Legal Ethics: Advising a Risk-Tolerant Client

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Introduction

1. Agenda: Professionalism Topics covered in this presentation:
   - 2.4 Recognizing and being sensitive to clients' circumstances, special needs, and intellectual capacity (e.g., multi-cultural, language, gender, socioeconomic status, demeanour)
   - 2.5 Managing difficult clients
   - 2.9 Conducting effective client interviews and client meetings, including theory and practical application

2. Vignettes

1> Devry Smith Frank LLP v. Chopra, 2018 ONSC 1303 (CanLII), retrieved on 2019-12-05

[6] In February 2009, Mr. Chopra raised health and safety concerns with his employer, which he says were ignored… [O]n May 22, 2009, Easy Plastic Containers terminated Mr. Chopra's employment. In its termination letter, Easy Plastic Containers accused Mr. Chopra of conspiring to make false and slanderous accusations and of creating a poisoned workplace.

[7] At the time of termination, Mr. Chopra was earning a salary of approximately $48,000. He received no severance pay. He was emotionally devastated by the dismissal. He suffered a severe depression for which he was hospitalized at CAMH. He was unable to mitigate the loss of his job by seeking a new one…

[9] On September 14, 2010, Mr. Chopra met with two lawyers at DSF…

[14] On March 15, 2011, DSF had a Statement of Claim issued. In his action against Easy Plastic Containers, Mr. Chopra claimed damages of $100,000…

[15] Before the issuance of the claim and thereafter, there was no discussion between lawyer and client of the risks and rewards of suing for $100,000 in the Superior Court of Justice. Mr. Chopra testified that he was told that the total costs of the litigation would not exceed $30,000. However, I find as a fact that no such assurance was given to him. I find as a fact that there was no discussion about the financial risks of losing …

[18-19] While the litigation was ongoing, DSF rendered invoices to Mr. Chopra as follows… The amount of the invoices is $117,939.20…

[20] On June 19, 2014 Justice Sanderson released her judgment. She dismissed Mr. Chopra's action. Easy Plastic Containers claimed costs of $99,163.05, and Justice Sanderson awarded it $25,000 on a partial indemnity basis.

[21] During the two-year run-up to the trial, Mr. Chopra was adamant that he wished to have his day in court. Mr. Chopra testified that he was told that his claim was strong and that Easy Plastic Containers would pay a portion of his costs. However, I find as a fact that although DSF did tell Mr. Chopra that the unsuccessful party typically pays costs to the winner, they told him that there was a serious risk that he would be unsuccessful and that litigation is risky and outcomes cannot be predicted with any certainty. I find that DSF encouraged Mr. Chopra to settle his claim because of the risks of losing. I find that a mediator told Mr. Chopra much the same thing.

[22] Unfortunately, Mr. Chopra, who likely was continuing to suffer from a depression, could not be reasoned with. He was too emotionally invested in his claim, and misunderstood warnings as assurances. He wanted his day in court. He was obsessive. He wanted revenge or vindication…

2> R. (Re), 2009 CanLII 28631 (ON CCB), retrieved on 2019-12-05

Dr. Shulman was a geriatric psychiatrist and he had been R's physician since April 8. He said that R. was a voluntary patient who accepted the medication prescribed. He described R. as being intelligent and stated that R. had no cognitive problems. He was able to understand the relevant issues concerning management of finances. The doctor said that the patient was manic and grandiose and he had no doubt that this was a result of his bi-polar disorder which had not been properly treated since early 2008. He said that capable persons are entitled to make bad or reckless financial decisions. He noted that R. had purchased a 1972 Ford Mustang vehicle for $72,000 and he was required to make payments of over $1,000 per month. R. told him that his total pension income was $1,300 per month. R. had been "cycling" his credit by paying off one credit card with another. He had not paid his mortgage or any of his debts. While R. knew the extent of his income and the magnitude of his debt he was unable to appreciate that eventually he could not keep living well beyond his means.

