtroom is a location of many emotions, usually negative”<sup>53</sup>. And like everyone else, judges naturally feel emotions, especially when exposed to emotionally stimuli which is definitively their case. Thus, substantial empirical data prove that judicial emotional elimination is unrealistic.

However, that is not necessarily a bad thing for them. It means that an event is of particular relevance and as it is unavoidable it also reflects rational assessment of the world - since is central in life - that motivates action and enables reason. In addition, certain kind of emotions may motivate the judges or yield specific judgmental benefits as sympathy, for instance, that enhances perspective-taking which can improve judges understanding of case-relevant facts (Feigenson, N. (2009).

Overall, emotions rest on thoughts and cannot be eliminated, only regulated. Experiencing emotions every day, judges expend energy to cope with it and is no easy matter since law doesn’t offer any direction or advice. That’s where psychology of emotional regulation in needed (T. A. Maroney & J. J. Gross, 2014).

Moreover, these matters are not merely of academic interest. Many lawyers preparing their cases want to be able to appraise accurately which different ways of presenting arguments should they chose to influence the judges more effectively (Feigenson, N. (2009).

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<sup>51</sup> Emotional influences on judgments of legal blame: How they happen, whether they should, and what to do about it. N. Feigenson, 2009; In *Emotion and the Law* (p. 89). Springer New York;

<sup>52</sup> Legal integral emotion sources and extralegal integral emotion sources (N. Feigenson, 2009);

<sup>53</sup> Magistrates' Everyday Work and Emotional Labour. *Journal of Law and Society*, 32(4), Anleu, S. R., & Mack, K. (2005), p. 591;

Trial lawyers with emotional intelligence are more able in perceiving and appraising judge's emotions or moods in court and in dealing with it or using that same information in order to influence the court and the decision-making process. In fact, to psychology, there is no such thing as unbiased judges or jurors (V. Gold, 1986). And emotional intelligent trial lawyers are more equipped to deal with their emotions more than others in the process of trying to achieve their aims.

## VII. LEGAL EDUCATION

In order to understand what is really happening in legal education it's inevitable to mention the main actors who convey their knowledge to law students – law teachers. To my knowledge, in Portugal, most of law teachers go directly into teaching from their own academic training. As soon as they finish their “shining” academic path, best students are asked to teach by law professors who soon acknowledged their cognitive abilities and also their incredibly high grades.

Although some of them start working in prestigious law firms, the majority use to dedicate most of their time teaching law and studying for their academic careers. And some of them, I may add, are very good and inspiring teachers.

As a result, many law teachers never went inside a courtroom. And taking into consideration that most of law students usually aim to become lawyers after they graduate<sup>54</sup> – and many of them want to become trial advocates – that means they are teaching their in-depth knowledge of the law without really knowing about its practicing and not having experienced what is to be in trial. Therefore, they are not able to provide students other valuable tools as the ones this paper addresses and that are essential to succeed as a lawyer.

In legal culture, there is a resistance to acknowledging the power of lawyers' emotional lives and the general profile of law aspirants, the relevance of rationality and unemotionally, the Socratic

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<sup>54</sup> Which doesn't mean they don't change their minds after experiencing how stressful being a lawyer is (indeed is very common);

method implemented in law schools and the logical discourse, are all factors that contribute to rejection of emotional process. Basically, emotions seem to be the enemy of lawyers.

However, as Marjorie Silver argues, lawyers need emotional intelligence as much as they need the other skills that make them good lawyers (M. A. Silver, 1999). In fact, law schools seem to be more appealing to more logical and rational people and we cannot ignore that individuals with lack of interpersonal skills self-select into law school in the first place. And the fact is, legal education amplifies this tendency (S. Daicoff, 1997).

Furthermore, this has also other important (and harmful) consequences regarding relationships. Actually, as Andrew Watson points out, “the possession of impressive intellectual capacities often causes excessive use of the defense of *“intellectualization”*. This is a psychological maneuver whereby persons relate to each other and themselves primarily through ideas, even when emotional matters may be more pertinent.

While this device is useful for neutralizing anxiety, it is my impression that lawyers use it to an extensive and inappropriate degree. It causes them to place too much emphasis upon the verbal aspects of communication, and not enough on the feeling-content and connotations which are present.”<sup>55</sup>

The tendency among law students and lawyers to rationalize most situations (“including those that the average person – the reasonable person – would expect to have more emotional content”)<sup>56</sup> is aggravated with legal education which doesn’t help developing the (other) personal skills necessary to become successful as a lawyer and specially as a trial lawyer. Moreover, we cannot ignore that attorneys – all of them, not only trial lawyers – need clients for living.

