

A worthwhile read: Rabbi Dr. Aaron Levine, *Moral Issues of the Marketplace in Jewish Law* (2005)

Introduction

1. Neil Etienne, *Law Society Zeroes in on Lawyer Advertising*, Law Times, Jan. 11 '16

In the early summer of 2015, Convocation agreed to a call for input on potential changes to its existing regulations on advertising, giving legal professionals until this past October to comment. [Malcolm] Mercer [Chair of the LSUC Professional Regulation Committee] says the call for input stemmed mainly from concern by some lawyers and benchers about the proliferation of advertising in the personal injury realm in recent years. "There were concerns expressed simply about the volume of it, but there was also concern expressed about the nature of the advertising, and some of that goes to the professionalism of the content," Mercer says.

Another issue that came up is the substance of what is being said in ads. Some respondents say there are claims being made in advertising that shouldn't be made, such as potentially misleading claims about awards. He says lawyers have also complained that some advertising suggests a lawyer is particularly aggressive or will take a hard-nosed, adversarial approach...

Mercer adds another interesting point raised by some legal professionals is advertising that "tends to lower the public confidence in the legal system is a problem in and of itself."

2. Cases:

- *Bird & Dog LLP* advertises will preparation services, but actually refers all clients to other firms, in exchange for referral fees. [*Bird & Dog LLP* appropriately discloses the fee to the client.] May *Bird & Dog LLP* advertise legal services without disclosing this arrangement?
- *Lowe & Price LLP*'s marketing slogan is, "We will beat anyone's hourly fee to draft your will!" Is this an acceptable form of marketing?
- *Lowe & Lower LLP* advertises a flat, all-costs-included fee of \$2,500 to draft personal wills for individuals of low net worth, and names a competitor who recently charged \$7,000 to draft a personal will for an individual in that class. Is this acceptable?
- The marketing consultant for will-drafters *Meany & Lauder LLP* recommends a new advertising strategy: a campaign of daily emails to cancer survivors, citing data on the frequency of relapse and including graphic imagery from hospital wards and funerals. Recipients are offered "special deals" which are good for only 24 hours. Is this acceptable?

The imperative to advertise

3. Chief Justice Nemetz, Supreme Court of BC (reported at (1985), 64 B.C.L.R. 113 (B.C.C.A.))

We have no doubt that the right to access to the courts is under the rule of law one of the fundamental pillars protecting the rights and freedoms of our citizens.

4. Leviticus 19:33-34, 24:22

וְכִי־יָגוּר אִתְּךָ גֵר בְּאַרְצְכֶם לֹא תוֹנוּ אֹתוֹ: כְּאַזְרַח מִכֶּם יִהְיֶה לְכֶם הַגֵּר הַגֵּר אִתְּכֶם וְאַהֲבַת לֹ כְמוֹד כִּי־יִגְרִים הֵייתֶם בְּאֶרֶץ מִצְרַיִם אֲנִי ד' אֱלֹהֵיכֶם:

מִשְׁפַּט אֲחָד יִהְיֶה לְכֶם כְּגֵר כְּאַזְרַח יִהְיֶה כִּי אֲנִי ד' אֱלֹהֵיכֶם:

When a stranger lives among you, in your lands, do not abuse him. He shall be as a citizen of yours, the stranger who lives among you, and you shall love him as yourself, for you were strangers in Egypt. I am HaShem your Gd.

You shall have one justice for yourself, like stranger like citizen, for I am HaShem your Gd.

5. Dept. of Justice, *Expanding Horizons: Rethinking Access to Justice in Canada* (2000)

Preface: For nearly three decades, access to justice has been a central policy issue within the Department of Justice. The early programs, developed during the 1970s, provided information about the law and how the justice system works, or assured representation in court for people who could not afford legal assistance. Looking back, though, we can see that these programs took for granted a traditional form of justice that was largely formal and technical. Access was improved, but the problems that brought people into contact with the law were generally defined in narrow legal

terms to be resolved only in court. But justice means more than simply applying the law without regard to the underlying social, economic, and psychological factors, as we have become increasingly aware in recent years. New ideas have entered the discourse, widening the scope of the concept and affecting the way we think of justice – and of access to justice. It is not enough to treat access as solely a matter of courts and formal legal proceedings.

Page 11: In the last few decades we've experimented with a variety of alternatives to our mainstream legal system in the forms of alternative dispute resolution, voluntary compliance, diversion from the criminal justice system or creative processes for sentencing offenders. We have had much success with these efforts. They embolden us to move even further away from the centrifugal force of the legal system.

