Professional Confidentiality and the Demands of Jewish Law

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BEIT MIDRASH

The Roots of Confidentiality

1. Jared A. Mackey, *Privacy and the Canadian Media*, Western Journal of Legal Studies 2:1 (2012) http://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1054&context=uwojls

With the recent recognition of the new tort of "intrusion upon seclusion", Canadian privacy law has experienced a fundamental and modernizing shift. In *Jones v Tsige*, the Ontario Court of Appeal held that a person is liable for an invasion of privacy, if "he or she intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns [...] if the invasion would be highly offensive to a reasonable person."

2. Rabbi Yehoshua Falk (16th century Poland), Sefer Meirat Einayim 378:4

משום דשם (בסי' קנד) הראיה מצד עצמה אין עושה בהן היזק אלא שגורמת היזק, כגון שחבירו לא יעשה עסקיו בחצר מכח הבושה ממנו...

In 154:3 sight [of the property] itself does not harm, but it causes harm, as the other cannot go about his business in his yard due to embarrassment.

3. Leviticus 19:16

לא תלך רכיל בעמך לא תעמוד על דם רעך אני ד'

Do not travel as a peddler [of tales] in your nation; do not stand by as the blood of your neighbour is shed; I am HaShem.

4. Talmud, Yoma 4b

מניין לאומר דבר לחבירו שהוא בבל יאמר עד שיאמר לו לך אמור שנאמר "וידבר ד' אליו מאהל מועד לאמר"

How do we know that one may not repeat something told to him until he is told, "Go tell it"? It is written: "And Gd spoke to him from the Tent of Meeting, to go tell."

5. Rabbi Aharon haLevi (13th century Spain), Sefer haChinuch 236

משרשי המצוה, כי ד' חפץ בטובת הבריות אשר ברא, וצונו בזה כדי להיות שלום בינינו, כי הרכילות סיבה לריב ומצה.

Among the roots of this command is that Gd desires the good of His creations, and He instructed us in this so that there should be peace among us, as gossip is cause for quarreling and strife.

6. Michah 6:8

הִגִּיד לְךָ אָדָם מַה־טּוֹב וּמָה־ד' דּוֹרֵשׁ מִמְּךָ כִּי אִם־עֲשׂוֹת מִשְׁפָּט וְאַהֲבַת חֶסֶד וְהַצְנֵעַ לֶכֶת עִם־אֱלֹקֶיךָ׃

He has told you, Man, what is good: What does Gd require of you but to do justice, to love kindness, and to walk privately with your Gd?

Confidentiality with a Lawyer

7. LSO, Rules of Professional Conduct (2014), Rule 3.3-1

A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information

8. Smith *v.* Jones, [1999] 1 S.C.R. 455, paragraphs 13-14

The Quebec Court of Appeal concluded in Perron, supra, at p. 113 C.C.C.:

[Translation] When counsel requires the services of an expert in order to help him better prepare his defence, he acts within the scope of his mandate. It is the interest of his client which compels counsel to confer on a specialist the charge of evaluating the case and it follows that the accused must be able to undergo the evaluation in the same climate of confidence and in complete confidentiality as if he were communicating with counsel.

This reasoning is persuasive, and confirms that conversations with defence experts, such as psychiatrists, fall within the solicitor-client privilege and attract permanent and substantive privilege: see Calcraft v. Guest, [1898] 1 Q.B. 759 (C.A.), Descôteaux v. Mierzwinski, [1982] 1 S.C.R. 860.

9. Law Society of Ontario, *Confidentiality versus Privilege* http://www.lsuc.on.ca/ConfidentialityVsPriviledge/
Though the term "privilege" is often used to refer to a lawyer's duty of confidentiality, the duty of confidentiality must be distinguished from solicitor-client privilege. Privilege is an evidentiary rule of law that refers to the legal right of an individual to withhold information from an opposing party, a court, a tribunal, and investigations, including law enforcement officials.

10. Maimonides, Mishneh Torah, Laws of Gifts to the Needy 8:12
אין פודין את השבויים ביתר על דמיהן מפני תקון העולם, שלא יהיו האויבים רודפין אחריהם לשבותם,
We do not redeem captives for more than their value, for society's sake, lest the enemy pursue them to capture them.

