Legal Ethics: Sharp Practice

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Introduction

1. Agenda: Professionalism Topics covered in this presentation:

1.4 Duty to act in good faith and avoid sharp practice

- The Five Duties of the lawyer
- The need for legal professionals to honour both the letter and spirit of the law
- The need for legal professionals to uphold high standards of civility
- The need for legal professionals to aggressively pursue the interests of the client, without taking advantage of errors which do not go to the merits of the case
- The question of benefiting from opposing counsel's ignorance
- Analogues of all of the above in Jewish jurisprudence

2.14 Dealing effectively with unrepresented persons

- The challenge of dealing with an unrepresented opposing litigant without limiting her/his access to justice by taking advantage of her/his ignorance
- The unique challenges to courtesy in dealing with an unrepresented opposing litigant
- Avoiding misunderstandings in the relationship with the unrepresented opposing litigant, regarding the role of counsel and function of counsel's advice

2. Vignettes

(1) In August 2007, Lisa, an 86-year old widow, signed an agreement of purchase and sale, to sell her home to Jonathan. Subsequently, Lisa's lawyer contended that she had signed the agreement under duress and while lacking capacity. Jonathan filed an affidavit stating that there had been no duress, and Lisa had been alert, knowledgeable and willing. In September 2007, Jonathan's lawyer commenced an action claiming specific performance and a declaration that the sale agreement was binding. Later in September, a certificate of pending litigation was served on Lisa. In October 2007, Lisa's lawyer requested an adjournment, in part because he planned to provide medical evidence regarding Lisa's state, and to cross-examine Jonathan regarding his affidavit. The adjournment was granted to a date to be set. Nothing further was done, and in March 2008, without any warning, or any correspondence, Jonathan's lawyer noted Lisa in default. The default was only noted in a letter of September 2008, which included an offer to settle. Is noting default without communication an act of sharp practice?

(2) James sued XLF Pharmaceuticals and lost; he is representing himself in an appeal. Mary, lead counsel for XLF, sees that James is having difficulty meeting the filing deadline for his factum, but he doesn't seem to be aware that he can request an extension. Is Mary expected to inform James of this option?

(3) Returning to the case of Lisa and Jonathan: Jonathan's lawyer believes that Jonathan is right, but she feels that he lacks the supporting evidence to successfully persuade the court. Would that justify sharp practice in failure to communicate before noting Lisa in default?

LSO Expectations of a Lawyer

3. Law Society of Ontario, Rules of Professional Conduct (2014), Rule 5.1-1 and 5.1-2 (i)

When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

When acting as an advocate, a lawyer shall not deliberately refrain from informing the tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent

4. Law Society of Ontario, Rules of Professional Conduct (2014), Rule 7.2-1 and 7.2-2

A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

A lawyer shall avoid sharp practice and shall not take advantage of or act without fair warning upon slips, irregularities, or mistakes on the part of other legal practitioners not going to the merits or involving the sacrifice of a client's rights.

5. Disqualification for Personal Misconduct https://www.yutorah.org/lectures/lecture.cfm/878399/

6. John J. Flynn, *Professional Ethics and the Lawyer's Duty to Self*, Washington University Law Review 1976:3
The lawyer's usual response to accusations of amorality rests on the nature of the adversary process in which he is engaged. Neither advocate in a dispute can assume the truth of his position; "truth" emerges from a clash of opposing views.

7. Eric Appleby, *Legal Research Guide to Ethics* (2006) http://www.mlb.nb.ca/site/ffiles/ethics06.pdf
State; The Courts; The Client; Fellow Lawyers; Third Parties

8. Felix Cohen, *Field Theory and Judicial Logic,* 59 YALE L. 238, 238 (1950)
How the edifice of justice can be supported by the efforts of liars at the bar and ex-liars on the bench is one of the paradoxes of legal logic which the man in the street has never solved.