3> Gluckstein Personal Injury Lawyers v. Verlaan-Cole, 2019 ONSC 6648 (CanLII), retrieved on 2019-12-05
Marin maintains that the solicitor-client relationship started to experience strain in 2015. They disagreed over the scope of the economic loss report as well as the nature of the medical legal expert reports the firm could acquire. Marin believed that the variety of financial losses that the Client wanted to claim were too remote. Marin states that the Client accused Marin of failing to protect her in the advancement of these claims at her discovery…
[I]n March 2015, the Client expressed dissatisfaction with the accounting expert hired on her behalf…
In July 2015, in correspondence to Angela at Gluckstein, the Client states that she believes she was poorly represented at discovery. In the midst of this email she states, "It is time to begin taking care of me Angela".
In August 2015, she wrote to Angela again stating, "Everything I have experienced so far in the legal system is a lack of systematic approach by all those involved and then a convenient, blaming of the client in the court." She then goes on to state that the need for a new economic loss report, "…was caused by all of you – not planning and controlling your work."
In October 2015, she wrote to Angela again citing Gluckstein's failure to follow through with promises. She also stated, "Do you know the definition of stupid? It is doing the same thing over and over and expecting different results. I am not stupid. Are you?"
In January 2017, the client sent an email to Marin stating, "I am also deeply scared that you have completely lost touch with our level of suffering."
In August 2017, Marin advised the Client that they were having difficulties establishing the necessary medical evidence and how this would impact their ability to prove her claim at trial. Marin claims that the Client was not receptive to this information. The Client was also advised that Marin was soon starting a maternity leave.
Following this communication in August 2017, Marin confirmed their conversation in writing. This letter, dated August 14, 2017, stated as follows: We commenced the call with a discussion regarding your confidence in the Gluckstein Firm continuing as your representative. I explained the importance of trust in the lawyer-client relationship as it is an essential component. You confirmed that you have no intention of seeking alternative counsel, and that you continue to have trust in our services. I encouraged you to seek an independent legal opinion if you have any concerns or doubts, or if you would like a second opinion, as it is your right to do so. You expressed your intention to "follow our advice", understanding key decision making must nevertheless be made by you. …
Mr. Gluckstein, the principal who maintained carriage of the file while Marin was on maternity leave, also experienced some difficulties with the Client. In an email to Mr. Gluckstein dated May 6, 2018, she stated, "At the time of the mediation you referred to Dr. Rundle's assessment without regard for Dr. Wong's diagnosis… This example leads me to the conclusion that you need a full briefing on the history of by health condition, the interventions which have been made by health professionals and the complex unresolved dynamic of neuromuscular functioning in my body ever since the accident. I am at the point where I need an advocate to speak on my behalf because I am not heard."…
From October 22, 2018 to November 12, 2018, the Client and various members of the Gluckstein law firm exchanged e-mails in order to set up a meeting to prepare for the upcoming pre-trial in March 2019. The Client was unable to go to Gluckstein and asked that the appointment take place at her residence at a certain time…
On the morning of the appointment, the Client wrote to Marin and asked for a written status report on her accident benefits claim in advance of their meeting. She asked for specific details. She indicated that the written report would be the basis of their meeting. Marin has indicated in her Affidavit that she interpreted that request, especially in the context of earlier discussions, as indicative of the client's desire to assess their account and take her file elsewhere. Accordingly, Marin responded by e-mail to indicate that the meeting could not proceed… After a further exchange, Marin sent the following e-mail:… "After much consideration, Charles and I have decided that the best course of action is to part ways. We are not able to satisfy your requests. It is very clear that your relationship with the Gluckstein firm has suffered irreparable damage. The purpose of today's meeting was to review the status of your file and discuss this breakdown in relationship. However, you indicated you required a full breakdown and explanation of your accident benefits claim prior to proceeding with such a meeting. I have drafted a letter detailing some of the major disagreements, which is attached. A copy of this letter will follow by registered mail tomorrow. We are fully prepared to help you obtain new counsel should you wish for that assistance. I know this is certainly not what you want to hear but we firmly believe it is for the best for all concerned."

#1 - Declining to advise a risk-tolerant client to settle

3. Tiffin Holdings Ltd. v. Millican et al, 1964 CanLII 637 (AB QB), retrieved on 2019-12-05

The obligations of a lawyer are, I think, the following:
(1) To be skilful and careful.
(2) To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary.
(3) To protect the interests of his client.
(4) To carry out his instructions by all proper means.
(5) To consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him.
(6) To keep his client informed to such an extent as may be reasonably necessary, according to the same criteria.