Exceptions to Confidentiality
11. LSO, Rules of Professional Conduct (2014), Rule 3.3-1
and shall not divulge any such information unless
(a) expressly or impliedly authorized by the client;
(b) required by law or by order of a tribunal of competent jurisdiction to do so;
(c) required to provide the information to the Law Society; or
(d) otherwise permitted by rules 3.3-2 to 3.3-6.

12. LSO, Rules of Professional Conduct (2014), Commentary to Rule 3.3-1 (emphasis added)
Although the rules make it clear that the lawyer shall not knowingly assist or encourage any dishonesty, fraud, crime, or illegal conduct (rule 3.2-7) and provide a rule for how a lawyer should respond to conduct by an organization that was, is or may be dishonest, fraudulent, criminal, or illegal (rule 3.2-8), it does not follow that the lawyer should disclose to the appropriate authorities an employer's or client's proposed misconduct. Rather, the general rule, as set out above, is that the lawyer shall hold the client's information in strict confidence, and this general rule is subject to only a few exceptions.

13. LSO, Rules of Professional Conduct (2014), Rule 3.3-3
A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.
Commentary [2]: The Supreme Court of Canada has considered the meaning of the words "serious bodily harm" in certain contexts, which may inform a lawyer in assessing whether disclosure of confidential information is warranted. In *Smith v. Jones*, [1999] 1 S.C.R. 455 at paragraph 83, the Court observed that serious psychological harm may constitute serious bodily harm if it substantially interferes with the health or well-being of the individual.

14. Smith *v.* Jones, [1999] 1 S.C.R. 455, paragraphs 79, 82, 84
79: What should be considered in determining if there is a clear risk to an identifiable group or person? It will be appropriate and relevant to consider the answers a particular case may provide to the following questions: Is there evidence of long range planning? Has a method for effecting the specific attack been suggested? Is there a prior history of violence or threats of violence? Are the prior assaults or threats of violence similar to that which was planned? If there is a history of violence, has the violence increased in severity? Is the violence directed to an identifiable person or group of persons? This is not an all-encompassing list. It is important to note, however, that as a general rule a group or person must be ascertainable. The requisite specificity of that identification will vary depending on the other factors discussed here.
82: The "seriousness" factor requires that the threat be such that the intended victim is in danger of being killed or of suffering serious bodily harm. Many persons involved in criminal justice proceedings will have committed prior crimes or may be planning to commit crimes in the future. The disclosure of planned future crimes without an element of violence would be an insufficient reason to set aside solicitor-client privilege because of fears for public safety. For the public safety interest to be of sufficient importance to displace solicitor-client privilege, the threat must be to occasion serious bodily harm or death.

84: The risk of serious bodily harm or death must be imminent if solicitor-client communications are to be disclosed. That is, the risk itself must be serious: a serious risk of serious bodily harm. The nature of the threat must be such that it creates a sense of urgency. This sense of urgency may be applicable to some time in the future. Depending on the seriousness and clarity of the threat, it will not always be necessary to impose a particular time limit on the risk. It is sufficient if there is a clear and imminent threat of serious bodily harm to an identifiable group, and if this threat is made in such a manner that a sense of urgency is created. A statement made in a fleeting fit of anger will usually be insufficient to disturb the solicitor-client privilege. On the other hand, imminence as a factor may be satisfied if a person makes a clear threat to kill someone that he vows to carry out three years hence when he is released from prison. If that threat is made with such chilling intensity and graphic detail that a reasonable bystander would be convinced that the killing would be carried out the threat could be considered to be imminent. Imminence, like the other two criteria, must be defined in the context of each situation.

15. Yossi Schochet, *Is it an Attorney's Responsibility to Disclose Client's Threats of Suicide?* http://yslaw.ca/275-2/
Only in Ontario does this exception to confidentiality condone disclosure where serious preventable harm would flow from a *non-criminal* occurrence… Therefore, I would think that in Ontario, if there is an "imminent risk" to an "identifiable person", in this case the client, "of death or serious bodily harm", which includes suicide, the lawyer may disclose, pursuant to judicial order where practicable, confidential information where it is necessary to do so in order to prevent the death or harm. (And the operative word is "may").

