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Advocacy and Compassion in the Jewish Tradition

Cover Page Footnote

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ADVOCACY AND COMPASSION IN THE JEWISH TRADITION

Daniel B. Sinclair*

I. INTRODUCTION

Law and medicine both pose problems for Jewish law, or *halakhah*,¹ in contemporary times. There is, however, a fundamental difference between the two areas. In the case of medicine, *halakhic* problems arise in relation to particular issues such as assisted reproduction² and euthanasia.³ There has never been any serious or sustained attempt in post-biblical Jewish law to question the legitimacy of saving human life by medical means.⁴ Moreover, the practice of medicine is highly regarded in the Jewish tradition, and many eminent *halakhists* also practiced medicine.⁵

This is not the case with regard to the practice of law, especially in an adversarial context. Supplying a litigant with legal arguments in his favor, or coaching him for a court appearance, is frowned upon in the Jewish tradition. In the ethical tractate of the *Mishnah*, *Ethics of the Fathers*, Judah ben Tabbari warns against acting like an advocate.⁶ The *Talmud* interprets the biblical phrase: “Your lips

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1. The Hebrew term for Jewish law is “*halakhah*,” the root meaning of which is “to go.” According to Rabbi (R.) Nathan of Rome’s classical lexicon of the *Talmud* and *Midrash*, the word *halakhah* is used to describe Jewish law, since it is “the path in which the people of Israel goes.” *Arukh Hashalem* 3: 208, *sub voce halakh*.

2. See, e.g., IMMANUEL JAKOBOVITS, *JEWISH MEDICAL ETHICS* 153-69 (1975); *JEWISH BIOETHICS*, 59-117 (Fred Rosner & J. David Bleich eds., 1979); DANIEL SINCLAIR, *JEWISH BIOMEDICAL LAW: LEGAL AND EXTRA-LEGAL DIMENSIONS* 68-112 (2003).

3. See, e.g., JAKOBOVITS, *supra* note 2, at 119-25; *JEWISH BIOETHICS*, *supra* note 2, at 253-76; SINCLAIR, *supra* note 2, at 181-224.

4. See SINCLAIR, *supra* note 2, at 143-59.

5. See 11 *ENCYCLOPEDIA JUDAICA* 1178-99 (1974); JAKOBOVITS, *supra* note 2, at 201-13.

6. *Mishnah*, *Ethics of the Fathers* 1:8. Judah ben Tabbari’s statement has been understood in different ways since the Hebrew text is linguistically difficult, and there are variant readings in a number of important manuscripts of the *Mishnah*. See Jacob Kutsher, *The Language of the Rabbis*, in *SEFER HANOCH YELLIN* 246-80 (1963). The majority of commentators on this *mishnah* understand Judah ben Tabbari to be warn-

have spoken lies,"⁷ as a reference to "the advocates of the parties before the judges."⁸ In his commentary to *Ethics of the Fathers*, Maimonides emphasizes that the proffering of legal advice by professional advocates is prohibited: "even if one knows that the litigant to be advised is facing a deceitful and oppressive opponent, it is, nevertheless, forbidden to teach him arguments designed to help him win his case."⁹

Justice under Jewish law is fundamentally judge-based and inquisitorial in nature.¹⁰ The biblical admonition to judges to "hear the causes between your brethren, and judge righteously between every man and his brother, and between the stranger with him,"¹¹ encapsulates the fundamentally unmediated approach of Jewish law to judicial proceedings. The judge alone is to hear the claims of the parties, and decide the issue between them.¹² Even the use of an interpreter is a problematic issue in Jewish law, since it interferes with the unmediated nature of judicial proceedings.¹³ The role of the advocate in the today's common law adversarial systems is deeply problematic in terms of the basic approach of Jewish law to the administration of justice.