4. Wong v. 407527 Ontario Ltd., 1999 CanLII 3788 (ON CA), retrieved on 2019-12-05

[46] I do not, however, rest my concern about Hui's duty to negotiate security on any distinction between business advice and legal advice. Hui submitted that he had no duty to negotiate security for the warranty because this was a business matter, not part of a lawyer's retainer. I do not accept this submission. Although ordinarily clients retain lawyers for legal advice not business advice, on some transactions the two are intermingled and no clear dividing line can be drawn. Thus, a lawyer may well have a duty to give advice on the financial or business aspects of a transaction, depending on the client's instructions and sophistication, and on whether the client is relying on the lawyer for that kind of advice.

5. LSO, Rules of Professional Conduct (2014), Section 3.1: Competence

3.1-1 In this rule, "competent lawyer" means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client including
(a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises,
(b) investigating facts, identifying issues, ascertaining client objectives, considering possible options, and developing and advising the client on appropriate courses of action,

3.1-2 A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer.

6. LSO, Rules of Professional Conduct (2014), Section 3.2: Quality of Service

3.2-4 A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing or continuing useless legal proceedings.

7. Commerce Realty Ltd. v. Olenyk and Olenyk, 1957 CanLII 316 (BC SC), retrieved on 2019-12-05

The first duty of an agent is to comply explicitly with the orders of his principal. If the following of those instructions involves the abandonment by the principal of a statutory protection surely the principal cannot complain.

8. Devry Smith Frank LLP v. Chopra, 2018 ONSC 1303 (CanLII), retrieved on 2019-12-05

There was no discussion between lawyer and client that the Chopras' upside was net $5,000 and their downside was approximately $148,000. I appreciate that Mr. Chopra was adamant in having a day in court, and I believe that DSF's lawyers were well-intentioned in agreeing to defer payment of the firm's accounts until Mr. Chopra had his day in court, but these good intentions were a trap and a recipe for the financial disaster that followed. The deferred retainer ran the risk that a poor family would be out on the street having lost everything. If DSF was not prepared to act on the matter based on a contingency fee under which they would bear some of the risks, they cannot expect to be fully paid in the absence of having made it perfectly clear that it would be foolish for Mr. Chopra to sue having regard to the risks and rewards of litigation.

9. Leviticus 19:14

לא תקלל חרש ולפני עור לא תתן מכשל ויראת מאלקיך אני ד'

Do not curse the deaf, and do not put a stumbling block before the blind; you shall revere Gd, I am Gd.

10. Midrash, Sifra, Kedoshim 2

היה נוטל ממך עצה, אל תתן לו עצה שאינה הוגנת לו, אל תאמר לו צא בהשכמה שיקפחוהו ליסטים, צא בצהרים בשביל שישתרב

If someone asks you for advice, do not advise him in a way that is inappropriate for him. Do not tell him, "Depart in the early morning," such that thieves will attack him, or "Depart at noon," so that he will be overcome by heat.

11. Rabbi Moses Maimonides (12th century Egypt), Sefer haMitzvot, Prohibition 299

והמצוה הרצ"ט הוא שהזהירנו מהכשיל קצתנו את קצתנו בעצה... ומאלו הפנים אמרו במלוה ולוה בריבית ששניהם יחד עוברים משום "ולפני עור לא תתן מכשול" כי כל אחד מהם עזר חבירו והכין לו להשלים העבירה. ודברים רבים מאד מזה המין יאמרו בהם "עובר משום ולפני עור לא תתן מכשול." ופשטיה דקרא הוא במה שזכרנו תחלה:

The 299th mitzvah is that Gd commanded that some of us not cause others among us to stumble via advice… And among these aspects of the law they stated regarding a creditor and borrower with interest that both of them violate "And do not put a stumbling block before the blind" because each of them aids the other and lays the groundwork for him to complete the transgression. And regarding many cases like this they said, "He violates, 'And do not put a stumbling block before the blind.'" And the simple meaning of the text is what we mentioned first.

12. Rabbi Yehudah Rosanes (17th century Turkey), Mishneh l'Melech to Hilchot Kilayim 1:6

"ואסור לישראל להניח לכותי שירכיב לו אילנות כלאים כו'."... נראה דסבירא ליה דאף בלא אמירה אסור להניח וטעמא דמילתא כיון דנכרי מוזהר אם יניחנו עובר משום ולפני עור וכו':

"A Jew may not let a non-Jew graft trees in a prohibited way"… Apparently, he believes that this is prohibited even without instructing [the non-Jew to do it]; one may not let him do it. This is because since the non-Jew is prohibited from this action, allowing him to do it would violate "And do not put a stumbling block before the blind."