6. CBA, *Legal Ethics in a Digital World* (2014-2015), pg. 11

Aside from being a very valuable marketing tool, law firm websites can also serve as a public service to help promote access to justice. After all, "[a]ccess to justice requires that the public have available understandable information about the justice system, its resources, and means of access." Law firm websites have the potential to help individuals "access justice by developing and disseminating information and materials as broadly as possible in forms and by means that can reach the largest possible number and variety of people."

7. Exodus 18:21

וְאֶתֶּה תִּחְזֶה מִכָּל־הָעָם אַנְשֵׁי־חַיִל יִרְאֵי אֱלֹקִים אַנְשֵׁי אֱמֶת שֹׂנְאֵי כַּצַּע וְשֹׂמְתֵי עֲלֵהֶם שְׂרֵי אֲלָפִים שְׂרֵי מֵאוֹת שְׂרֵי חֲמִשִּׁים וְשְׂרֵי עֶשְׂרֵת:

And from the entire nation you shall identify men of strength, who revere Gd, men of truth who hate profit, and you shall place upon them officers over thousands, hundreds, fifties and tens.

8. Mishnah, Sanhedrin 1:1

וכמה יהא בעיר ותהא ראויה לסנהדרין? מאה ועשרים. רבי נחמיה אומר מאתים ושלישים כנגד שרי עשרות.

How large a city warrants a Sanhedrin [of 23 judges]? 120. Rabbi Nechemiah said 230, like the offices of tens.

9. Talmud, Bava Kama 82a

ודנין בשני ובחמישי דשכיחי דאתו למקרא בסיפרא

Courts judge on Mondays and Thursdays, because people are available as they come read from the Torah.

10. Talmud, Sanhedrin 6b

רבי יהושע בן קרחה אומר: מצוה לבצוע, שנאמר, "אמת ומשפט שלום שפטו בשעריכם." והלא במקום שיש משפט אין שלום, ובמקום שיש שלום אין משפט! אלא איזהו משפט שיש בו שלום? הוי אומר זה ביצוע.

Rabbi Yehoshua son of Karchah said: It is a mitzvah to split, as Zechariah 8:16 says, "Truth, and justice of peace, you shall judge in your gates." Where there is justice there is no peace, and where there is peace there is no justice! What is justice that includes peace? This is splitting.

11. Leviticus 5:1

וְנָפֵשׁ כִּי־תִחַטָּא וְשָׁמְעָה קוֹל אֱלֹהִים וְהוּא עֵד אוֹ רָאָה אוֹ יָדַע אִם־לֹא יִגִּיד וְנִשְׁאַ עֲוֹנוֹ:

When a person sins, hearing the call of an oath, and he is a witness – he saw or knew – then if he does not tell, he bears his sin.

12. Talmud, Sanhedrin 8a

"כקטן כגדל תשמעון" - אמר ריש לקיש שיהא חביב עליך דין של פרוטה כדין של מאה מנה. למאי הלכתא? אילימא לעיוני ביה ומיפסקיה, פשיטא! אלא לאקדומיה.

Deuteronomy 1:17 says, "Hear the small like the great." Reish Lakish said: The law of a *perutah* should be as beloved to you as the law of 100 *maneh*. For what? If to examine and rule properly, that's obvious! Rather, to put it first.

13. Rebecca L. Sandefur, *Middle Income Access to Justice*, pg. 239

Purchasing a lawyer's services is an uncertain business. Law is both what economists term a credence good and what they term an experience good. The signal quality of a credence good is that consumers cannot evaluate providers' performance: producers of credence goods identify and treat problems that their clients do not know how to solve and may not even recognize what they confront. An experience good is one for which consumers cannot 'evaluate [its] quality... prior to purchase, but [for which] they may be able to assess quality... after purchase.'

14. UN Conference on Trade and Development: *Why competition and consumer protection matter*

Consumer protection benefits all consumers by ensuring that they have the right of access to: non-hazardous products; to adequate information to enable them to make informed choices according to individual wishes and needs; and to effective redress.

Empowered consumers, who know their rights and enforce them, are subject to fewer abuses. This directly improves their welfare. It also contributes to creating a level playing field for businesses which have to apply a common set of standards, supporting competition.

15. Akiva Miller, *What do we worry about when we worry about price discrimination?*

[W]e might also consider whether a rule requiring a seller to disclose her lowest price may not also be advisable as a precautionary rule under the other arguments of unfairness, consumer welfare and antitrust. If those arguments are true, the best way to avoid those complaints be [*sic*] to force the disclosure of a seller's lowest price, so that the seller could would [*sic*] not be able to employ pricing strategies that consumers find unfair or unduly extract consumer welfare.