16. Smith *v.* Jones, [1999] 1 S.C.R. 455, paragraphs 20-22 (minority opinion)
20: If defence counsel cannot freely refer clients, particularly dangerous ones, to medical or other experts without running a serious risk of the privilege being set aside, their response will be not to refer clients until after trial, if at all. This could result in dangerous people remaining free on bail for long periods of time, undiagnosed and untreated, presenting a danger to society.
21 The chilling effect of completely breaching the privilege would have the undesired effect of discouraging those individuals in need of treatment for serious and dangerous conditions from consulting professional help. In this case the interests of the appellant and more importantly the interests of society would be better served by his obtaining treatment. This Court has recognized that mental health, including those suffering from potentially dangerous illnesses, is an important public good: see M. (A.) v. Ryan, [1997] 1 S.C.R. 157, at para. 27.
22 Although the appellant did not go to Dr. Smith to seek treatment, it is obvious that he is more likely to get treatment when his condition is diagnosed than someone who keeps the secret of their illness to themselves. It seems apparent that society will suffer by imposing a disincentive for patients and criminally accused persons to speak frankly with counsel and medical experts retained on their behalf.

17. Maimonides, Mishneh Torah, Laws of Oaths 5:15
הנשבע לחבירו שלא אעיד לך עדות זו שאני יודעה או שלא אעיד לך אם אדע לך עדות הרי זה לוקה משום שבועת שוא מפני שהוא מצווה להעיד.
One who swears to another, "I won't offer regarding you the testimony I possess," or, "I won't testify regarding you if I do know testimony," is lashed for a vain oath, for he is commanded to testify.

18. Midrash, Sifra Kedoshim 2
ולפני עור לא תתן מכשול לפני סומא בדבר... היה נוטל ממך עצה, אל תתן לו עצה שאינה הוגנת לו
"Do not place a stumbling block before the blind." This means: Before someone who is blind in a given matter… If someone asks your advice, do not give him improper advice.

19. Talmud, Sanhedrin 73a
מניין לרואה את חבירו שהוא טובע בנהר או חיה גוררתו או לסטין באין עליו שהוא חייב להצילו תלמוד לומר לא תעמד על דם רעך
How do we know that one who sees another drowning in a river or being dragged by a beast or being beset by bandits must act to save him? The Torah says: You shall not stand by as the blood of your neighbour is shed.

20. Rabbi Eliezer Waldenberg (20th century Israel), Tzitz Eliezer 13:81:2

ובודאי הברור שמותר וגם חייב למסור על מחלתו לשלטונות

It is of the greatest certainty, one is permitted and also obligated to inform the authorities of this person's illness!

21. Rabbi Yisrael Meir Kagan (19th-20th century Poland), Chafetz Chaim, Lashon HaRa 10:2

שֶׁיְּכַוֵּן לְתוֹעֶלֶת... וְלֹא לְהָנוֹת, חַס וְשָׁלוֹם, מֵהַפְּגָם הַהוּא, שֶׁהוּא נוֹתֵן בַּחֲבֵרוֹ, וְלֹא מִצַּד שִׂנְאָה, שֶׁיֵּשׁ לוֹ עָלָיו מִכְּבָר.

אִם הוּא יָכוֹל לְסַבֵּב אֶת הַתּוֹעֶלֶת הַזֹּאת גּוּפָא בְּעֵצָה אַחֶרֶת, שֶׁלֹּא יְצְטָרֵךְ לְסַפֵּר אֶת עִנְיַן הַלָּשׁוֹן הָרָע עָלָיו, אֲזַי בְּכָל גַּוְנֵי אָסוּר לְסַפֵּר.

He must intend to help… and not to benefit, Gd-forbid, from that flaw he ascribes to the other, and not out of pre-existing enmity.

If he can cause that benefit in some other way, without needing to speak harmfully of him, then this speech is always prohibited.

Case 1: Potential Financial Injury

As counsel for a public corporation, I become aware that they are moving rapidly toward filing for bankruptcy. A neighbour of mine has invested her retirement funds in corporate stock. May I inform her of the danger?

22. Proposed Rule 2.03(5), Special Convocation, May 2000 http://www.lsuc.on.ca/media/specialconvocation.pdf

Where a lawyer has reasonable grounds for believing that there is imminent risk that a fraud that may cause substantial financial injury to another is likely to be committed, the lawyer may disclose confidential information to prevent the fraud, but shall not disclose more information than is required.