In light of the problematic nature of adversarial advocacy, it is unsurprising that in contrast to the vast and burgeoning body of contemporary *halakhic* literature devoted to Jewish biomedical law,¹⁴ there are only a few contemporary published works on Jew-

ing against the practice of giving legal advice to a litigant, or advocating on behalf of a litigant, on the part of either a judge or a professional advocate. See Maimonides, R. Jonah, R. Menahem Hameiri and R. Simon Duran in their commentaries on this *mishnah*. This would also appear to be Rashi's understanding of the warning. See KETUBOT 52b, *sub voce keorkhei hadayanin*; Shabbat 139a, *sub voce orkhei*; Sotah 47b, *sub voce lohashei lehisshot*. Another view is that the statement is critical of judges who regard themselves as superior judges in the sense that they are sufficiently erudite to reach a decision without needing to study the law. See *Avot Derrabi Nathan* 10:2. Yet another view is that Judah ben Tabai is criticizing imperious judges who force themselves upon litigants, or who do not defer to their teachers when deciding cases. See Commentary of R. Ovadiah of Bertinoro on the MISHNAH.

7. Isaiah 59:3.

8. SHABBAT 139a.

9. *Commentary to the Mishnah, Ethics of the Fathers* 1:8.

10. See THE PRINCIPLES OF JEWISH LAW 573-74, 609-10 (Menachem Elon, ed., 1974).

11. Deuteronomy 1:16.

12. *Id.* It is noteworthy that Jewish law also makes provisions for mediation. See TUR, HOSHEN MISHPAT 12.

13. See HOSHEN MISHPAT 17; *Makkot* 1:9; SANHEDRIN 17a; Yisrael Lau, *Representing Litigants in Court*, 20 TEHUMIN 21, 21-30 (2000).

14. See SINCLAIR, *supra* note 2, and the selected bibliography at the end of the book.

ish legal ethics.¹⁵ One reason for this lack of balance may be the fact that the *halakhist* may address medical issues secure in the knowledge that modern medical treatment is basically a positive pursuit in terms of Jewish law.¹⁶ The practice of law in an adversarial system is very different, since its very legitimacy is *halakhically* questionable.¹⁷

In fact, the fundamental opposition to advocacy, both inside and outside of the courtroom, has weakened considerably over the course of time, and the more compassionate policy of helping inarticulate and inexperienced litigants by coaching them during the trial, or giving them legal advice prior to the legal proceedings, is evident in the *Talmud* itself.¹⁸ As will be explained in the following two parts, the Babylonian *Talmud* is much more concerned with the avoidance of advocacy, both on the bench and away from it, than is the Jerusalem *Talmud*.¹⁹

The period from the *Talmud* to the present has witnessed the rise of the professional advocate in Jewish law, and in contemporary times, both specialized rabbinical pleaders and regular attorneys are a ubiquitous feature of rabbinical courts all over the world.²⁰ The type of advocacy practiced before rabbinical courts is not as client-oriented as in modern common law adversarial systems, and almost all the *halakhic* sources that deal with this issue emphasize the need to insure that coaching during the trial and the giving of legal advice outside of the court does not lead to the perversion of justice.²¹

This essay surveys the *Talmudic* sources dealing with the issue of advocacy in Jewish law, and highlights the element of compassion that underlies the permissive approach to advocacy in the *Talmudic* sources. It outlines post-*Talmudic* developments with a special emphasis on the way in which the medieval authorities synthesized the views of the two *Talmuds* on the question of advocacy, and how later *halakhists* pushed this synthesis to its limits in order to pave the way for the emergence of the rabbinical pleader of modern

15. A relatively recent and notable English language work is MICHAEL J. BROYDE, *THE PURSUIT OF JUSTICE AND JEWISH LAW* (1996). See also Dov Frimer, *The Role of the Lawyer in Jewish Law*, 1 J.L. & RELIGION 297 (1983); Simcha Krauss, *Litigation in Secular Courts*, 2 J. HALACHA & CONTEMP. SOC'Y 35 (1982).

16. See SINCLAIR, *supra* note 2, at 159-71.

17. See Part I.

18. See *infra* Parts I and II.

19. See *infra* Parts I and II.

20. See Lau, *supra* note 13, at 30.

21. See, e.g., MAIMONIDES, HILKHOT SANHEDRIN 21:11.

times. This essay concludes with a brief remark on the link between compassion and advocacy in the Jewish tradition.