16. Mishnah Keritot 1:7

מעשה שעמדו קינים בירושלים בדינרי זהב אמר רבן שמעון בן גמליאל המעון הזה לא אלין הלילה עד שיהו בדינרין נכנס לבית דין ולימד האשה שיש עליה חמש לידות ודאות חמש זיבות ודאות מביאה קרבן אחד ואוכלת בזבחים ואין השאר עליה חובה ועמדו קינים בו ביום ברבעתים

Once, bird offerings in Jerusalem cost gold dinarim. Rabban Shimon ben Gamliel said: By the Temple! I will not sleep tonight until they cost standard dinarim. He entered the court and taught, "A woman who needs to bring offerings for multiple births or impurities brings one offering..." Bird offerings dropped to a quarter-dinar that day.

17. Jacob Gofman, *Restrictions on Lawyer Advertising and the Market for Legal Services* (2011)

In fact, it has been found that price advertising has had a relatively paltry impact on decreasing the cost of legal services even in countries with the most relaxed restrictions on price advertising such as the United States. This is because a problem arises when price advertising is undertaken exclusively, or at least, principally by low-price/low-quality suppliers. In these circumstances price advertising becomes an adverse signal on quality. The underlying reasoning being that consumers who are unable to assess quality in an *ex ante* or *ex post* manner and observe a low price for a non-standardised service assume that more knowledgeable purchasers have assessed the services and concluded them to be of low quality.

Concern for inappropriate advertisements

18. LSUC Rules of Professional Conduct (2014), Rule 4.2-1

A lawyer may market legal services if the marketing

(a) is demonstrably true, accurate and verifiable;

(b) is neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive; and

(c) is in the best interests of the public and is consistent with a high standard of professionalism.

19. Exodus 23:7

מִדְּבַר־שֶׁקֶר תִּרְחֶק...

Distance yourself from falsehood...

20. Talmud, Bava Metzia 49a

רבי יוסי ברבי יהודה אומר: מה תלמוד לומר הין צדק? והלא הין בכלל איפה היה? אלא לומר לך: שיהא הן שלך צדק, ולא שלך צדק
Rabbi Yosi b'Rabbi Yehudah said: Why does the Torah say 'a just *hin*'? Isn't the *hin* included in the reference to a [just] *ephah*? Rather, this teaches that your "Yes" [*hen*] shall be just, and your "No" shall be just.

21. Talmud, Pesachim 113b

שלשה הקב"ה שונאן: המדבר אחד בפה ואחד בלב והיודע עדות בחבירו ואינו מעיד לו והרואה דבר ערוה בחבירו ומעיד בו יחידי
Gd despises these three: A person who speaks one way with his mouth and another with his heart; one who knows testimony on behalf of another and does not testify; and one who witnesses impropriety by another and testifies alone.

22. 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.

23. 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.

24. Mishnah, Bava Metzia 4:10 (58b)

כשם שאונאה במקח וממכר כך אונאה בדברים לא יאמר לו בכמה חפץ זה והוא אינו רוצה ליקח

Just as there is commercial abuse, so there is verbal abuse: One may not say to him, "How much does this item cost?" when he does not wish to buy it.

25. Rabbi Menachem Meiri (13th century France) to Bava Metzia 58b

אסור להונות את חברו ולגרור לו פסידא בדבריו והוא שאמר לא יאמר לו בכמה חפץ זה והוא אינו רוצה ליקח שהרי מתוך שהוא בוש לומר שאינו רוצה ליקח משפיל לו מקחו לומר שאינו שוה כל כך ואחרים שומעים ונמצא גורם לו פסידא ואפילו לא היה אדם שם מ"מ הוא מטריחו ומצערו שחשב למכור ולא מכר

One may not abuse another and cause him loss with his words. Thus it says, "One may not say to him, 'How much does this item cost?' when he does not wish to buy it." Because he is embarrassed to say that he does not wish to buy, he instead degrades the merchandise, saying that it is not worth this much. Others hear, and so he causes the merchant a loss. And even if no one is present, still, he strains the merchant and causes him pain, for he expects to sell and he does not sell.

26. Rabbi Joseph Caro (16th century Israel), Shulchan Aruch Choshen Mishpat 359:10

כל החומד עבדו או אמתו או ביתו או כליו של חבירו או כל דבר שאיפשר שיקנהו ממנו, והכביד עליו רעים והפציר בו עד שלקחו ממנו, הרי זה עובר בלא תחמוד (שמות כ, יד).

