

The duty to avoid participation in unethical conduct

1. When a client violates Jewish law, but not secular law - <https://www.yutorah.org/lectures/lecture.cfm/890765>

2. LSO, Rules of Professional Conduct (2014), Rule 3.2-1

A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.

3. Rabbi Yaakov Yeshayah Blau (21st century Israel), Pitchei Choshen IV 7:10-11

מוזהר הפועל שלא יבטל מעט כאן ומעט כאן, אלא חייב לדקדק על עצמו בזמן... וכן חייב לעבוד בכל כחו...

אין הפועל רשאי לעשות מלאכתו בלילה ולהשכיר עצמו ביום, ולא ירעב ולא יסגף עצמו, מפני ביטול מלאכתו של בעה"ב...

An employee is required not to cease working a little here and a little there; he must take care to be precise regarding times... And he is obligated to work with all of his powers...

An employee may not perform his own work at night and hire himself out by day, and he may not starve himself and cause himself suffering, as this will diminish his work for the employer...

4. LSO, Rules of Professional Conduct (2014), Rule 3.2-7

A lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct or instruct a client or any other person on how to violate the law and avoid punishment.

5. Talmud, Bava Kama 118b-119a

אין לוקחין מן הרועים לא עזים ולא גדיים ולא גזיזין ולא תלושין של צמר אבל לוקחין מהן תפורין מפני שהן שלהן ולוקחין מהן חלב וגבינה במדבר ולא ביישוב

We do not purchase goats, kids, wool or tufts of wool from shepherds, but we purchase stitched clothing from them, because these are theirs. We may purchase milk and cheese in the wild, but not in urban areas.

6. Talmud, Sotah 41a-b

משנה: אגריפס המלך... כשהגיע ללא תוכל לתת עליך איש נכרי זלגו עיניו דמעות אמרו לו אל תתירא אגריפס אחינו אתה אחינו אתה גמרא: באותה שעה נתחייבו שונאי ישראל כלייה שהחניפו לו לאגריפס

Mishnah: When King Agrippas read, "You shall not place a stranger upon yourself," his eyes ran with tears. They said to him, "Do not fear, Agrippas! You are our brother, you are our brother!"

Gemara: At that moment, the "enemies of Israel" became liable for destruction, for flattering Agrippas.

7. Tosafot (12th-13th centuries Western Europe), Sotah 41b **אותו**

נהי שלא יוכלו למחות היה להן לשתוק ולא להחזיקו.

Granted that they could not protest, they should have been silent and not strengthened him.

8. Leviticus 19:17

לא תשנא את אחיך בלבבך הוכח תוכיח את עמיתך ולא תשא עליו חטא.

Do not hate your brother in your heart. Instruct, and do not bear sin for him.

9. Eric B. Appleby, Legal Research Guide to Ethics, Chapter 2

A lawyer is an officer of the court which requires a standard of conduct that includes a special duty to maintain and uphold the law.

10. Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, paragraph 118

"The advocate has a duty to his client, a duty to the Court, and a duty to the State: but he has above all a duty to himself and he shall be, as far as lies in his power, a man of integrity. No profession calls for higher standards of honour and uprightness, and no profession, perhaps, offers greater temptations to forsake them..." Lord Birkett's Presidential Address to the Holdsworth Club in Birmingham. Cited in David Hawreluk, "The Lawyer's Duty to Himself and the Code of Professional Conduct" (1993) 27 LSO Gazette 119 at 121.

11. Rabbeinu Asher (13th-14th c. Germany/Spain), Commentary to Makkot 1:11

כל הרואה דבר ערוה מחויב להעיד לקיים מה שנאמר (דברים יג) ובערת הרע מקרבך.

Anyone who sees impropriety is obligated to testify, fulfilling, "And you shall eradicate evil from your midst."

12. Talmud, Bava Metzia 32a

מנין שאם אמר לו אביו "היטמא" או שאמר לו "אל תחזיר" שלא ישמע לו? שנאמר "איש אמו ואביו תיראו ואת שבתותי תשמרו אני ד' - כולכם חייבין בכבודי."

How do we know that if one's father says to him, "Become impure [to retrieve a lost object]" or "Do not return [a lost object]", one should not listen? Leviticus 19:3 says, "You should revere your mother and father, and you shall guard my Sabbaths; I am G-d." All of you are obligated in My honour.

Question 1: Prevention: My client is planning to defraud investors without my help. What are my responsibilities?

13. LSO, Rules of Professional Conduct (2014), Commentary to Rule 3.3-1

A lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

14. 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.

15. LSO, Rules of Professional Conduct (2014), Rule 5.1-2(b)

In acting as an advocate, the lawyer shall neither assist nor permit dishonest or dishonourable conduct.