13. Rabbi Moses Maimonides (12th century Egypt), Mishneh Torah, Laws of Kilayim 10:31

המלביש את חבירו כלאים אם היה הלובש מזיד הלובש לוקה והמלביש עובר משום ולפני עור לא תתן מכשול, ואם לא ידע הלובש שהבגד הוא כלאים והיה המלביש מזיד המלביש לוקה והלובש פטור.

One who clothes another with *shaatnez* – if the one wearing it does so intentionally, that person is lashed and the one providing the clothing transgresses "And do not put a stumbling block before the blind." If the one wearing it does not know that the clothing is *shaatnez* and the other does it intentionally, the other is lashed and the one wearing it is exempt.

14. Rabbi Chaim Ozer Grodzinski (20th century Poland), Achiezer 3:65:9

י"ל דבלפני עור יש ב' סוגים: לפ"ע כפשוטו שנותן מכשול או משיא לו עצה שאינה הוגנת, דזהו שייך רק בשוגג שאין העור יודע, והשואל עצה אינו יודע בעצמו שהעצה אינה הוגנת לו. ויש עוד סוג לפני עור באיסורים כמו מושיט לו כוס יין לנזיר דבזה גם במזיד עובר לפ"ע... וזהו דין דלפ"ע מיוחד באיסורים... ואולי באיסורים הטעם דגם במזיד הוי כעור שאין אדם עובר עבירה אא"כ נכנס בו רוח שטות...

One could say that in "Before the blind" there are two types. There is simple "Before the blind," putting a stumbling block before him, or giving him inappropriate advice, which is only relevant when done to one who is unaware, that the blind victim is unaware, and the one who asks for advice does not know himself that the advice is inappropriate for him. And there is another kind of "Before the blind" with prohibitions, like extending a cup of wine to a *nazir*, where even if [the sin] is intentional one violates "Before the blind"… This is a law of "Before the blind" which is unique to prohibitions… Perhaps regarding prohibitions the reason is that even the one who sins intentionally is like a blind person, for "One does not transgress unless a spirit of foolishness enters him"…

15. Rabbi Meir Abulafia (12th-13th century Spain), Yad Ramah, Bava Batra 26a

אסיר למגרם מידי דאתי מיניה היזקא לאינשי, אי משום לפני עור לא תתן מכשול ואי משום ואהבת לרעך כמוך

One may not cause any harm to people, whether due to "And do not put a stumbling block before the blind" or because of "Love your neighbour as yourself."

16. Rabbi Shlomo Ibn Aderet (13th century Spain), Rashba 1:99

ואם פתהו שמעון להתגייר וקבל ממנו ונתגייר אין שמעון חייב כלום לרבו. שהוא לא הזיקו בכלום והעבד הוא שנתגייר מרצונו... ולא מצינו בשום מקום משיא עצה ואפילו בנזקים שהוא חייב בדיני אדם

If Shimon persuaded [a servant] to convert, and the servant accepted and converted, Shimon owes nothing to the master, for he harmed nothing; the servant converted on his own… We never find that one who gives advice is liable in human courts, even for causing harm.

17. R' Yosef Karo, R' Moshe Isserles (16th c. Israel, Poland), Code of Jewish Law, Choshen Mishpat 386:3
הזורק כלי שלו מראש הגג, והיו תחתיו כרים וכסתות שאם יפול עליהם לא ישבר, וקדם אחר וסלקם, ונחבט הכלי בארץ ונשבר, חייב המסלק; וכן כל כיוצא בזה. הגה: וי"א דזה מקרי גרמא בנזקין ופטור...
Rabbi Karo: If one throws his own implement from a roof, over cushions which would prevent it from breaking, and another removes them and it smashes on the ground, the remover is liable. The same is true in all similar cases.
Rabbi Isserles: Some say removal is called *grama* and one is exempt…

18. Rabbi Yosef Karo (16th century Israel), Code of Jewish Law, Choshen Mishpat 386:1
קיימא לן כרבי מאיר דדאין דינא דגרמי
We follow Rabbi Meir, who punishes for *garmi*.