9. Law Society of Ontario, Rules of Professional Conduct (2014), Section 1.1
"conduct unbecoming a barrister or solicitor" means conduct, including conduct in a lawyer's personal or private capacity, that tends to bring discredit upon the legal profession including, for example,
(a) committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer,
(b) taking improper advantage of the youth, inexperience, lack of education, unsophistication, ill health, or unbusinesslike habits of another, or
(c) engaging in conduct involving dishonesty or conduct which undermines the administration of justice;

10. Thomas G. Heintzman O.C., Q.C., McCarthy Tetrault LLP, *Ethical Issues Relating to Lawyers and Unrepresented Litigants in the Civil Justice System*
Presently, I have been a chair of a committee of the American College of Trial Lawyers which has drafted a Code of Conduct for trial lawyers in trials involving unrepresented litigants…
Apart from the duty to the court and his professional regulating body, the lawyer's only duty is to the client. The lawyer is prohibited from creating any conflict of interest between that duty and a duty to others…

11. Law Society of Ontario, Rules of Professional Conduct (2014), Rule 5.1-1
When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.
Commentary [1]: In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law.

<u>Jewish Expectations of a Lawyer</u>
12. Talmud, Berachot 6a
אמר רבין בר רב אדא אמר רבי יצחק ומנין לשלשה שיושבין בדין ששכינה עמהם...
Ravin bar Rav Ada cited Rabbi Yitzchak: … How do we know that when three sit in judgment, G-d is with them?…

13. Talmud, Shabbat 10a
כל דיין שדן דין אמת לאמיתו אפילו שעה אחת מעלה עליו הכתוב כאילו נעשה שותף להקב"ה במעשה בראשית
A judge who judges truthfully, even for a moment, is viewed by Scripture as a partner of G-d in creation.

14. Talmud, Sanhedrin 7a
כל דיין שדן דין אמת לאמיתו משרה שכינה בישראל שנאמר...
A judge who judges truthfully causes the Shechinah to be manifest in Israel, as it is written…

15. Maimonides, Mishneh Torah, Laws of Theft 7:8

אחד הנושא ונותן עם ישראל או עם הגוי עובד עבודה זרה אם מדד או שקל בחסר עובר בלא תעשה וחייב להחזיר, וכן אסור להטעות את הגוי בחשבון אלא ידקדק עמו... והרי הוא אומר (דברים כ"ה ט"ז) "כי תועבת ד' אלקיך כל עושה אלה כל עושה עול" - מכל מקום.

One who interacts with a Jew or a non-Jewish idolator, measuring or weighing dishonestly, violates a prohibition and is obligated to refund the money. Similarly, one may not trick a non-Jew in accounting; one must be precise… Deuteronomy 25:16 says, "It is abhorrent before G-d to do these things, to perform any corrupt act," in any form.

16. Talmud, Moed Katan 17a

אמר רב הונא באושא התקינו אב בית דין שסרח אין מנדין אותו אלא אומר לו הכבד ושב בביתך חזר וסרח מנדין אותו מפני חילול ד'.

Rav Huna said: In Usha they enacted that if a Chief Justice goes bad, we do not ex-communicate him. We tell him, "Be honoured and remain at home." If he repeats the act, we ex-communicate him because of desecration of Gd's Name.

17. Rabbi Moses Maimonides (12th century Egypt), Mishneh Torah, Laws of Sanhedrin 4:15

מי שאינו ראוי לדון מפני שאינו יודע או מפני שאינו הגון, שעבר ראש גלות ונתן לו רשות או שטעו בית דין ונתנו לו רשות, אין הרשות מועלת לו כלום עד שיהא ראוי, שהמקדיש בעל מום למזבח אין הקדושה חלה עליו.

One who is unfit to judge, because he doesn't know how or because he is unfit, but the exilarch inappropriately licensed him, or the court mistakenly licensed him, the license is ineffective until he is suitable. If one consecrates a blemished animal for the altar, no sanctity takes effect.