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<sup>55</sup> Watson, A. S. (1968). The quest for professional competence: Psychological aspects of legal education. *U. Cin. L. Rev.*, 37, p. 113;

<sup>56</sup> Emotional intelligence and legal education. Silver, M. A. (1999). *Psychology, Public Policy, and Law*, 5(4), p. 1192;

By that I mean, getting clients, keeping their clients and making them happy<sup>57</sup>. And by happiness I mean not only winning their cases in trial but also listening to their problems and during the whole time they need their support, since the very beginning until the end of a case (which as we know, can take several years). Listening to them and to their problems, not ignoring their calls, replying to their emails shortly, being kind with them and letting them feel that lawyers are not only technical law practitioners but that they actually care.

In her Article<sup>58</sup>, Marjorie A. Silver gives us the perfect illustration of what we are talking about when she refers to Patch Adams<sup>59</sup>, the unusual candidate for a medical degree who after going to a mental hospital starts to be compassionate with trouble patients, playing with them and making them laugh. Dean Wolcott, the doctor who had a very different vision – didn't agree with the joy that Patch Adams was bringing to patients' lives because it was against the "standards and codes" and prohibited him to see patients asserting that passion didn't make doctors.

Patch explained that he was only "visiting friends" and Dean replied back, saying that patients didn't need friends. After being dismissed and within his appeal, Patch claimed "if we're going to fight a disease, let's fight one of the most terrible diseases of all: indifference...I've heard people lecture on transference and professional distance. Transference is inevitable, Sir., every human being has an impact on another. Why don't we want that in a patient-doctor-relationship?".

As the Author explains after using this good example, "the similarities between medical education and legal education in their neglect of emotional skills training are striking"<sup>60</sup>. Law schools don't provide students with the skills needed to handle other aspects of the professional relationships such as the ability to deal with people, and the Socratic Method, which leads to an ablation of emotional awareness, can have serious effects (A. S. Watson, 1968). Maybe that's why calls for

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<sup>57</sup> Which will certainly bring more clients to their office;

<sup>58</sup> Emotional intelligence and legal education. Silver, M. A. (1999). *Psychology, Public Policy, and Law*, 5(4), p. 1185-1186;

<sup>59</sup> (Doctor) Hunter Doherty "Patch" Adams;

<sup>60</sup> Emotional intelligence and legal education. Silver, M. A. (1999). *Psychology, Public Policy, and Law*, 5(4), p. 1192;

training in emotional intelligence have been more common in many professions and organizational settings, especially in the human service sectors including medicine and legal profession.

Even in Portugal Bar Association's classes – to which all lawyer candidates are forced to attend if they want to practice lawyering in Portugal – no one teaches about the other aspects which also matter inside the courtroom and are useful to become a successful lawyer, like the ones addressed in this paper regarding the use of emotions, persuasion techniques, empathy, non-verbal communication and credibility, things that, on the other hand, are also valuable for their client-lawyer-relationships.

As a result, most “typical” lawyers have trouble empathizing with people or understanding how others feel because of their preference for thinking instead of feeling (Daicoff, S. (1997). Maybe that's why “there are all those arrogant lawyer jokes.”<sup>61</sup>

## VIII. CONCLUSIONS

Emotional intelligence is the capacity to reason about emotions and meets the three classical criteria of a standard intelligence. It is the ability to accurately analyse emotions in oneself and in others, have adaptive regulation of emotion and appropriate expression of emotion. Researches have shown that a person may have a high IQ and have poor emotional intelligence. Thus, cognitive abilities may help students on having outstanding grades and in finding a good job, but emotional intelligence can make the difference in the workplace performance.

Furthermore, scientific findings support that emotional intelligence is positively correlated to several factors of workplace performance and it is valuable in lawyers – especially trial lawyers – since it enhances the abilities to persuade others, to create empathy with others, to better express themselves and to have and show more credibility. Besides being important factors for the client-lawyer-relationship, these aspects are also extremely valuable in court and for lawyers to be successful.

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<sup>61</sup> Richardson, R., McKenna, W., Bristow, M., Maisch, B., Mautner, B., & O'connell, J. (2002). *A Report by*.

The ones who have emotional intelligence are more able to perceive and to appraise the other participants' emotions in trial, which is particularly relevant for the decision making process. There is substantial empirical data proving that judicial emotional elimination is unrealistic. Judges are not robots and moods and emotions can influence legal judgements in many ways. Therefore, lawyers with emotion intelligence are more able to perceive and appraise judge's emotions in the courtroom and in using that information in order to get the desired judicial judgements for their clients.

On the other hand, besides teaching law, law schools don't provide students with other skills necessary to become successful trial lawyers or to improve their relationships with clients, and the Socratic method, which leads to an ablation of emotional awareness, can have serious effects on students. Moreover, law schools seem to be more appealing to more logical and rational people and legal education amplifies this tendency to an extensive and inappropriate degree. Consequentially, all the important aspects which were addressed in this modest paper have never been even discussed inside most law school classes.