19. Rashbam (12th century France) to Bava Batra 94a **ונותן**
וכשבורר הצרור ומשליך חוץ היזק בידים הוא שאותן צרורות היו לו שוין כמו חטין
Sifting out the pebble and discarding it is direct harm; those pebbles were equal in value to wheat for him.

20. Rabbi Shabbtai haKohen (17th century Poland), Shach to Choshen Mishpat 386:1
חכמים קנסו בדבר שהי' נראה להם שהוא שכיח ורגיל וכי האי גוונא ואין לדמות גזרות חכמים זו לזו
The sages fined when they judged a circumstance to be common, like this, and one cannot compare decrees.

21. Rabbi Yaakov Yeshayah Blau (21st century Israel), Pitchei Choshen VI 4 footnote *57*
יועץ לעניני השקעות שיעץ בהשקעה לא טובה, לכאורה היה נראה שיש מקום לחייבו מדין מראה דינר... ויועץ לעניני מס שהפסיד ללקוח ע"י עצתו נראה שיש לדון בו כדין מראה דינר לשולחני.
An investment advisor who advises to make a bad investment would appear to be liable under the law of one who shows a *dinar* [to a moneychanger]… And a tax advisor who causes a client a loss via his advice would appear to be judged under the law of one who shows a *dinar* to a moneychanger.

22. L.M.P. v. A. Douglas Hoffer, 2005 MBQB 254 (CanLII), retrieved on 2019-12-05
The respondent is a lawyer with many years of experience in the area of family law. Notwithstanding this experience, he was unable to provide the court with any evidence that he provided Ms. L.M.P. with an opinion as to the merits of the application to vary, either before the investigation and discovery of Mr. D.P. were completed, or afterwards. He says that he urged Ms. L.M.P. and Mr. J.M. to consider settlement prior to the commencement of trial but they were adamant that the matter should proceed. I am satisfied that a lawyer in this situation should have clearly documented in writing that he/she had advised the client not to proceed but that the client insisted on proceeding to trial. The respondent was unable to provide any such written evidence to the court. Ms. L.M.P. and Mr. J.M. have denied that they received any such advice from the respondent, and where there is a dispute between the oral evidence of the lawyer and the clients I must give the clients the benefit of the doubt. By his own acknowledgment the respondent has many years of experience as a family law lawyer. I cannot imagine him failing to protect himself with "self-serving" memoranda, if not a document signed by the client, if his version of the facts were accurate.

<u>Incapacity</u>
23. Substitute Decisions Act, 1992, SO 1992, c 30, retrieved on 2019-12-05
6 A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision. 1992, c. 30, s. 6.

24. Capacity Assessment, O Reg 460/05, retrieved on 2019-12-05

(1) A person is qualified to do assessments of capacity if he or she,

(a) satisfies one of the conditions set out in subsection (2);

(b) has successfully completed the qualifying course for assessors described in section 4;

(c) complies with section 5 (continuing education courses);

(d) complies with section 6 (minimum annual number of assessments); and

(e) is covered by professional liability insurance of not less than…

(2) The following are the conditions mentioned in clause (1) (a):

1. Being a member of the College of Physicians and Surgeons of Ontario.

2. Being a member of the College of Psychologists of Ontario.

3. Being a member of the Ontario College of Social Workers and Social Service Workers and holding a certificate of registration for social work.

4. Being a member of the College of Occupational Therapists of Ontario.

5. Being a member of the College of Nurses of Ontario and holding a general certificate of registration as a registered nurse or an extended certificate of registration as a registered nurse.

25. Assessment Report, https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity.php

The *Substitute Decisions Act, 1992* applies an "understand and appreciate" test of incapacity.

"Understand" refers to the ability to understand information that is relevant to making a decision, while "Appreciate" refers to the ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision. Failure to "understand" or "appreciate" is grounds to conclude incapacity.

A person who lacks the "ability to understand" is one who:

1. lacks the factual knowledge base and skills needed to manage the decision-making demands of their circumstances and cannot be educated in that regard, or

2. lacks the ability to intellectually understand the options for meeting their financial or personal care needs, or cannot communicate their choice/decisions.

A person who lacks the "ability to appreciate" is one who:

1. lacks the ability to realistically appraise the risk and likely outcome of a decision or lack of decision or lacks the ability to plan and to take action to implement a plan, or

2. lacks the ability to rationally manipulate information to reach a reasoned decision consistent with personal values and free from delusional beliefs.

