

Resolving Conflicts of Interest and Establishing Boundaries

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Professionalism Topics covered in this presentation:

1.2 Duty to avoid and manage conflicts of interest

- What steps are necessary to determine the existence or absence of conflicts of interest?
- What constitutes a conflict of interest, and how do we assess gray areas, from the standpoint of both contemporary practice and Jewish tradition?
- How should a lawyer manage relationships with clients effectively, and particularly in the realm of identifying, respecting and enforcing appropriate boundaries?

1.12 Optional and mandatory withdrawal from representation

- What options are open to a lawyer who feels unable to resolve a conflict of interest?

Introduction

1. LSO, Rules of Professional Conduct (2014), Rule 1.1-1 (emphasis added)

"conflict of interest" means the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer.

2. Talmud, Ketuvot 105b

אמר רבא: מאי טעמא דשוחדא? כיון דקביל ליה שוחדא מיניה, איקרבא ליה דעתיה לגביה והוי כגופיה, ואין אדם רואה חובה לעצמו. מאי שוחד? שהוא חד.

Rava said: Why is a bribe forbidden? Once one accepts a bribe from him, one's mind becomes close to him and he is like his person, and one cannot see guilt for himself. What is *shochad*? *Shehu chad* ["it is one" or "it is sharp"].

3. Vignettes

- (1) While attending the same university between 2003 and 2006, Jonathan and Sara were part of a student Facebook group, occasionally commenting on each other's status updates and uploaded photographs. Jonathan left Facebook in 2006, and has neither seen nor communicated with Sara since. If a business wishes to retain Jonathan as legal counsel in 2015 for a suit against a business owned by Sara, does Jonathan face a conflict of interest? If this is considered a conflict of interest, what can Jonathan do in order to represent the business? If this is not a conflict of interest, is Jonathan required to inform the business of his connection to Sara at all?
- (2) When Kimberly bought her home, her home inspector assured her that no radon test was needed, because radon was not prevalent in the area. Ten years later, Kimberly developed lung cancer, which she believes is due to radon gas emitted by the soil below her home. Kimberly sues her home inspector. Her lawyer, David, is aware of experts who would disagree that radon had caused her cancer, and he proposes meeting with them as possible experts, in order to create a conflict of interest disqualifying them from the case. Is David's strategy ethical?
- (3) Rhonda, a corporate lawyer, has been managing her firm's relationship with NPO Pharmaceuticals for the past seven years. Over that time, she has shared weekly communications, at least, with the pharmaceutical company's CEO, Sam. One day, Sam invites Rhonda to dinner, alone, to celebrate the good work Rhonda's firm has done for his company. Rhonda is uncomfortable, feeling that this is more personal than business. How should Rhonda navigate the need to maintain good relations with Sam, while preserving appropriate boundaries?

Philosophy

4. MacDonald estate v. Martin 1990 3 SCR 1235

In determining whether a disqualifying conflict of interest exists, the Court is concerned with three competing values: (1) the concern to maintain the high standards of the legal profession and the integrity of our system of justice; (2) the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause; and (3) the desirability of permitting reasonable mobility in the legal profession.

5. LSO, Rules of Professional Conduct (2014), Commentary [5] to Rule 3.4-1 (emphasis added)

The value of an independent bar is diminished unless the lawyer is free from conflicts of interest. The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Aspects of the duty of loyalty owed to a current client are the duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty to avoid conflicting interests. Current clients must be assured of the lawyer's undivided loyalty, free from any material impairment of the lawyer and client relationship.

6. Midrash, Sifra, Kedoshim 2

אל תאמר לו מכור את שדך, וקח לך חמור, ואת עוקף עליו ונוטלה ממנו

Do not tell him, "Sell your field and buy a donkey," while trying to get his field from him.

7. Rabbi Moshe Isserles (16th century Poland), Code of Jewish Law, Choshen Mishpat 290:8

י"א כמו שהאפוטרופס יכול ליתנם לאחרים, כך יכול לקבל המעות לעצמו, ובלבד שיעשה בבית דין, משום לזות שפתים.

Some say that just as a guardian may invest with others, so he may accept the investment for his own ventures – so long as the rabbinical court oversees it, due to concern for gossip.

8. Talmud, Sanhedrin 18b

לא מלך וכהן גדול בעיבור שנה; מלך - משום אפסניא, כהן גדול - משום צינה.

Neither king nor high priest may participate in the decision of whether to add a month to the lunisolar calendar. The king due to his forces, the high priest due to cold.