## IX. REFERENCES

- Anleu, S. R., & Mack, K. (2005). Magistrates' everyday work and emotional labour. *Journal of Law and Society*, 32(4), 590-614;
- Arvey, R. D., & Campion, J. E. (1982). The employment interview: A summary and review of recent research. *Personnel psychology*, 35(2), 281-322;
- Ashley, C. (2017). Emotional Intelligence (EQ): Why Lawyers Need it to succeed. *American Bar Association*, Vol 34, n.º 4;
- Bar-On, R. (1997). The emotional intelligence inventory (EQ-I): Technical manual. *Toronto, Canada: Multi-Health Systems*;
- Bench-Capon, T., Atkinson, K., & Chorley, A. (2005). Persuasion and value in legal argument. *Journal of Logic and Computation*, 15(6), 1075-1097;
- Bennett, W. L., & Feldman, M. S. (2014). *Reconstructing reality in the courtroom: Justice and judgment in American culture*. Quid Pro Books;
- Bond Jr, C. F., & DePaulo, B. M. (2006). Accuracy of deception judgments. *Personality and social psychology Review*, 10(3), 214-234;
- Brackett, M. A., Rivers, S. E., & Salovey, P. (2011). Emotional intelligence: Implications for personal, social, academic, and workplace success. *Social and Personality Psychology Compass*, 5(1), 88-103;
- Burkley, E., & Anderson, D. (2008). Using the science of persuasion in the courtroom. *The Jury Expert*, 8, 1-5;
- Carlson, R. L. (1988). Argument to the jury: passion, persuasion, and legal controls. *Louis ULJ*, 33, 787;
- Chaiken, S. (1980). Heuristic versus systematic information processing and the use of source versus message cues in persuasion. *Journal of Personality and Social Psychology*, 39, 752-766;
- Chartrand, T. L., & Bargh, J. A. (1999). The chameleon effect: the perception-behavior link and social interaction. *Journal of personality and social psychology*, 76(6), 893-910;
- Cherniss, C. (2000, April). Emotional intelligence: What it is and why it matters. In *annual meeting of the Society for Industrial and Organizational Psychology, New Orleans, LA* (Vol. 15);
- Cooper, R. K., & Sawaf, A. (1998). *Executive EQ: Emotional intelligence in leadership and organizations*. Penguin;
- Cote, S., & Miners, C. T. (2006). Emotional intelligence, cognitive intelligence, and job performance. *Administrative Science Quarterly*, 51(1), 1-28;
- Daicoff, S. (1997). 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. *Geo. J. Legal Ethics*, 11, 547;
- DeSteno, D., Petty, R. E., Rucker, D. D., Wegener, D. T., & Braverman, J. (2004). Discrete emotions and persuasion: the role of emotion-induced expectancies. *Journal of personality and social psychology*, 86(1), 43;

- DeSteno, D., Petty, R. E., Wegener, D. T., & Rucker, D. D. (2000). Beyond valence in the perception of likelihood: the role of emotion specificity. *Journal of personality and social psychology*, 78(3), 397;
- Feigenson, N. (2009). Emotional influences on judgments of legal blame: How they happen, whether they should, and what to do about it. In *Emotion and the Law* (pp. 45-96). Springer New York;
- Fiori, M. (2009). A new look at emotional intelligence: A dual-process framework. *Personality and Social Psychology Review*, 13(1), 21-44;
- Fletcher, G. P. (1968). Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases. *The Yale Law Journal*, 77(5), 880-935;
- Fox, S., & Spector, P. E. (2000). Relations of emotional intelligence, practical intelligence, general intelligence, and trait affectivity with interview outcomes: It's not all just 'G'. *Journal of Organizational Behavior*, 203-220;
- Frost, M. (1994). Ethos, pathos and legal audience. *Dickinson Law Review. Dickinson School of Law*; 99 Dick. L. Rev. 85;
- Gardner, H., & Hatch, T. (1990). Multiple Intelligences Go to School: Educational Implications of the Theory of Multiple Intelligences. Technical Report No. 4;
- Gibbs, N. (1995). What's your EQ. *Time. October*, 2;
- Gold, V. (1986). Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom. *NCL Rev.*, 65, 481;
- Goleman, D. P. (1995). Emotional intelligence: Why it can matter more than IQ for character, health and lifelong achievement;
- Goleman, D. (1997). *Emotional intelligence. Why it can matter more than IQ*. New York: Bantam Books;
- Goleman, D. (1998). *Working with emotional intelligence*. Bantam;
- Hayes, H. B. (1972). Applying Persuasion Techniques to Trial Proceedings. *SCL Rev.*, 24, 380;
- Leviathan. T. Hobbes; 1904 (A. R. Waller, Ed.). Cambridge, UK: Cambridge University Press (Original work Published 1651)
- Hochschild, A. R. (2012). *The managed heart: Commercialization of human feeling*. Univ of California Press;
- Isen, A. M., & Baron, R. A. (1991). Positive affect as a factor in organizational-behavior. *Research in organizational behavior*, 13, 1-53;
- Keeva, S. (1999). Beyond the Words. *ABAJ*, 85, 60;
- Kelton, C. C. (2014). Clients want results, lawyers need emotional intelligence. *Clev. St. L. Rev.*, 63, 459;
- Lam, L. T., & Kirby, S. L. (2002). Is emotional intelligence an advantage? An exploration of the impact of emotional and general intelligence on individual performance. *The journal of social Psychology*, 142(1), 133-143;
- Maroney, T. A. (2012). Angry judges; *Vanderblit Law Review*, Vol. 65:5:1207; 1207-1286;
- Maroney, T. A., & Gross, J. J. (2014). The ideal of the dispassionate judge: An emotion regulation perspective. *Emotion Review*, 6(2), 142-151.carlson;