26. McDougald Estate v. Gooderham, 2005 CanLII 21091 (ON CA), retrieved on 2019-12-05

The application judge relied primarily on the evidence of two people in concluding that Ms. McDougald was incapable of managing her property at the time the Palm Beach property was sold. First, there was the evidence of Dr. Marotta, an eminent neurologist and the testator's treating physician during the relevant time period. Dr. Marotta testified that Ms. McDougald's physical and mental health deteriorated significantly between 1992 and 1996. It was Dr. Marotta's evidence that by 1995 and 1996, the testator suffered from multi-system deterioration and avascular necrosis, a neurological disease. Her deteriorating physical condition was evidence of the progression of her neurological disease, which had a demonstrable effect on her mental condition. Dr. Marotta testified that Ms. McDougald had pronounced deficits including marked impairment of recent and remote memory; an inability to compute numbers; loss of orientation; lack of insight and inability to do abstract reasoning; loss of general information; and, loss of all higher cognitive functions. She was, in his words, "demented".

27. M. (Re), 2006 CanLII 52797 (ON CCB), retrieved on 2019-12-05

During the assessment of Ms. Jozsvai, M. appeared oriented as to time and place. He denied having any mental illness. He thought that the PGT was managing his finances because he was being treated at the WMHC for diabetes. M. showed her and the Board a number of documents from a lottery company in Vancouver, B.C., advising him that he was entitled to claim lottery winnings totaling $11,881,397.49 simply by mailing $25.00 to that company. He never got the money. He planned to travel to Vancouver and to the United States to collect his winnings.

M. appeared to know the following facts about his finances:

- He was receiving a monthly pension of about $1,200 from the government.
- Of that amount, the PGT was giving him $160 a month.
- His condominium was sold because he did not pay the condominium fees.
- The remaining net proceeds from the sale amounted to approximately $30,000 which the PGT was managing.

M. told Ms. Jozsvia that he planned to live on the $1,200 pension and that he would need about $600 for rent, with the rest going for food. At the assessment and during the Hearing, M. claimed that he would make millions of dollars in profit by investing the $30,000 in the stock market. He saw no possibility of losing his investment in the stock market.

Ms. Jozsvia reported that M. miscounted the change 50% of the time when asked to make a hypothetical purchase, albeit not by much. She acknowledged that M. was able to make simple meal purchases at the cafeteria.

Ms. Jozsvia concluded that M. failed both branches of the capacity test for managing property under section 6 of the Act. He was incapable of understanding information relevant to making a decision about his finances because he suffered from a delusion that he was a wealthy man with millions of dollars in lottery winnings and that he would invest the money in the stock market. He was not able to appreciate the possible consequences of buying stocks and losing his real assets. He could not manage small amounts of money because of impaired short-term memory and impaired sequential reasoning ability.

28. R. (Re), 2009 CanLII 28631 (ON CCB), , retrieved on 2019-12-05

The doctor conceded that R. was not suffering from hallucinations or delusions. However, he had "impaired reality testing". R. felt that he deserved things. R. was intelligent and he could engage in conversation and articulate his position. Nevertheless, R. was unable to appreciate that he was about to lose his home and that he could not continue to lead the lifestyle he wanted to lead. He remained grandiose despite the severe financial difficulties he had encountered. The doctor said that his patient had not improved much while in hospital. He said that in order to determine whether he had the capacity to make financial decisions he needed to obtain information from the family. The doctor said that the patient's sons had told him of problems and he looked at those problems and the patient's manic presentation to him in coming to his finding.

29. Rabbi Moses Maimonides (12th century Egypt), Mishneh Torah, Laws of Inheritance 10:8

קטן שהגדיל אפילו היה אוכל ושותה יותר מדאי ומפסיד והולך בדרך רעה אין בית דין מונעין ממנו ממונו ואין מעמידין לו אפוטרופוס

When a child matures, even if he eats and drinks excessively and squanders his property and travels a bad path, the court may not keep his assets from him and may not appoint a guardian.

30. Rabbi Yosef Karo (16th century Israel), Shulchan Aruch Choshen Mishpat 35:8

שוטה, פסול. ולא שוטה שהוא הולך ערום ומשבר כלים וזורק אבנים בלבד, (אלא) כל מי שנטרפה דעתו ונמצאת דעתו משובשת תמיד בדבר מהדברים, אף על פי שהוא מדבר ושואל כענין בשאר דברים, הרי זה פסול, ובכלל שוטים יחשב.