One who desires another's servant, maid, home or implement, or anything he can purchase from him, and who weighs him down with third parties and badgers him until he can buy it, violates "You shall not desire."

27. Rabbi Yaakov Yeshayah Blau (21st century Israel), Pitchei Choshen V 1 footnote 26

ראיתי מי שכתב שהוא הדין הכופה את חבירו לקנות ממנו, יש בזה משום איסור חמס, ונראין דבריו...

I have seen one who wrote that the same applies for one who pushes another to buy from him; this involves the prohibition against *chamas*. His words appear to be correct...

28. Jacob Gofman, *Restrictions on Lawyer Advertising and the Market for Legal Services* (2011)

Indeed, studies have shown that the traditional normative justifications given by those in the legal profession do not comport with the realities of consumer perception. In an ABA national survey, advertising was found to not be a major factor in shaping public impressions of the bar. Moreover, dignified advertisements were found to reflect favourably on the profession. Of the surveyed American states, over 90% of all complaints about advertising came from other lawyers, while only 1 to 2% of consumers' complaints about lawyers involved advertising.

29. Talmud, Shabbat 114a

אמר רבי חייא בר אבא אמר רבי יוחנן: גנאי הוא לתלמיד חכם שיצא במנעלים המטולאים לשוק. והא רבי אחא בר חנינא נפיק! אמר רבי אחא בריה דרב נחמן: בטלאי על גב טלאי. ואמר רבי חייא בר אבא אמר רבי יוחנן: כל תלמיד חכם שנמצא רבב על בגדו חייב מיתה, שנאמר (משלי ח:לו) "כל משנאי אהבו מות" - אל תקרי "משנאי" אלא "משניאי".

Rabbi Chiya bar Abba cited Rabbi Yochanan: It is disgraceful for a Torah scholar to go to the market with patched shoes. But Rabbi Acha bar Chanina went! Rabbi Acha son of Rav Nachman explained: The problem is with patches upon patches. And Rabbi Chiya bar Abba cited Rabbi Yochanan: A Torah scholar who has grease on his clothing is liable for death, as it says, "Those who hate Me, love death." Read it not as "hate Me" but "cause hate for Me".

Our cases

30. Neil Etienne, *Law Society Zeroes in on Lawyer Advertising*, Law Times, Jan. 11 '16

[Mercer] says one broader issue that "right or wrong is worthy of consideration" is an increase in lawyers who pay referral fees to other lawyers who provide them with cases and how those firms advertise.

"There has been concern expressed that some of the referral fees are not a percentage of the ultimate recovery but are flat rates," he says. "The concerns of those who raised that issue are that the result may be the referring lawyer isn't interested in getting the file to the lawyer who can do the best job but to the lawyer that's prepared to pay the highest fixed fee; it's worthy of examination, how the referral fee system has evolved to reflect the question: Is this a system [that] is transparent, that is aligned with client interests or not?"

31. LSUC Rules of Professional Conduct (2014), Rule 3.6-6

A lawyer who refers a matter to another licensee because of the expertise and ability of the other licensee to handle the matter and the referral was not made because of a conflict of interest, the referring lawyer may accept and the other licensee may pay a referral fee provided that

- (a) the fee is reasonable and does not increase the total amount of the fee charged to the client, and
- (b) the client is informed and consents.

32. LSUC Rules of Professional Conduct (2014), Rule 4.2-1 Commentary

Examples of marketing that may contravene this rule include

- (a) stating an amount of money that the lawyer has recovered for a client or referring to the lawyer's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases;
- (b) suggesting qualitative superiority to other lawyers;
- (c) raising expectations unjustifiably;
- (d) suggesting or implying the lawyer is aggressive;
- (e) disparaging or demeaning other persons, groups, organizations or institutions;
- (f) taking advantage of a vulnerable person or group;
- (g) using testimonials or endorsements which contain emotional appeals.

33. Talmud, Bava Metzia 80a

אמר רבי יוחנן: המוכר פרה לחבירו ואמר לו "פרה זו נגחנית היא, נשכנית היא, בעטנית היא, רבצנית היא," והיה בה מום אחד וסנפו בין המומין, הרי זה מקח טעות. מום זה ומום אחר, אין זה מקח טעות.

Rabbi Yochanan said: If one sells a cow and says, "This cow gores, bites, kicks and sprawls," and it only has one of those defects, which he included among these defects, that is grounds for claiming it was an erroneous purchase. If he names [only] this defect and one other, it is not an erroneous purchase.