9. Rabbi Avraham Yeshayah Karelitz (20th century Israel), Emunah uBitachon 3:30

והנה אין הזהרת השוחד מכלל המשפטים אלא מכלל החקים, שהרי לא אסרה התורה הוראה לעצמו ואדם רואה טריפה לעצמו, אף אם הוא דל וכל חייו תלויים בו.

The warning against bribes is not rational law, but engraved statute, for the Torah did not prohibit ruling for one's self, and one may examine the kashrut of his own slaughter, even if he is indigent and his entire life depends on it.

Question 1a: Does Facebook friendship demonstrate/create a conflict of interest?

10. Committee for Justice and Liberty v. National Energy Board 1978 1 S.C.R. 369

The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "*what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude...*"

11. Wewaykum Indian Band v. Canada 2003 SCC 45

[I]t cannot be addressed through peremptory rules, and contrary to what was submitted during oral argument, there are no "textbook" instances. Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.

12. Canadian National Railway Co. v. McKercher LLP, 2013 SCC 39, [2013] 2 S.C.R. 649

The rule applies where the *immediate legal* interests of clients are *directly* adverse. It does not apply to condone tactical abuses. And it does not apply in circumstances where it is unreasonable to expect that the lawyer will not concurrently represent adverse parties in unrelated legal matters.

13. *Ethical Principles for Judges*, Section E: Conflicts of Interest, E6

Owning an insurance policy, having a bank account, using a credit card or owning shares in a corporation through a mutual fund would not, in normal circumstances give rise to conflict or the appearance of conflict unless the outcome of the proceedings before the judge could substantially affect such holdings. Nor should small holdings, such as those contemplated by the *de minimis* provisions of *ABA Model Code (1990)* give rise to any reasonable question concerning the judge's impartiality. However, if the holding is more substantial, the judge should not sit...

14. *C.M.M. v. D.G.C.*, 2015 ONSC 1681

[N]otwithstanding the passage of some 16 years since the time of the brief solicitor-client relationship, the lack of recollection of that relationship by both D.G.C. and Sachs J. prior to the release of the Decision, and the independent concurrence of Frank J. and myself in the Decision authored by Sachs J., in my view prudence dictates that the Decision be set aside, this panel stand down from this matter, and a new panel be constituted by the Associate Chief Justice to rehear the appeal.

15. LSO, Rules of Professional Conduct (2014), Commentary [8] to Rule 3.4-1

(d) A lawyer has a sexual or close personal relationship with a client.

16. *Heffel v. Registered Nurses Association* 2015 NWTSC 16

My review of cases where the issue has been dealt with indicates that while Facebook "friendship" indicates that the parties know each other, it does not, without more, establish that there is a relationship which would result in a reasonable apprehension of bias according to the accepted test. More evidence is needed.

17. Exodus 23:8

וְשֹׁחַד לֹא תִקַּח כִּי הַשֹּׁחַד יְעִוֵּר פְּקֻדִים וְיִסְלַף דְּבָרֵי צְדִיקִים:

And you shall not accept a bribe, for the bribe will blind the sighted, and warp the words of the righteous.

18. Rabbi Joseph Caro (16th century Israel), Code of Jewish Law, Choshen Mishpat 7:12

כל דבר שיש לדיין בו צד הנאה, אינו יכול לדון עליו.

Wherever a judge has potential benefit, he may not judge it.

19. Talmud, Ketuvot 105a

"ושוחד לא תקח" מה ת"ל? אם ללמד שלא לזכות את החייב ושלא לחייב את הזכאי, הרי כבר נאמר: "לא תטה משפט!" אלא אפי' לזכות את הזכאי ולחייב את החייב, אמרה תורה: "ושוחד לא תקח".

"And you shall not accept a bribe" – What does this teach? If this is to teach that he should not find the guilty innocent or the innocent guilty, the text already says, "You shall not warp the judgment"! Rather, even if [the payment] is encouragement to find the innocent innocent and the guilty guilty, the Torah says, "And you shall not accept a bribe."

20. Rabbi Joseph Caro (16th century Israel), Code of Jewish Law, Choshen Mishpat 7:7

אסור לאדם לדון למי שהוא אוהבו, אף על פי שאינו שושבינו ולא ריעו אשר כנפשו; ולא למי ששונאו, אף על פי שאינו אויב לו ולא מבקש רעתו, אלא צריך שיהיו השני בעלי דינים שוים בעיני הדיינים ובלבם

One may not judge a friend, even where he is not a *shushvin* or his closest friend, or one he hates, even where he is not an enemy and he does not seek to harm him. The litigants must be equal in the eyes and hearts of the judges.