II. THE JUDGE ACTING AS AN ADVOCATE

The major focus of the *Talmudic* sources, including the above-mentioned statement of Judah ben Tabbai, is on judicial advocacy. Notwithstanding the biblical insistence on unmediated justice, the *Talmudic* position is much more nuanced than might have been expected. The complexity of the *Talmudic* approach is nicely illustrated in two of Maimonides' rulings in this area. In the first ruling, Maimonides states that a judge is not permitted to express approval of a litigant's argument, and if he does so, he is in breach of the biblical injunction to keep afar from a false matter.²² The judge is also forbidden to coach a litigant.²³

There are, however, certain cases in which the rule prohibiting judicial advocacy is suspended. In his second ruling, Maimonides provides as follows:

If a judge perceives that a litigant is having trouble presenting a valid claim because he is unable to express himself logically, or is overcome with anger which causes him to lose the thread of his argument, or he makes mistakes as a result of foolishness, the judge is allowed to help the litigant a little by explaining to him the beginning of his intended claim since it is written: 'Open your mouth on behalf of the dumb.'²⁴ However, great care must be taken in order to avoid acting like an advocate.²⁵

The source for Maimonides' first ruling forbidding judicial advocacy is in the Babylonian *Talmud*,²⁶ which states quite simply: "How do we know that a judge should not act as an advocate for

22. *Id.* at 21:10.

23. *Id.*

24. *Proverbs* 31:8.

25. MAIMONIDES, *HILKHOT SANHEDRIN* 21:11.

26. SHAVUOTH 30b. There are, in fact, two ways of understanding this *Talmudic* passage. One is to view it as a prohibition on acting as an advocate for one of the litigants, and the other is to understand it as a prohibition on a judge defending what he fears to be a wrong decision because he is too ashamed to admit that he made a mistake. The former approach is adopted by Maimonides and by R. Hananel in his commentary on this passage. It is also adopted by Ritba in his commentary on the *Talmud*. The latter approach is taken by Rashi and R. Isaiah of Trani in their *Talmudic* commentaries. One of the objections to the approach adopted by Rashi and R. Isaiah is that a judge who refuses to admit to his error in a civil case perverts the course of justice. The *Talmud*, however, only mentions the biblical prohibition on avoiding falsehood which would appear to be a much milder consequence of the judge's defense of his erroneous judgment.

his words? Because it is said: 'From a false matter keep afar.'²⁷ His source for the exception to the prohibition is in the Jerusalem *Talmud*.²⁸ Maimonides' formulation in his second ruling strikes a delicate balance between the two *Talmuds*, and he downplays the exception to the ban on judicial advocacy in the Jerusalem *Talmud* in order to make it compatible with the general prohibition in the Babylonian *Talmud*.²⁹

In the Jerusalem *Talmud*, it is recorded that if, in the course of hearing a case, R. Huna discovered an argument in favor of one of the litigants, he would make it on that litigant's behalf, if the latter was unaware of its existence.³⁰ R. Huna's practice is much bolder than the exception to the judicial advocacy rule presented by Maimonides. That exception is restricted to cases in which the litigant is aware of the legal argument in his favor, but does not make it as a result of lack of eloquence, emotional strain or foolishness.³¹ None of this appears in the Jerusalem *Talmud*.

Maimonides also refers to the general concept of not "acting like an advocate," which the Jerusalem *Talmud* does not discuss with regard to R. Huna's practice, seemingly indicating that this concept does not trouble R. Huna at all.

Clearly, Maimonides sought to harmonize the two *Talmuds*, and he achieved this goal by asserting a limit to the conditions under which R. Huna was prepared to engage in judicial advocacy, and by adding the rider that any such advocacy was to be carefully considered in the light of the generally negative attitude towards judicial advocacy in Jewish law.³²

The disparity between Maimonides' formulation of the law and the position adopted by the Jerusalem *Talmud* was noted by R. Jacob ben Asher who, after citing Maimonides verbatim, observes that "this is not the position adopted in the Jerusalem Talmud . . . as cited by my father the Rosh."³³ This disparity is also the subject of a commentary by R. Joseph Karo, who states, in no uncertain terms, that according to the Jerusalem *Talmud*, judicial advocacy is "permitted in all cases, even if the litigant had no knowledge of the

27. *Exodus* 23:7.