16. Julie Sobowale, *In-house whistleblowing: Where do your loyalties lie?*, CBA National Dec. '15

The financial scandals of the 2000s, beginning with Sharon Watkins blowing the whistle on Enron, put the issue in the public eye. In the aftermath of the scandals, major reforms were made in financial reporting. As part of the reforms, the American Bar Association (ABA) amended its rules to include third party disclosure. Model Rule 1.6(b)(3) permits lawyers to disclose information "to prevent, mitigate or rectify substantial injury to the financial interests or property of another." Model Rule 1.13 also allows lawyers to disclose information to third parties "to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization."

So far Canada has not followed the U.S. model. The Federation of Law Societies of Canada (FLSC) reviewed the new ABA rules but decided not to move forward in amending the Model Code of Professional Conduct. In 2010, the Advisory Committee on the Future Harm Exception recommended the rules be amended to include disclosure based on imminent risk of "substantial financial injury."

"Following consultation with the law societies, it was agreed that more discussion of the proposed future financial harm rule was needed," says Tom G. Conway, President of the FLSC. "In March 2011, the matter was referred to the Federation's Standing Committee on the Model Code of Professional Conduct. The issue is on the committee's 'issues list' and will be considered in due course."

Law societies have also looked at the issue. In the Law Society of Upper Canada (LSUC) Rules of Professional Conduct, the commentary under Rule 3.3, Justified or Permitted Disclosure, makes it clear that even with imminent financial harm, lawyers are not permitted to disclose to third parties. In the commentary, the rules state that while lawyers should not knowingly encourage or participate in any wrongdoing, "it does not follow that the lawyer should disclose to the appropriate authorities an employer's or client's proposed misconduct."

17. Eric B. Appleby, *Legal Research Guide to Ethics*, Chapter 3

The lawyer is an officer of the courts. A lawyer when acting for a client has a prior and perpetual retainer on behalf of truth and justice; and there is no Crown or other licence which in any case, or for any party or purpose, can discharge him from that primary and paramount retainer.

18. L. MacKinnon, *Whistleblower Edgar Schmidt loses Charter suit against his former department*, iPolitics Mar '16
Former Department of Justice lawyer Edgar Schmidt has lost his bid to sue the ministry that once employed him for failing to report to Parliament whether new laws might be so inconsistent with the Charter of Rights and Freedoms they would trigger constitutional challenges.

Under a 1985 law, the justice minister has a duty to inform the House of Commons if any draft or proposed bill violates guaranteed rights. The law might as well not exist: no justice minister has reported a proposed government bill for its possible unconstitutionality in 31 years.

The Federal Court of Canada ruled against Schmidt Tuesday, saying it was satisfied with the government's standard of "credible argument" — that a proposed bill need be reported only if no credible argument can be made to support it.

19. Affidavit of M. Deborah McNair, Court file No. T-2225-12

38. If a legislative drafter cannot remain loyal to the client, and respect the instructions of public servants and public officials, the ultimate remedy is for counsel to withdraw from the employment relationship and resign. Where there is disagreement with the client, like other public servants or government counsel, legislative drafters have three options. First, they can strongly present their views and put forward other options for consideration. Second, if this does not resolve the matter to the employee's satisfaction, the next step is for the employee to ask to be assigned to different tasks. Lastly, in extreme cases, where these options have not worked, the employee can resign.

39. That is the only accepted ethical course of action for a counsel, as appears both from section 3.7 of the *Code of Professional Conduct* of the Manitoba Law Society, to which the plaintiff belongs, and from Chapter XII of the *Code of Professional Conduct* adopted by the Canadian Bar Association in 2009.

20. Bill Curry, *Judge raps Justice officials for treatment of whistle-blower*, Globe and Mail Jan. 16 '13

Federal Court judge Simon Noël heard from the two sides in the Schmidt case Tuesday and criticized Ottawa's swift response to the lawyer, who considers himself a whistle-blower acting in the public interest.

"The day after the filing of this statement [by Mr. Schmidt], bang: 'You're suspended,' " said Justice Noël, pointing out to federal lawyer Alain Préfontaine that the government has taken away Mr. Schmidt's income and reputation. "It's unbelievable ... Your client has done everything it can to kill this thing. The court doesn't like that ... We see that in different countries and we don't like it ... Canada is still a democracy."

21. 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? Leviticus 19:16 says: You shall not stand by as the blood of your peer is shed.

22. Rabbi Ovadia Yosef (20th century Egypt, Israel), Yechaveh Daat 4:60

יש לפרש גם כן כוונת הפסוק, "לא תלך רכיל בעמך, לא תעמוד על דם רעך", שאף על פי שאסור לך להיות רכיל, ולגלות סוד חבירך... מכל מקום "לא תעמוד על דם רעך", ועליך להודיע לחבירך כדי שישמר מנזק וסכנה.