<u>Applying the Principles</u>

18. Duhaime's Legal Dictionary, http://www.duhaime.org/LegalDictionary/S/SharpPractice.aspx

Besides the duty which a lawyer owes to the court and his client, she or he is bound to treat the opposite party and fellow lawyers with civility, fairness and propriety. Failing to do so is *sharp practice*.

Obviously from the above, it is challenging to pin down a definition of *sharp practice* as it is subject to both a wide and a more limited definition by those law societies - and they are legion - that prohibit sharp practice…

In Canada, the more limited definition is favoured, aimed more at taking unfair advantage of slips, irregularities or mistakes on the part of the other side, including other lawyers. In *Re Blackhouse* (1889), the Ontario High Court wrote: "To build up a client's case on slips of an opponent, is not the duty of a professional man."

19. Garten v. Kruk, 2009 CanLII 21206 (ON SC), <http://canlii.ca/t/23cc9>

Should the actions of the plaintiff in failing to warn the defendant of an intention to note her in default provide grounds by itself to set aside the noting in default? The defendant was in default in delivering a statement of defence and the plaintiff had a clear legal right to note her in default under rule 19.01. Although a plaintiff may have a legal right to note default, "it was unprofessional to do so without warning" particularly where the plaintiff was aware of the identity of the defendant's solicitor. Nonetheless, a "failure to warn, without more, does not provide grounds to set aside any resulting default judgment"… Therefore in my view, the failure to warn, although unprofessional, does not provide grounds, by itself to set aside the noting in default. It may however be a factor in determining costs.

20. Ethics Committee, Law Society, BC http://www.lawsociety.bc.ca/docs/publications/handbook/ec/09-05_6.pdf

In negotiations between two lawyers with respect to a transaction, Lawyer A receives from Lawyer B draft 5 of the agreement between the clients. A clause that Lawyer B emphasized was very important to her client in a previous draft is missing from the latest draft, and does not seem to be covered by other parts of the agreement.

21. Ethics Committee, Law Society, BC http://www.lawsociety.bc.ca/docs/publications/handbook/ec/96-03(7).pdf

When a caveat has been filed in one Supreme Court registry but not in others through inadvertence, it is sharp practice for a lawyer to apply for letters of administration without notifying the lawyer who filed the caveat of the proposed application.

22. Construction Workers Local 53 v. Fahringer Mechanical Contractors Limited, 2001 CanLII 3504 (ON LRB), <http://canlii.ca/t/6rrz>

[The Ontario Labour Relations Board originally approved the following voting constituency as a bargaining unit: "all journeymen and apprentice refrigeration and air conditioning mechanics, journeymen and apprentice plumbers and pipefitters, journeymen and apprentice sheet metal workers, journeymen and apprentice electricians in the employ of Fahringer Mechanical Limited in all sectors of the construction industry in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman."]

The applicant acknowledges that it agreed in the certification process to exclude journeyman and apprentice plumbers and pipefitters. It now says it has changed its mind.

The Board is generally reluctant to allow parties to change a position once this has formed the basis of an agreement by the parties. Nothing in the applicant's submissions would cause the Board to depart from this policy in this case.

The Board would also point out that it is generally considered to be "sharp practice" if not unethical for one party to take advantage of a clear oversight by the opposite party in a proceeding. This rule applies with even greater force to an oversight made by the tribunal before which the parties appear.

Accordingly the Board reconsiders its decision of May 11, 2001. The bargaining unit description therein will be amended to exclude journeyman and apprentice plumbers and pipefitters

23. Haider Humza Inc. v Mohammed Rafiq, 2013 ONSC 3161 (CanLII), <http://canlii.ca/t/fxq8z>

MT, former counsel for the Plaintiffs in this action, seeks leave to appeal the order of Master Dash dated October 30, 2012, in which the learned Master ordered MT to personally pay $3,000 to Aswani K. Datt, counsel for the Defendant Mohammad Rafiq…