23. Why not?

http://www.lawyersweekly.ca/index.php?section=article&volume=30&number=14&article=1

http://www.slaw.ca/2012/03/30/dont-shoot-the-messenger-solicitor-client-privilege-vs-fraud-prevention/

24. Maimonides, Book of Mitzvot, Prohibition 297

והמצוה הרצ"ז היא שהזהירנו מהתרשל בהצלת נפש אחד מישראל כשנראהו בסכנת המות או ההפסד ויהיה לנו יכולת להצילו.

The 297th command warns us not to be weak in saving a Jew when we see he is in danger of death or loss and we are capable of rescue.

25. Talmud, Bava Metzia 33a

אמר רב יהודה אמר רב: אמר קרא אפס כי לא יהיה בך אביון - שלך קודם לשל כל אדם.

Rav Yehudah cited Rav: The text say, "But there shall be no pauper among you" – Yours precedes that of all others.

Case 2: Withdrawal from Representation

I am counsel in litigation on behalf of an individual who has disclosed to me that his suit is frivolous, so that I am ethically bound to withdraw from representation. I file a motion to withdraw, but my client fights the motion. May I disclose to the court my reason for withdrawal?

26. R. v. Short, 2018 ONCA 1, paragraph 37

Trial counsel was candid in indicating that non-payment of his fees had created considerable strain in the relationship and made it impossible for him to properly prepare for the second trial. At the same time, however, trial counsel repeatedly told the court that the problems between he and the appellant had gone beyond those related to the non-payment of his fees and had reached the point where the client-solicitor relationship had broken down. As I understand *Cunningham*, the trial judge was obligated to accept trial counsel's representation.

27. R. *v.* Cunningham, 2010 SCC 10, [2010] 1 S.C.R. 331

[48] Assuming that timing [of withdrawal, in terms of impacting the client's case – MT] is an issue, the court is entitled to enquire further. Counsel may reveal that he or she seeks to withdraw for ethical reasons, non-payment of fees, or another specific reason (e.g. workload of counsel) if solicitor-client privilege is not engaged. Counsel seeking to withdraw for ethical reasons means that an issue has arisen in the solicitor-client relationship where it is now impossible for counsel to

continue in good conscience to represent the accused. Counsel may cite "ethical reasons" as the reason for withdrawal if, for example, the accused is requesting that counsel act in violation of his or her professional obligations… or if the accused refuses to accept counsel's advice on an important trial issue… If the real reason for withdrawal is non-payment of legal fees, then counsel cannot represent to the court that he or she seeks to withdraw for "ethical reasons". However, in either the case of ethical reasons or non-payment of fees, the court must accept counsel's answer at face value and not enquire further so as to avoid trenching on potential issues of solicitor-client privilege.

28. LSO, A Litigator's Guide to the Challenging Lawyer-Client Relationship, Apr. 24 '17, pp. 9-10

The affidavit should also clarify the nature and extent of the lawyer/law firm's involvement on the file. Finally, it should clearly set out the reasons for removal (e.g. failure to pay fees, or client's refusal to provide instructions).

Although the affidavit needs to justify the removal, it must do so without revealing confidential or privileged information. The lawyer should take great care to avoid revealing anything that could prejudice the client's interests in the action. If this appears unavoidable, the lawyer may wish to move for directions before a judge or attempt to obtain a sealing order over the affidavit.

29. R. v. Short, 2018 ONCA 1, paragraph 43

Trial counsel's application to be removed from the record put the appellant in a difficult position, although he may well have been responsible for his own predicament. If possible, I think it would have been helpful had the appellant received some legal advice from duty counsel, or perhaps some senior member of the bar, before the application proceeded. Counsel could have ensured that the appellant understood the nature of the application, his options in respect of representation and participation in the application, his right to maintain the confidentiality of his communications with his trial lawyer, and the potential impact of the outcome of the application on the timing of, and the appellant's representation at, his upcoming trial.

<u>Case 3: Jewish Law vs. the LSO</u>

As counsel in a case of medical malpractice, I become aware that a certain cardiac surgical team has a poor track record. A neighbour is planning on using them for her heart bypass surgery. I confer with my own counsel and learn that this does not rise to the level of risk permitting disclosure. However, I do believe that I am obligated to warn her, under the Jewish law requiring that I intervene to prevent harm to others. Do I inform her?