- Mayer, J. D., Caruso, D. R., & Salovey, P. (1999). Emotional intelligence meets traditional standards for an intelligence. *Intelligence*, 27(4), 267-298;
- Mayer, J. D., DiPaolo, M., & Salovey, P. (1990). Perceiving affective content in ambiguous visual stimuli: A component of emotional intelligence. *Journal of personality assessment*, 54(3-4), 772-781;
- Mayer, J. (1997). What is emotional intelligence? From Salovey, P and Sluyter, D.(eds.) Emotional development and emotional intelligence: Educational Implications;
- Mayer, D. J., Salovey, P., & Caruso, R. D. (2004). Emotional Intelligence: Theory, Findings, and Implications. Department of Psychology. University of New Hampshire; Yale University. *Psychological Inquiry*, 15 (3,197-215);
- Mayer, J. D., Salovey, P., & Caruso, D. R. (2008). Emotional intelligence: new ability or eclectic traits? *American psychologist*, 63(6), 503;
- McAuliff, B. D., Ellis, L., & Phillips, M. (2011). "May It Please the Court..." A Social-Cognitive Primer on Persuasion in Legal Contexts. In *Handbook of trial consulting* (pp. 33-61). Springer US;
- Morse, G. J. (2009). Techno-jury: techniques in verbal and visual persuasion. *NYL Sch. L. Rev.*, 54, 241;
- Ono, M., Sachau, D. A., Deal, W. P., Englert, D. R., & Taylor, M. D. (2011). Cognitive ability, emotional intelligence, and the big five personality dimensions as predictors of criminal investigator performance. *Criminal Justice and Behavior*, 38(5), 471-491;
- O'Sullivan, M. (2005). Emotional intelligence and deception detection: Why most people can't "read" others, but a few can. *Applications of nonverbal communication*, 215-253;
- Richardson, R., McKenna, W., Bristow, M., Maisch, B., Mautner, B., & O'Connell, J. (2002). *A Report by*.
- Rideout, J. C. (2008). Storytelling, narrative rationality, and legal persuasion. *Legal Writing: J. Legal Writing Inst.*, 14, 53;
- Rothblatt, H. B. (1984). Psychological Techniques of Persuasion in the Trial Process. *Ohio NRL Rev.*, 11, 755;
- Salovey, P., & Mayer, J. D. (1990). Emotional intelligence. *Imagination, Cognition, and Personality*, 9, 185-211. Salovey 1859, Imagination. *Cognition, and Personality*1990;
- Sannito, T. (1983). Nonverbal communication in the courtroom. *Trial Diplomacy Journal*, 35, 35-37.
- Schlenker, B. R. (1980). *Impression management*. Brooks/Cole Publishing Company;
- Schutte, N. S., Schuettpepel, E., & Malouff, J. M. (2001). Emotional intelligence and task performance. *Imagination, Cognition and Personality*, 20(4), 347-354;
- Silver, M. A. (1999). Emotional intelligence and legal education. *Psychology, Public Policy, and Law*, 5(4), 1173;
- Silver, M. A. (1999). Love, hate, and other emotional interference in the lawyer/client relationship. *Clinical L. Rev.*, 6, 259;
- Thorndike, E. L. (1920). Intelligence and its uses. *Harper's magazine*;
- Tiedens, L. Z., & Linton, S. (2001). Judgment under emotional certainty and uncertainty: the effects of specific emotions on information processing. *Journal of personality and social psychology*, 81(6), 973;

Watson, A. S. (1968). The quest for professional competence: Psychological aspects of legal education. *U. Cin. L. Rev.*, 37, 91;

Zeidner, M., Matthews, G., & Roberts, R. D. (2004). Emotional intelligence in the workplace: A critical review. *Applied Psychology*, 53(3), 371-399.