A *shoteh* is disqualified [from testifying]. This is not only a *shoteh* who wanders without clothing and breaks implements and throws stones, but anyone whose mind is torn, so that his mind is confused perpetually on some matter, even though he speaks and inquires on point in other areas. He is disqualified, and considered a *shoteh*.

31. Rabbi Moses Maimonides (12th century Egypt), Mishneh Torah, Laws of Testimony 9:10

הפתאים ביותר שאין מכירין דברים שסותרין זה את זה ולא יבינו עניני הדבר כדרך שמבינין שאר עם הארץ, וכן המבוהלים והנחפזים בדעתם והמשתגעים ביותר הרי אלו בכלל השוטים, ודבר זה לפי (מה) שיראה הדיין שאי אפשר לכוין הדעת בכתב.

Those who are especially foolish [*peti*], who do not recognize contradictory statements and do not understand matters as other normal people do. Also, those who are confused and hasty in their minds, and those who are especially foolish, are in the category of *shotim*. It is as the judge sees it; one cannot specify a mindset in writing.

32. Rabbi Yehoshua Falk (16th century Poland), Sma Choshen Mishpat 35:22

המבוהלים והנחפזים בדעתם והמשתגעים ביותר - נראה שכל הני פירושם הוא שאינם מתונים בעניניהם, אלא כל מעשיהן עושין במהירות ולא מבינים לסוף הענין ולתכלית המעשה, מ"ה זה ג"כ בשם שגעון ושטות יחשב:

"Those who are confused and hasty in their minds, and who are especially foolish" – It appears that the meaning of all of these is that they are not patient in their affairs. They perform all of their deeds hastily, not understanding the end of the matter and goal of the act. Therefore, this is also considered foolishness and irrationality.

33. Rabbi Shemuel de Medina (16th century Turkey), Even haEzer 239

ולכאורה נר' שאין לנו מבוהל ונחפז גדול ממי שהוא מנוגף בקדחת עזה והרי הוא בכלל שוטה שפסול מן התורה

It appears that we have no one more confused and hasty than a person who is struck with powerful fever; he is a *shoteh*, biblically disqualified.

34. Rabbi Yosef Trani (16th century Israel/Turkey), 2:Even haEzer 16

כשאנו באים לקיים דבר עמו במקח וממכר או בגיטין וקידושין ומסברו ליה וסבר ואנו מכירין שהבין הדברים כגון זה לאו שוטה הוא והרי הוא כפקח לכל מה שהוא עושה בדעת שפויה לפנינו

When we convene for a commercial matter, or a matter of divorce and marriage, and we explain it to him and he understands and we see that he understands the matter, this is not a *shoteh*. He is like a person of normal perception for anything which he does rationally before us.

35. Rabbi Yehoshua Falk (16th century Poland), Sma Choshen Mishpat 35:21

זהו החילוק בין פתי לשוטה שהשוטה דעתו היא משובשת ומטורפת לגמרי בדבר מהדברים משא"כ פתי שאינו מטורף לגמרי בשום דבר.

This is the difference between a *peti* and a *shoteh*: The *shoteh*'s mind is entirely confused and torn in some matter; the *peti* is not entirely torn in any one matter.

36. Rabbi Moshe Sofer (18th-19th century Hungary), Chatam Sofer Even haEzer 2:2

הנה לדון בדיני השוטים א"א כ"א בראיית עיני הדיין המבין מה טיבו ומהותו וא"א לברר בכתב מה ענינו וטבעו ומהותו וכמ"ש הרמב"ם פ"ט מה' עדות ואין לדיין אלא מה שעיניו רואות

Judging the matter of *shotim* is impossible other than through the eyes of a judge who understands his nature. One cannot clarify in writing the nature of a *shoteh*; as Maimonides wrote, "The judge only has what his eyes see."

<u>Withdrawal</u>

37. LSO, Rules of Professional Conduct (2014), Rule 3.7-1-2

3.7-1 A lawyer shall not withdraw from representation of a client except for good cause and on reasonable notice to the client.

Commentary [1] Although the client has the right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship.