28. *SANHEDRIN* 3:8; see also *RIF*, *SANHEDRIN* 3; *ROSH*, *SANHEDRIN* 3 no. 32.

29. See *supra* note 26.

30. *SANHEDRIN* 3:8. R. Huna's proof text is *Proverbs* 31:8.

31. *MAIMONIDES*, *HILKHOT SANHEDRIN* 21:11.

32. Both the *PENEI MOSHE* and the *MAREH HAPANIM*, the two standard commentaries on the Jerusalem *Talmud*, explain the *Talmudic* text in the light of Maimonides' approach.

33. *TUR*, *HOSHEN MISHPAT* 17:8. The *ROSH* is in *SANHEDRIN* 3, no. 32.

argument in question."³⁴ Maimonides' synthesis has been incorporated into the *Shulhan Arukh*,³⁵ and it is cited in all the major codes and monographs dealing with the *halakhah* regarding judges and judicial ethics.³⁶

Before concluding a discussion of judicial advocacy in the *halakhah*, it is important to point out that there is no contradiction between one of the methods of appointing judges in monetary cases described in the *Talmud* and the general ban on judicial advocacy in Jewish law. According to the *Talmud*, if the litigants cannot settle on an established *beth din*, each of the litigants in a monetary case can select one judge, and the third member of the court is chosen by the two selected judges.³⁷

Rashi explains that the reason for this arrangement is that if the losing side has a hand in appointing one of the judges, he will accept the verdict in an amicable fashion, since "he will be sure that his appointee would have looked at every possible angle to reach a verdict in his favor."³⁸ It is an error to make Rashi into a champion of untrammelled judicial advocacy. This is evident from his words, which do not carry any implication that the judge should disregard all legal convention and judicial etiquette in order to achieve victory for the litigant who appointed him. Later authorities have made a point of emphasizing that Rashi's comment is not to be taken as a general license for judicial advocacy.³⁹ R. Asher ben Yehiel begins his clarification of Rashi's comment with the following observation:

Those with little understanding interpret Rashi's words wrongly, and imply from them that the judge appointed by one of the litigants may ignore legal and ethical rules in the course of furthering the case of the litigant who appointed him Heaven forefend that this should be understood as the meaning of Rashi's words.⁴⁰

R. Asher proceeds to explain that the link made by Rashi between having a hand in choosing the panel and becoming recon-

34. BETH YOSEF, HOSHEN MISHPAT 17.

35. See HOSHEN MISHPAT 17:8.

36. See ARUKH HASHULHAN, HOSHEN MISHPAT 17:13, KOVETZ HAPOSKIM, HOSHEN MISHPAT 17:8, RESPONSA SHEVUT YA'AKOV I no. 64, RESPONSA BINYAMIN ZE'EV no. 50.

37. SANHEDRIN 3:1. Monetary cases in Jewish law are heard by a panel of three judges. See *id.* at 1:1.

38. SANHEDRIN 23a, *sub voce* yaza din emet.

39. See *infra* notes 40-44.

40. ROSH, SANHEDRIN 3 no. 2.

ciled to losing the case is purely psychological, and has nothing to do with the actual decision-making process.⁴¹ Since he had a hand in appointing one of the judges, the losing party will be more amenable to accepting his loss, and will not blame it on a biased court.⁴² As far as the actual judicial proceedings are concerned, all three judges in monetary cases are bound to conduct themselves in accordance with the highest professional standards.⁴³ The same point is made by R. Yehiel Epstein in his early twentieth century code of Jewish law.⁴⁴

The *halakhic* position on judicial advocacy consists, therefore, of two elements. The first is a general prohibition on the practice.⁴⁵ The second is the granting of discretion to a judge to help a litigant formulate a claim in the circumstances defined by Maimonides above, i.e. the element of compassion.⁴⁶ The biblical proof text for this discretion is the verse in *Proverbs*: “Open your mouth on behalf of the dumb.”⁴⁷ The context of this verse is the obligation upon judges to provide justice to the less fortunate members of society, and in that context, the verse is concerned with the particular instances of those who are untutored in legal argumentation, and who fail to present their case to their advantage due to lack of experience in the courtroom.⁴⁸ In this respect, concern for the welfare of the less fortunate lies at the root of the permission to engage in judicial advocacy in Jewish law.

