

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

Cases

1. Cases:

- *Bost & Bragg LLP* advertises in *The Globe and Mail* that "Canada's Fastest Growing Firm of Business Advisors Announces its Newest Partners", without providing any supporting information. Is that acceptable?
- *Bates & Swich LLP* advertises services for preparing personal tax filings for Canadian citizens currently residing in Brazil. Their South American specialist left the firm three years ago, and they have no plan to hire a replacement; they simply hope to bring in other business from these expatriates. Is that acceptable?
- *Lowe & Lower LLP* advertises a flat, all-costs-included fee of \$500 to prepare personal tax filings for individuals of low net worth, and names a competitor who charges \$2,500 to prepare personal tax filings for individuals of higher net worth. Is this acceptable?
- The marketing consultant for financial planners *Meaney & Lauder LLP* recommends a new advertising strategy: a campaign of daily emails to cancer patients, citing data on the frequency of relapse and emphasizing the need for estate planning. Recipients are offered "special deals" which are good for only 24 hours. Is this acceptable?

The imperative to advertise

2. Ford v. Quebec (A. G.), [1988] 2 S.C.R. 712

Commercial expression, like political expression, is one of the forms of expression that is deserving of constitutional protection because it serves individual and societal values in a free and democratic society. Indeed, over and above its intrinsic value as expression, commercial expression, which protects listeners as well as speakers, plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy.

3. CPA of Ontario, *CPA Code of Professional Conduct* Section 217: Advertising, Solicitation and Endorsements Guidance 217.1(1): It is in the public interest and in the interest of all members and firms of CPA Ontario that members and firms be allowed to advertise or otherwise promote services available and the basis of fees charged.

4. 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.

5. 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.

6. Talmud, Bava Metzia 60a-b

משנה: רבי יהודה אומר לא יחלק החנוני קליות ואגוזין לתינוקות מפני שהוא מרגילן לבא אצלו וחכמים מתירין. ולא יפחות את השער וחכמים אומרים זכור לטוב....
גמרא: ולא יפחות את השער וחכמים אומרים זכור לטוב וכו' מאי טעמא דרבנן? משום דקא מרווח לתרעא.

Mishnah: Rabbi Yehudah said: A store owner may not distribute parched grain and nuts to children, for this would accustom them to come to him. But the Sages permit.

[Rabbi Yehudah said:] And he should not reduce the rate. But the Sages say: He is remembered for the good.

Gemara: What is the logic of the Sages? This will cause the rate to broaden.

Concerns: Secular and Halachic

7. CPA of Ontario, *CPA Code of Professional Conduct* Section 217: Advertising, Solicitation and Endorsements

217.1 Advertising and promotion - A member or firm may advertise or seek publicity for the member's or firm's services, achievements or products and may seek to obtain new engagements and clients by various means, but shall not do so, directly or indirectly, in any manner

(a) which the member or firm knows, or should know, is false or misleading or which includes a statement the contents of which the member or firm cannot substantiate;

(b) which makes unfavourable reflections on the competence or integrity of the profession or any member or firm; or

(c) which otherwise brings disrepute on the profession.

Guidance 217.1(3) - Members and firms that engage public relations, recruiting or other agents are responsible for ensuring that no activity for which the agent is engaged contravenes the CPA Code.

Guidance 217.1(6) - Members and firms should ensure, at all times, that any public reference (in promotional material, websites, stationery, reports, etc.) to themselves or their services is accurate. The following are examples of false or misleading references:

- any implication that the practising unit is larger than it is, such as by use of plural descriptions or other misleading use of words;
- any implication that a person is a partner of a firm, when the person is not; ...
- any reference to particular services of any person or firm where the person or firm is not currently able to provide those services;
- any statement that the practice is restricted to one or more functions, if assignments are accepted in other practice functions; ...

Guidance 217.1(7) - Any reference to fees which is intended for the information of the public (including prospective clients) should not be misleading. The following are examples of false or misleading fee references:

- fee information if the service at the fee specified will not be available on an ongoing basis for a reasonable length of time;
- a quotation of specific fee information if the service at the fee specified is conditional upon the acceptance by the client of other services, unless such condition is disclosed; ...

8. 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.

9. Rabbi Moses Maimonides (Rambam, 12th century Egypt), *Mishneh Torah*, Laws of Sales 18:1, 18:5

אסור לרמות את בני אדם במקח וממכר או לגנוב את דעתם, ואחד עובד כוכבים ואחד ישראל שוים בדבר זה, היה יודע שיש בממכרו מום יודיעו ללוקח, ואפילו לגנוב דעת הבריות בדברים אסור...

אין מערבין פירות בפירות אפילו חדשים בחדשים, ואין צריך לומר ישנים בחדשים...