The central point in Master Dash's ruling is his finding, at paragraph 21 of his October 30, 2012 endorsement, that MT engaged in "sharp practice" contrary to Rule 6.03(3) of the Law Society's Rules of Professional Conduct…

In coming to this conclusion, Master Dash relied on the Divisional Court's judgment in Garten v Kruk, 2009 CanLII 58071 (ON SCDC), [2009] OJ No 4438. In that case, the defendant appealed a Master's order refusing to set aside a noting in default where plaintiff's counsel had not warned defendant's counsel that he was about to do that. Wilson J. indicated, in one sentence and as one of her reasons for reversing the Master's order, that the Master's refusal to grant relief to the defendant "reinforces sharp practice." Garten, at para 14.

24. Ethics Committee, Law Society, BC http://www.lawsociety.bc.ca/docs/publications/handbook/ec/09-05_6.pdf

Lawyer A states in a conversation with Lawyer B that she will be issuing a writ against Lawyer B's client well within the limitation period which she states is two years. In fact, Lawyer B knows the limitation period is shorter than that stated by Lawyer A, but Lawyer B has made no comment himself on what the limitation period is.

25. Talmud, Sanhedrin 7a

דאזיל מבי דינא שקל גלימא, ליזמר זמר, וליזיל באורחא.

One who leaves the court bereft of his cloak should sing as he walks.

26. Rabbi Moshe Isserles, Code of Jewish Law, Choshen Mishpat 28:1

ואפילו אמר לו: בא ועמוד עם עד אחד שיש לי ולא תעיד, רק שיפחד בעל חובי ויסבור שיש לי שני עדים ויודה לי, לא ישמע לו (טור).

One may not listen to someone who says, "Come stand beside my single witness, without testifying, so that my debtor will be afraid, thinking I have two witnesses, and will admit the debt."

<u>The Self-Represented Litigant</u>

27. Rabbeinu Asher (13th-14th century Germany/Spain), Rosh to Bava Kama 1:5

מי שבא לפני ב"ד ואומר "יש לי תביעה על פלוני, ומצאתי לנכסיו במקום ידוע ואני ירא שאם יבואו לידו יבריחם ולא אמצא מקום לגבות ממנו חובי," ומבקש שיעכבו ב"ד הנכסים עד שיתברר תביעתו... ואם רואה הדיין אמתלא בדברי התובע או שלא יוכל ראובן לגבות חובו משמעון כשיגיע הזמן, מצווה הדיין לעכב ממון הנתבע עד שיברר התובע תביעתו... וכן מצאתי בשם הגאון ז"ל כתוב דתקנתא דרבנן הוא באיניש דמפסיד נכסיה משום השבת אבידה. ולי נראה דלא צריכנא לתקנתא דרבנן אלא דין גמור הוא שחייב אדם להציל עשוק מיד עושקו בכל טצדקי דמצי למיעבד.

If one comes to court and says, "I have a claim against *ploni*, and I have discovered assets of his in a certain place and I fear that if they reach him he will hide them and I will have no means of collecting my debt," and he requests that the court hold the property until his claim is clarified… If the judge sees logic in the claim, or that Reuven would not be able to collect his debt from Shimon when the time came, then the judge is instructed to hold the property of the defendant until the plaintiff clarifies his claim… And so I have found from the Gaon z"l, that there is a rabbinic enactment regarding [a defendant] who destroys his property, to restore loss. It appears to me that there is no need for a rabbinic enactment; it is straightforward law that one is obligated to save the abused party from one who would abuse him, with any available strategy.

28. Rabbi Moses Maimonides (Rambam, 12th century Egypt), Mishneh Torah, Hilchot Sanhedrin 2:7

ובכלל "אנשי חיל" שיהיה להן לב אמיץ להציל עשוק מיד עושקו, כענין שנאמר "ויקם משה ויושיען."

Including in "men of *chayil*" is that they must have a brave heart, to save the abused from one who would abuse him, as it says, "And Moshe arose and saved them."