There are a number of other instances in which this verse from *Proverbs* is used in the *Talmud* to support deviations from strict adherence to the principle of judicial non-intervention in order to help those who are likely to be at a disadvantage in legal proceedings as a result of inexperience and lack of worldliness. These include legally incompetent women⁴⁹ and in certain situations, lenders, heirs and buyers.⁵⁰ In all these cases an effort is made to

41. *Id.*

42. *Id.*

43. Rashi's statement ends, “[under a scenario where each chooses a judge], the judges themselves will feel free to assert the law in favor of either party, because they were selected by both parties.”

44. ARUKH HASHULHAN, HOSHEN MISHPAT 13:3.

45. *See, e.g.*, MAIMONIDES, HILKHOT SANHEDRIN 21:10.

46. *Id.* at 21:11.

47. *Proverbs* 31:8.

48. *See* the commentaries of Ralbag, Mezudat David and R. Elijah of Vilna on *Proverbs* 31:8.

49. KETUBOT 36a.

50. *See* GITTIN 58b; SHULHAN ARUKH, HOSHEN MISHPAT; TUR, HOSHEN MISHPAT 42:3.

strike the appropriate balance between the role of the judge as an upholder of strict and impartial justice, and his compassionate role as the protector of the weak and the defenseless.

III. LEGAL ADVICE OUTSIDE OF COURT

The *Talmud* raises the issue of the propriety of providing legal counseling outside of court in relation to R. Yohanan's advice to his relatives with regard to their widowed mother's medical expenses.⁵¹ According to Jewish law, a widow is entitled to maintenance from her dead husband's estate provided that she has not received the lump sum due to her under the *ketubah*.⁵² The widow has the right to choose between regular maintenance and receiving the *ketubah*, and as long as she decides not to take the latter, the estate must pay for her daily upkeep.⁵³ Medical expenses fall into the category of regular maintenance provided which they are of an unlimited nature that would be the case in relation to a woman who was constantly ill.⁵⁴ If the expenses are of a limited nature, they may be paid out of the estate.⁵⁵

In the Babylonian *Talmud*, the episode is presented as follows. Relatives of R. Yohanan complained to him that their late father's wife required daily medical attention, and her bills constituted a serious drain on their resources.⁵⁶ R. Yohanan suggested that they make an arrangement with the doctor to pay a fixed sum in order to cover all her expenses.⁵⁷ This would constitute a limited sum, which could then be deducted from her *ketubah*.⁵⁸

After giving the advice, R. Yohanan regretted his action and said that he had put himself in the position of "acting as an advocate."⁵⁹ The *Talmud* then explains R. Yohanan's reason for giving the advice in the first place and his subsequent rejection of that justification. Initially, R. Yohanan had thought that it was permitted to help out his relatives in compliance with the biblical admonition:

51. KETUBOT 52a.

52. See *supra* note 10, at 399-401.

53. See *supra* note 10, at 399-401.

54. See MAIMONIDES, HILKHOT ISHUT 18:5; SHULHAN ARUKH, EVEN HAEZER 69:1.

55. See MAIMONIDES, HILKHOT ISHUT 18:5.

56. See *supra* note 50.

57. See *supra* note 50.

58. See KETUBOT 52a the opinion of R. Simon ben Gamliel.

59. KETUBOT 52b, *sub voce keorkhei*. Rashi comments that an advocate is someone who "is partial to one of the parties and explains his case in as positive a light as possible to the judges." *Id.*

“And from your own flesh do not hide.”⁶⁰ The word “flesh” in this verse refers to a person’s family, and the lesson to be learned from it is as follows:

All Israel are obliged to feed the hungry and clothe the naked, but one has a stronger obligation in relation to one’s own family members. A person should not stand by and watch his relatives descend into poverty, but should help them out with loans or in other ways.⁶¹

The principle of helping family before attending to the needs of strangers is an important one in the *halakhah* relating to charity,⁶² and it also appears, together with the proof-text from Isaiah, as the basis for justifying niece-marriages under Talmudic law.⁶³ R. Yohanan’s initial assumption was, therefore, that the obligation to help relatives by supporting them before they descend into poverty overrides the rule against acting as an advocate, especially when the advice is given outside of the courtroom.⁶⁴

Upon reflection, however, R. Yohanan came to the conclusion that the principle of not hiding from one’s own flesh did not apply to him, since he was a noted personality whose actions served as an example for the whole community.⁶⁵ As a result, it was more important for him to uphold the general ban on advocacy in the eyes

60. *Isaiah* 58:7.