3.7-2 Subject to the rules about criminal proceedings and the direction of the tribunal, where there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Commentary [1] A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if a lawyer is deceived by their client, the client refuses to accept and act upon the lawyer's advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect…

38. Gluckstein Personal Injury Lawyers v. Verlaan-Cole, 2019 ONSC 6648 (CanLII), retrieved on 2019-12-05

I have reviewed the record provided by both parties. There is ample evidence that the Client was critical of the Gluckstein firm and did not believe they were adequately representing her. It is clear that she had lost confidence in their ability to represent her to the standards that she demanded. She did not agree with their advice and would not accept the perceived deficiencies with her case. Accordingly, I find that Gluckstein had good cause to terminate the CFA.

39. Rabbi Moses Maimonides (12th century Egypt), Mishneh Torah, Hilchot Nizkei Mammon 14:7

ליבה וליבתו הרוח, חייב, שהרי הוא גרם...

If he fans it and the wind fans it, he is liable, for he caused it…

40. Rabbi Yosef Karo (16th century Israel), Shulchan Aruch Choshen Mishpat 34:1

ואפילו עד כשר, שיודע בחבירו שהוא רשע, ואין הדיינים מכירים רשעו, אסור לו להעיד עמו, אף על פי שהוא עדות אמת (ל' הרמב"ם פ"י מעדות). ואצ"ל עד כשר שהוא יודע בעדות לחבירו, וידע שהעד השני שעמו עד שקר, שאסור לו להעיד.

Even a kosher witness who knows that his fellow witness is wicked, but the judges do not recognize his wickedness, may not testify with him – even though he knows the testimony is true. And it goes without saying regarding a kosher witness who knows testimony for someone, and knows that the second witness with him is lying, may not testify.

Cognitive Bias

41. LSO, Rules of Professional Conduct (2014), Commentary 8.1 to Rule 3.1-2

What is effective communication with the client will vary depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions.

42. Ian Weinstein, *Don't Believe Everything You Think*, 8 Clinical L. Rev. 783 (2002-2003)

The problem of egocentric bias is our tendency to think many of our own common, ordinary skills and experiences are exceptional. When we last left Mr. Worth, he had also expressed his belief that the jury would not convict him.

I had replied, "I'm not sure the jury will see it that way, but there is still a lot we don't know about the evidence."

"I know," he responded, smiling, "But I know myself. People like me. No jury will convict me. They don't convict people they like, do they?"

"You're exactly right about that." I told him, "If someone likes you, they believe you and they will try to think of reasons why you are right. But we will have to think long and hard about how to let the jury get to know you. A trial is very different from a social event and even liking some people isn't enough to get over strong evidence."

"They'll like me." Mr. Worth said to himself, as much as to me, "They won't convict me."

43. Talmud, Bava Kama 50a

כל האומר הקב"ה ותרן הוא יותרו חייו

Anyone who said G-d is forgiving – his life will be 'forgiven'.

44. Cohen & Knetsch, *Judicial Choice*, Osgoode Hall Law J. 30:3 (1992)

A further illustration of the differing valuations of gains and losses is provided by responses to recent automobile insurance legislation in two American states. In both jurisdictions people are given a choice between cheaper policies, which limit rights to subsequent recovery of further damages, and a more expensive policy permitting such actions. Importantly, the default option differs: the reduced rights policy is offered in New Jersey unless it is given up; and full rights policy is given in Pennsylvania unless the less expensive option is specified. Given the minimal costs in both states of choosing either option and the large amounts of money at issue, the results have been dramatic. At last count over 70 per cent of New Jersey automobile owners have adopted the reduced rights policy, but fewer than 25 per cent of Pennsylvanians have done so.

45. Guthrie, Rachlinski & Wistrich, *Inside the Judicial Mind*, 86 Cornell L. Rev. 778 (2000-2001)

Framing also has influenced the development of legal doctrine. When ownership of a commodity is in doubt, the courts traditionally favor those who hold possession of the good–even when possession is arbitrary. For example, if a seller contracts to sell a car to two different buyers, courts will often award permanent ownership to the party holding possession at the time the suit is brought.

Review Questions

- Must a lawyer encourage a client to settle, where the client has already demonstrated an aggressive stance and an unwillingness to listen to contrary advice?
- What are three halachic concerns in giving a client bad advice? Do they apply to failure to advise?
- Define "ability to appreciate" and "ability to understand" in the assessment of capacity
- Name three categories of incapacity recognized in Jewish law
- May a lawyer withdraw due to the lawyer's belief that the client's decisions are self-destructive?