29. Proverbs 31:8-9

פְּתַח פִּיךָ לְאִלֵּם אֶל דִּין כָּל בְּנֵי חֲלוֹף: פְּתַח פִּיךָ שְׁפָט צֶדֶק וְדִין עָנִי וְאֶבְיוֹן:

Open your mouth for the mute, for the judgment of all whose aid is transient. Open your mouth, judge righteously, litigate for the poor and indigent.

30. Talmud, Gittin 37b

כי אתו לקמיה דרב, אמר ליה "מידי פרוסבול היה לך ואבד?" כגון זה 'פתח פיך לאלם הוא.'

When they came to Rav, he would ask, "Perhaps you had a *prozbul* and it was lost?" This is an example of "Open your mouth for the mute."

31. Jerusalem Talmud, Sanhedrin 3:8

רב הונא כד הוה ידע זכו לבר נש בדינא ולא הוה ידע ליה, הוה פתח ליה, על שם [משלי לא ח] "פתח פיך לאלם."

When Rav Huna knew merit for a litigant and the litigant did not know, he would start for him, for, "Open your mouth for the mute."

32. Rabbi Moses Maimonides (Rambam, 12th century Egypt), Mishneh Torah, Hilchot Sanhedrin 21:10-11

מנין לדיין שלא יעשה מליץ לדבריו של בעל דין שנאמר "מדבר שקר תרחק," אלא יאמר מה שנראה לו וישתוק. ולא ילמד אחד מבעלי דינין טענה כלל, אפילו הביא עד אחד לא יאמר לו "אין מקבלין עד אחד" אלא יאמר לנטען "הרי זה העיד עליך," הלואי שיודה ויאמר "אמת העיד," עד שיטעון הוא ויאמר "עד אחד הוא ואינו נאמן עלי." וכן כל כיוצא בזה. ראה הדיין זכות לאחד מהן ובעל דין מבקש לאמרה ואינו יודע לחבר הדברים, או שראהו מצטער להציל עצמו בטענת אמת ומפני החימה והכעס נסתלק ממנו או נשתבש מפני הסכלות, הרי זה מותר לסעדו מעט להבינו תחלת הדבר משום פתח פיך לאלם, וצריך להתיישב בדבר זה הרבה שלא יהיה כעורכי הדיינין.

How do we know that a judge should not act as an interpreter for the litigant's words? "Distance yourself from falsehood." Rather, he should say what appears to him, and be silent. And he should not teach either litigant any claim; even if a litigant brings just one witness, he should not say, "We don't accept one witness;" rather, he should say to the defendant, "This one has testified against you." If only the other would admit and say, "He testifies honestly!" Until the defendant says, "He is just one witness, and he is not credible to me." And so in all similar cases.

If the judge sees merit for one party, and that litigant tries to make the point but does not know how to put it together, or the judge sees that the litigant is taking pains to save himself with an honest point, but it escapes him because of his rage and anger, or he is confused because of his foolishness, then he may assist the litigant a little to explain the beginning of it, under "Open your mouth for the mute." One must be very careful with this, lest he be as those who arrange the judges.

33. The Advocates' Society, *Principles of Professionalism/Civility for Advocates*, An Advocate's Duty to Opposing Counsel

4. Advocates must not attempt to gain a benefit for their client solely due to the fact that a litigant is self-represented. Counsel should cooperate with the court in ensuring that a self-represented litigant receives a fair hearing.

5. At trial, advocates are entitled to raise proper and legitimate objections but should not take advantage of technical deficiencies in a self-represented litigant's case which do not prejudice the rights and interests of their client.