61. *Id.* (commentary of R. David Kimhi).

62. See MAIMONIDES, HILKHOT MATNOT ANIYIM 7:13. This source deals with priorities in the distribution of charity.

63. See MAIMONIDES, HILKHOT ISSUREI BEIAH 2:14. The *Talmudic* source for this ruling is YEVAMOT 62b-63a. According to the *Talmud*, it is appropriate for a man to marry his niece, and one understanding of the rationale behind this ruling is that niece-marriages are recommended in order to provide the financial support ensuing from marriage to family members, rather than strangers. Maimonides cites the proof text from *Isaiah* 58:7 in relation to this recommendation. It is noteworthy that by the beginning of the twentieth century, it became accepted medical science that inbreeding, including marriages between uncles and nieces, causes a wide variety of genetically derived congenital defects and illnesses. In the light of this evidence, R. Elijah Klatzkin was asked about the possibility of deviating from the *Talmudic* position and banning niece-marriages in order to prevent the birth of defective and diseased children. R. Klatzkin accepted the genetic findings, and sanctioned deviating from *Talmudic* practice in this area. See RESPONSA EVEN ROSHAH no. 31.

64. See YEVAMOT 63a, discussing niece marriages. The following charitable acts are also subsumed under the biblical rubric of *Isaiah* 58:7: loving one’s neighbors, being supportive of family members and lending a poor person a *sela* (coin) when he is pressed. *Id.*, *sub voce az tikra*; see also the commentaries of R. Meir Halvi Abulafia and Maharsha on YEVAMOT 63a.

65. KETUBOT 52b. The Hebrew phrase “*adam hashuv*” as used in KETUBOT 52b, is used in several places in the *Talmud* to indicate a noted individual who is expected to set an example to the community at large. See 1 ENCYLOPAEDIA TALMUDIT 175-80 (1973).

of the public than to help his relatives preserve their financial well-being.⁶⁶ The *Talmudic* discussion concludes with R. Yohanan's regret that he had acted as an advocate by giving legal advice out of court.⁶⁷

The Jerusalem *Talmud* contains a different account of this story.⁶⁸ In this version, R. Yohanan was asked by a female relative about the reimbursement of medical fees for the treatment of an eye ailment.⁶⁹ He informed her that if the fee was in the form of a limited sum, it may be deducted from her *ketubah*.⁷⁰ If the doctor, however, was paid for each consultation, she would be entitled to receive the reimbursement as part of her maintenance.⁷¹ The *Talmud* then objects to R. Yohanan's conduct on the grounds that he acted as an advocate.⁷² The answer given by the *Talmud* is that R. Yohanan knew that his relative was an upright person who would not use his legal advice in order to gain a financial advantage.⁷³

It appears that the Babylonian *Talmud* is more concerned with the ban on advocacy than the Jerusalem *Talmud*. In the account in the Babylonian *Talmud*, R. Yohanan is troubled by the fact that in advising his relatives, he was acting as an advocate.⁷⁴ In the Jerusalem *Talmud*, there is no mention of any qualms on his part about the advice he gave to his female relative.⁷⁵ The Jerusalem *Talmud* raises the issue of advocacy, and then proceeds to discuss it in terms of the honesty and integrity of the recipient of the advice.

Later authorities combine the approaches of the two *Talmuds*. In his novellae on the *Talmud*, R. Yom Tov ben Abraham Ishvili cites both the Babylonian and the Jerusalem versions of R. Yohanan's foray into advocacy, and concludes that legal advice may be given to relatives by a non-notable person provided that the giving of the advice will not lead to a perversion of justice.⁷⁶ A similar position is

66. KETUBOT 52b.

67. *Id.*

68. BAVA BATHRA 9:4.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* The Jerusalem *Talmud* also explains that, in effect, R. Yohanan's advice was moot since the method of payment had yet to be agreed to by the husband. In the final analysis, the decision was still in his hands.