One may not deceive people in commerce, or 'steal' their minds, whether non-Jewish or Jewish. One who knows his merchandise is blemished must inform the consumer. Even 'stealing' minds verbally is prohibited...

One may not mix two batches of produce, even new with new, and certainly old with new...

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

אסור להונות את חברו ולגרום 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 ומצער שחשב למכור ולא מכר

One may not abuse another and cause him loss with his words. Thus the mishnah 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 insults 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.

11. Rabbi Joseph Karo (16th century Israel), Code of Jewish Law Choshen Mishpat 228:4

כיצד הוא אונאת דברים, לא יאמר: בכמה אתה רוצה ליתן חפץ זה, והוא אינו רוצה לקנותו. היו חמרים מבקשים לקנות תבואה, לא יאמר להם: לכו אצל פלוני, והוא יודע שאין לו למכור.

What is "verbal abuse"? One should not say, "How much would you want, to give this item," when he does not wish to buy it. If donkey drivers seek grain, one should not say, "Go to X," knowing that he has no grain to sell.

12. CPA of Ontario, *CPA Code of Professional Conduct* Section 217: Advertising, Solicitation and Endorsements

Guidance 217.1(9) - Since any member or firm may be able to offer services similar to those offered by others, it is not appropriate for any member or firm to claim superiority with respect to the competence or integrity of any other member or firm.

13. Talmud Yerushalmi, Chagigah 2:1

א"ר יוסי בן חנינה המתכבד בקלון חבריו אין לו חלק לעולם הבא

Rabbi Yosi ben Chanina said: One who is honoured by the shame of others has no share in the next world.

14. 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.

15. Rabbi Yisrael Meir Kagan (19th-20th century Poland), Chafetz Chaim, Laws of Harmful Speech 5:7

ודע דכשם שאסור להוציא דיבה על חברו כן על חפציו אסור להוציא דבה. (יראים קצא) וזה מצוי מאד, בעונותינו הרבים, שהנוני אחד מוציא דיבה על נכסי חנוני אחר וכל כהאי גוונא מפני הקנאה, וזו היא לשון הרע גמורה מדאורייתא.

Know that just as one may not speak poorly of another person, so one may not speak poorly about his property. (Yereim 191) And this is very common, due to our great sins, that a particular merchant speaks poorly about another merchant's goods and the like due to jealousy. This is fully included in the biblical prohibition against harmful speech.

16. CPA of Ontario, *CPA Code of Professional Conduct* Section 217: Advertising, Solicitation and Endorsements

Guidance 217.1(14) - Improperly claiming specialist status may violate one or more of the following rules:

- Rule 201.1, which requires members and firms to act in a manner that will maintain the good reputation of the profession;...

17. CPA of Ontario, *CPA Code of Professional Conduct* Section 217: Advertising, Solicitation and Endorsements

217.2 Notwithstanding Rule 217.1, a member or firm shall not, either directly or indirectly solicit, in a manner that is persistent, coercive or harassing, any professional engagement.

Guidance 217.2(2) - Communication with a prospective client should cease when the prospect so requests either directly to the member or firm or through CPA Ontario. Any continued contact will be regarded as harassment, which is contrary to the Rule.

18. Rabbi Joseph Karo (16th century Israel), Code of Jewish Law 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."

19. 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 person to buy from him; this involves the prohibition against *chamas*. His words appear to be correct...

Our Cases

20. Tim Falconer, CA Magazine Oct. 1993, cited in Auditing: An International Approach, Chapter 18

In 1987, three charges were brought against "a partner of Ernst & Whinney" in Ontario. The discipline committee found the member not guilty on the first charge, but guilty on the second and third. Both guilty charges concerned a 1985 ad he had placed in The Globe and Mail that stated, in part, "Canada's Fastest Growing Firm of Business Advisors Announces Its Newest Partners." The committee found the ad misleading in two ways. First, "accountants do not have a monopoly on the term 'business advisors.'" Second, the claim was made on the basis of statistics that were "accurate as they relate to the participating chartered accountant firms [but] without disclosure of the necessary parameters or basis for the statement, it is misleading." The member received a written reprimand, was assessed court costs of \$6,000, and was fined \$5,000.

21. Rabbi Dr. Aaron Levine, *Advertising and Promotional Activities As Regulated In Jewish Law*, J of Halacha and Contemporary Society (1981)

Attaching a warning to the advertisement that supplies are limited and are available on a "first-come-first-served" basis may, however, be sufficient to satisfy the "good faith" imperative and free the advertiser from the *ona'at devarim* interdict. In the final analysis, whether the above caveat does in fact make the advertisement morally acceptable depends, in our view, on the interpretation the majority of people attach to the advertisement. Consumer surveys could prove very helpful here.

22. 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.