34. Solomon v Abughaduma, 2015 ONSC 7670 (CanLII), <http://canlii.ca/t/gmh27>, retr. 2018-03-11
Counsel are not required to assist parties opposite on matters of substance. Nor do they need to make or even to ensure that the parties opposite understand the strategic choices that might be available to them. But, they are required to assist on scheduling and similar matters to ensure that the other side has an opportunity to present his or her evidence fairly…

35. Rabbi Yehoshua Falk (16th-17th century Poland) Sefer Meirat Einayim (SM"A) to Choshen Mishpat 17:14
ומה שבזה"ז נוהגין לדון לועזים ע"י מורשה שלהם הוא מפני שכל שבאו לדון לפני דיינים קבועין הו"ל כקיבלו עליהם לדון כן ואין לנו אחר הקבלה כלום.
Today's practice of judging *loazim* via their assignee is because all who come for judgment before permanent judges today are as though they had accepted this type of judgment, and there is nothing to do after that acceptance.

Helping a Client?
36. Rabbi Yaakov Lorberbaum of Lissa, Code of Jewish Law, Choshen Mishpat 12:Chiddushim 8
ואם יודע שהאמת אתו רק שהבי"ד לא יאמינו לו, יכול לבקש צדדים כדי שיבואו לידי פשרה, רק באופן שלא יהיה כרשע לפני בית דין.
If one knows that the truth is with him, but the court will not trust him, then he may seek ways to instigate a compromise; he must only avoid acting as a wicked person before the court.

37. Talmud, Bava Kama 113a
מתני'. אין פורטין לא מתיבת המוכסין...
והאמר שמואל דינא דמלכותא דינא! אמר רב חנינא בר כהנא אמר שמואל במוכס שאין לו קצבה. דבי ר' ינאי אמרי במוכס העומד מאליו.
Mishnah: One may not use coins from the tax collector's box [for they are deemed 'stolen']…
Gemara: But Shemuel ruled that the law of the land is binding! Rav Chanina bar Kahana cited Shemuel to explain that this is regarding a tax collector without a fixed rate. In the yeshiva of Rabbi Yannai they said that this is regarding a self-appointed tax collector.

38. Rabbi Moshe Sofer (19th century Pressburg), Responsa Chatam Sofer 2:Yoreh Deah 11
גבי עד אחד דעלמא שיודע בעצמו כי המעשה אמת נכון וראוי' הי' לעשות כל הטצדקאות רק להציל העשוק ואפי' להצטרף עם עד שקר כיון שנפשו יודעת מאוד שהדין דין אמת אלא אפקעתא דמלכא הוא כי ד' ציוה שכן לא יעשה להצטרף עם עד רשע אף על פי שהמעשה אמת א"כ אין לך בו אלא חדושו דכשאותו הרשע לא נפסל בב"ד אף על פי שהוא מכיר ברשעו של זה יכול הוא להצטרף עמו להעיד במה שהוא יודע שהוא אמת נכון
Regarding a lone witness who knows that his testimony is true: It would be appropriate for him to take every measure to save the victim, even combining with a false witness, since he knows that the testimony is true. By Royal fiat, G-d has decreed that one may not join with a wicked witness even where his testimony is true, but we limit that novelty to its narrowest application; when the wicked person is not technically disqualified in court, then even though one knows him to be wicked, one may combine with him to testify in a matter which one knows to be true.

39. Rabbi Moses Maimonides (Rambam, 12th century Egypt), Commentary to Avot 1:8
ואפילו ידע שהוא עשוק, ושבעל דינו טוען עליו בשקר לפי הכרע הסברה, אין מותר לו ללמדו טענה שתצילהו בשום פנים
Even where one knows that this party has been cheated, and that the opposing litigant is lying, one may in no way teach him claims that will assist him.

40. Talmud, Shevuot 31a
מנין לשלשה שנושין מנה באחד, שלא יהא אחד בעל דין ושנים עדים כדי שיוציאו מנה ויחלוקו? ת"ל: מדבר שקר תרחק.
How do we know that if someone owes three people a *maneh*, they should not arrange for one of them to be the plaintiff and the other two to serve as witnesses, to draw from him a *maneh* for them to split? It is written, "Distance yourself from falsehood."