74. See *supra* notes 56-67 and accompanying text.

75. See *supra* notes 68-73 and accompanying text.

76. KETUBOT 52b, *sub voce veasinu azmenu*.

adopted by R. Joel Sirkes, who observes that there is no prohibition on a non-notable person giving legal advice to his relatives.⁷⁷

Eventually, *halakhic* authorities dispensed with the family-oriented context of the *Talmud*, and gave permission to non-notables to advise all and sundry in relation to their lawsuits.⁷⁸ R. Yom Tov Lippman Heller states that there is no pious virtue in abstaining from giving legal advice to parties, provided that the advice does not lead to a perversion of justice.⁷⁹ It is worthwhile pointing out that R. Heller was writing in the seventeenth century, by which time the practice of hiring legal counsel was a firmly established aspect of Jewish legal procedure in rabbinical courts.⁸⁰ Permission to engage in the giving of legal advice provided that the giver is not a notable person is also given by R. Shabbetai Cohen in his super-commentary on the *Shulhan Arukh*.⁸¹

R. Abraham Botshatsh goes even further, and in his super-commentary on the *Shulhan Arukh* rules that even a notable person may give legal advice on condition that the advice is restricted to the broad legal position, and does not enter into a detailed and speculative analysis of a partisan nature.⁸² Modern authorities and commentators cite these earlier authorities as the basis for the widespread practice of hiring rabbinical pleaders and lawyers in proceedings before rabbinical courts.⁸³

Finally, it ought to be noted that the issue of legal advice outside the courtroom, unlike that of judicial advocacy, is not raised by any of the major codifiers of Jewish law. Its absence from Maimonides' *Mishneh Torah*, the Tur and the *Shulhan Arukh* may be presumed to indicate that the issue of legal advice per se is less grave than that of judicial advocacy from the bench.⁸⁴

77. BAYIT HADASH, HOSHEN MISHPAT 17.

78. See *infra* notes 79-83 and accompanying text.

79. TOSAFOT YOM TOV, AVOT 1:8.

80. See S.Y. Cohen, *The Status of Lawyers in Jewish Law*, 22 TORAH SHEBAL PEH 65, 68 (1981).

81. SIFTEI COHEN, HOSHEN MISHPAT 6:82.

82. KESEF HAKODASHIM, HOSHEN MISHPAT 17:9. Amongst the other arguments marshalled by R. Botshatsh in favour of advocacy are the idea that failing to give advice is a form of indirect damage to the person who could have benefited by that advice, and the biblical obligation to restore lost property found in *Deuteronomy* 22:1-2 that is interpreted by the rabbis to include the obligation to prevent its loss in the first place. *Id.*

83. See R. EZRA BAZRI, DINEI MAMONOT I, 439-41.

84. See BROYDE, *supra* note 15, at 16 n.21.

IV. COMPASSION AND ADVOCACY

The transition from the stern and unmediated judicial justice of the Bible to the widespread acceptance of advocacy in the Jewish judicial system was accomplished by assigning a higher value to the mandate to help the less fortunate than to the preservation of the biblical approach.⁸⁵ In this respect, compassion is linked to advocacy in the Jewish tradition. The hallmark of permitted advocacy is care and concern for the less articulate litigant, or the litigant lacking in worldliness and experience. As such, it is surely incumbent upon those who practice adversarial advocacy, and at the same time, wish to justify their professional activity in the light of the *halakhah*, to engage their compassion as well as their intellect in their professional pursuits, and to aspire to social justice as well as intellectual integrity in their legal practices.

It is, of course, important to emphasize that any such advocacy must take place within the parameters set down by the codes and commentators. The purpose of these parameters is to ensure that advocacy does not become a tool of unscrupulous individuals seeking to pervert the course of justice. Within these parameters, however, compassionate advocacy may be pursued in accordance with Jewish law.

85. This is certainly the normative position in the light of the previous two sections. In practical terms, the transition is undoubtedly a reflection of the growing complexity of the law over the centuries. Without this normative justification, however, it would not have been possible to overcome the hurdle of the biblical model of strictly unmediated judicial proceedings in Jewish law.