21. Rabbi Joseph Caro (16th century Israel), Code of Jewish Law, Choshen Mishpat 33:1

כל הפסולים לדון פסולים להעיד, חוץ מאוהב ושונא שכשרים להעיד, אף על פי שפסולין לדון.

All who are disqualified to judge are disqualified to testify, other than a friend or enemy, who may testify even though they may not judge.

22. Rabbi Joshua Falk (17th century Poland), *Sefer Meirat Einayim*, Choshen Mishpat 33:1

דבעדות, המעשה כאשר היה לפניו הוא מעיד, ולא חשדינן ליה שישנה בכיוון בשביל אהבתו או שנאתו. משא"כ בדין שתולה בסברא, והמחשבה משתנה מחמת אהבתו או שנאתו אפילו בלא כונת רשע

In testimony, he testifies about what he saw, and we do not suspect that he would intentionally alter it for love or hatred. This is not so in judgment, which depends on logic; one's mind changes due to love or hatred, even without evil intent.

23. Talmud, Ketuvot 105b

היכי דמי שוחד דברים?

- כי הא דשמואל הוה עבר במברא, אתא ההוא גברא יהיב ליה ידה, אמר ליה: מאי עבידתיך? אמר ליה: דינא אית לי, א"ל: פסילנא לך לדינא.
- אממר הוה יתיב וקא דאין דינא, פרח גדפא ארישיה, אתא ההוא גברא שקליה, א"ל: מאי עבידתיך? א"ל: דינא אית לי, אמר ליה: פסילנא לך לדינא.
- מר עוקבא הוה שדי רוקא קמיה, אתא ההוא גברא כסייה, א"ל: מאי עבידתיך? א"ל: דינא אית לי, א"ל: פסילנא לך לדינא.

What is a verbal bribe?

- Like when Shemuel crossed a river, and someone extended his hand to him. Shemuel asked, "Why are you here?" He replied, "I have litigation." Shemuel said, "I am disqualified to judge for you."
- Ameimar was judging, when a feather landed on his head. Someone removed it. Ameimar asked, "Why are you here?" He replied, "I have litigation." Ameimar said, "I am disqualified to judge for you."
- Mar Ukva spat before himself, and someone covered it. Mar Ukva asked, "Why are you here?" He replied, "I have litigation." Mar Ukva said, "I am disqualified to judge for you."

24. Talmud, Bava Batra 42b-43a

ומעידין [השותפין] זה לזה. אמאי? נוגעין בעדותן הן! הכא במאי עסקינן - דכתב ליה: דין ודברים אין לי על שדה זו...

"And [partners] may testify for each other." Why? They have an interest in their testimony! This is where they first write, "We have no claim in this [formerly jointly owned] field."

25. Tosafot (12th century France) to Bava Batra 43a וליסלקו

וא"ת, והא בעינן תחילתו וסופו בכשרות והכא הוי תחילה בפסול והוי כמו קרוב ונתרחק! ואור"י דלא שייך תחילתו בפסלות הכא כיון שאין פסלות תלוי בגוף אלא בממון.

But don't we require that they be acceptable from beginning to end, and here the witnesses began in disqualification? They are like someone who was a relative, and is no longer related! R"i explained that the concern for having been disqualified at the outset is irrelevant here, for the disqualification is a function of money, not their person.

Question 1b: What should Jonathan do, if he wishes to represent this company?

26. LSO, Rules of Professional Conduct (2014), Rule 3.4-2

A lawyer shall not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all clients and it is reasonable for the lawyer to conclude that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

(a) Express consent must be fully informed and voluntary after disclosure...

27. LSO, Rules of Professional Conduct (2014), Commentary 0.1 to Rule 3.4-2

Rule 3.4-2 permits a client to accept the risk of material impairment of representation or loyalty. However, the lawyer would be unable to act where it is reasonable to conclude that representation or loyalty will be materially impaired even with client consent. Possible material impairment may be waived but actual material impairment cannot be waived.

28. Rabbi Joseph Caro (16th century Israel), Code of Jewish Law, Choshen Mishpat 22:1

מי שקבל עליו קרוב או פסול, בין להיותו דיין בין להיותו עד עליו... אם קנו מידו על זה, אינו יכול לחזור בו.

One who accepts a relative or disqualified party as judge or witness... if there was a *kinyan*, he cannot recant.

Question 1c: If this is not a conflict of interest, need Jonathan do anything at all?

29. Langstaff v. Marson, 2014 ONCA 510

[32] It has also been held that, in order to maintain public confidence in the administration of justice, the appearance of judicial impartiality is as important as the reality. In Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon, [1968] 3 All E.R. 304 (C.A.), at p. 310, Lord Denning M.R. stressed the importance of the appearance of judicial impartiality. He said...

Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand.

30. Rabbi Yisrael ben Chaim (Mahari Bruna, 15th century Germany), Responsum 132

מעשה שנחלקו יו"ף מונ"כין והה"ר שמעון ואשתו אדי"ל ולקח כל אחד טוען, ומתחלה לקח שמעון ואשתו לטוען בצדם את הה"ר אהרן פפנהיי"ם, ועמהם הה"ר אברהם ק"ץ ליועץ, והלך עמהם לפני ב"ד, וגם הה"ר משה מינ"ץ. ולאחר זמן נתהפך ונשכר אברהם ק"ץ ליו"ף מונ"כין והלכו הה"ר משה והה"ר אהרן ושמעון וקבלו עליו לפני בית דין... ופסקנו שאין לנו לפוסלו מדינא, דמה מועיל אם אינו טוען, אם ירצה מצי ללמד מ"מ בחשאי מאי דבעי, וכשבאתי לביתי נמלכתי אם יבוא עוד מעשה כה"ג לידי אמחה בידו. דאשכחן בפ"ב דכתובות (כב ב) דאפי' דבר שהתר גמור הוא מ"מ לכתחלה לא יעשה, משום הא דרב [אסי] הסר ממך עקשות פה ולזות שפתים הרחק ממך...

Yosef Munchen and Shimon and his wife Eidel disputed, and each side hired a *toen*. At first, Shimon and his wife hired Aharon Pappenheim, as well as Avraham Katz as an advisor, and he went with them before the court, as well as Moshe Mintz. Later, Avraham Katz switched sides and was hired by Yosef Munchen. Moshe and Aharon and Shimon came to complain before the court... We ruled not to disqualify him, for what would be the benefit even if he were not the *toen*? If he wished, he could still tell them whatever he wanted in private! But when I came home I decided that if such a case were to come before me again, I would protest, for we find in Ketuvot 22b that even if something is permitted, one still should not determine to do it, as Rav Asi said: Remove from yourself the curved mouth, and distance gossip from yourself. (Proverbs 4:24)...

Question 2: Deliberately "conflicting out" experts

31. Sharp practice

<https://www.yutorah.org/lectures/lecture.cfm/936447/>

32. Rabbi Shlomo Yehudah Tabak (19th century Romania), Erech Shai to Choshen Mishpat 156:5

ואם מוזיל כדי להזיק לחבירו, על דעת "גם לי גם לך לא יהיה", ואפילו עושה כן כדי שחבירו יתן לו דמים, ודאי כופין על מדת סדום...
And where he reduces [the price] in order to harm the other, thinking, "Neither I nor you will gain," then even where he does this in order to induce the other to pay him, we compel him not to act as Sdom.

33. 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.

Question 3: Boundaries

34. Two useful articles

<https://www.wsba.org/for-legal-professionals/member-support/wellness/boundaries>

<https://www.lawtimesnews.com/archive/the-lawyer-therapist-healthy-boundaries-make-for-healthy-lawyers/260980>

35. Rabbi Moshe Feinstein, Igrot Moshe Even haEzer 4:65:1

ההיתר שנתפשט הוא משום שהרופא אף אם הוא נכרי הרי הוא טרוד במלאכתו לסלק מעצמו תאוותו, ואף כשכלה מלאכתו שהוצרך להתעסק בה אם הוא בזמן שקבע שיבוא אליו החולים הרי לא יוכל לשהות עמה עוד זמן מפני אלו שמחכים שם ואף אם עדיין לא באו שם חולים אחרים הרי חושש שיבואו עוד אחרים. וכשנשארה היא באחרונה שידוע שיותר לא יבואו שליכא טעמים אלו סומכות ע"ז שאיכא להרופא משרתת במרפאה (אפיס) שלו ואם תתאחר יותר זמן מכפי הרגיל ייראו שלא תחשוד את הרופא, והרופא אף שהוא נכרי ימנע מזה כדי שלא יצא עליו שם רע...

The common lenient practice is based on the fact that the physician, Jewish or not, is busy with his work and distracted from desire. Even when he finishes his work, he cannot stay with the patient during office hours; people are waiting for him. Even if other patients have not yet arrived, he is concerned that more might come. If she is the last of the day, so that the physician knows no more will come and the aforementioned logic doesn't apply, people still depend on the presence of assistants in the office; the assistants would suspect him of impropriety were he to remain longer than normal in the room. Jewish or not, the doctor will avoid this, lest he develop a bad reputation...