One should also explain thus the meaning of the verse, "Do not go as a peddler among your nation, do not stand by as the blood of your peer is shed." Even though you may not be a peddler and reveal your peer's secret... still, "Do not stand by as the blood of your peer is shed," and you must inform your peer so that he might avoid harm and danger.

Default Credibility: I was approached by a client to use my trust fund. May I assume honesty?

23. LSO, Rules of Professional Conduct (2014), Rule 3.2-7.1,2

3.2-7.1 A lawyer shall not act or do anything or omit to do anything in circumstances where he or she ought to know that, by acting, doing the thing or omitting to do the thing, he or she is being used by a client, by a person associated with a client or by any other person to facilitate dishonesty, fraud, crime or illegal conduct.

3.2-7.2 When retained by a client, a lawyer shall make reasonable efforts to ascertain the purpose and objectives of the retainer and to obtain information about the client necessary to fulfill this obligation.

24. Scott v. Valentine, 2012 ONSC 6349, Paragraph 35

I do agree with Mr. Sherkin's position is that there is at least an argument to be made that the Defendants breached the Rules. That said, the breach, if one can be shown, may well go to whether the conduct of the Defendants breached their professional responsibilities, but in and of itself such a breach does not generate proximity where none exists.

25. Talmud, Avodah Zarah 39b

אין לוקחין ימ"ח מח"ג בסוריא - לא יין ולא מוריים ולא חלב, ולא מלה סלקונדרית ולא חילתית ולא גבינה - אלא מן המומחה.

One may not purchase wine, muries, milk, Salkondri salt, *chiltit* or cheese in Suria, other than from a certified person.

26. Rabbi Moses Maimonides, Mishneh Torah, Laws of Forbidden Foods 11:26

המתארח אצל בעל הבית בכל מקום ובכל זמן והביא לו יין או בשר או גבינה וחתיכת דג הרי זה מותר ואינו צריך לשאול עליו אף על פי שאינו מכירו אלא יודע שהוא יהודי בלבד. ואם הוחזק שאינו כשר ולא מדקדק בדברים אלו אסור להתארח אצלו, ואם עבר ונתארח אצלו אינו אוכל בשר ולא שותה יין על פיו עד שיעיד לו אדם כשר עליהם.

One who stays in someone's home, anywhere and at any time, may eat the wine, meat, cheese or fish which the host provides, without inquiring after him. This is true even where one does not know him, but knows only that he is Jewish. However, where he is known not to be "kosher" and not to be careful in these matters, one may not stay with him. One who transgresses and stays with him may not eat meat or drink wine on his word, without the testimony of one who is "kosher".

27. Managing other people's money <https://www.yutorah.org/lectures/lecture.cfm/900523>

Livelihood: Am I obligated to leave my job rather than violate my duties?

28. LSO, Rules of Professional Conduct (2014), Rule 3.7-7

3.7-7 Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if (a) discharged by the client; (b) the client's instructions require the lawyer to act contrary these rules or by-laws under the *Law Society Act*; (c) the lawyer is not competent to continue to handle the matter.

29. Talmud, Sotah 41b

מותר להחניף לרשעים בעולם הזה שנאמר +ישעיהו לב+ לא יקרא עוד לנבל נדיב ולכילי לא יאמר שוע מכלל דבעולם הזה שרי ר' שמעון בן לקיש אמר מהכא +בראשית לג+ כראות פני אלקים ותרצני

One may flatter the wicked in this world. Isaiah 32:5 says, "[In the future] the repellent person will not be called generous, and the stingy person will not be called giving" – but in this world, one may do so. Rabbi Shimon ben Lakish cited Genesis 33:10, "Seeing you is like seeing the face of Gd, and you have accepted me."

30. Rabbi Eliezer of Metz (12th century France), Yereim 248

למדנו שמחניפין לרשעים מחמת פחד שרי אבל שלא מחמת פחד נקרא חנף...

We have learned that one may flatter the wicked due to fear, but otherwise it is [prohibited as] flattery...

31. Rabbi Moses Isserles, Shulchan Aruch Yoreh Deah 157:1

מכל מקום בדבר שיש חשש סכנה אין צריך להוציא ממונו על זה

Still, where there is concern for danger one need not spend for the purpose of rebuke.

32. Rabbi Abraham Tzvi Hirsch Eisenstadt (19th century Poland), Pitchei Teshuvah, Yoreh Deah 334:19

עיינ בס' בכור שור... דדברי מהרי"ו לא נאמרו כ"א בברי היזיקא ואלת"ה בטלת לא תגורו מעיקרא דודאי לא נאמר לא תגורו כ"א בדאיכא מקום לירא

See *Bechor Shor's* statement... that Rabbi Weil only said this regarding clear danger. Otherwise, you would eliminate the biblical warning, "Do not fear any man." "Do not fear" must refer to a case where there is reason to fear!

33. More on Whistleblowing and Risk: Rabbi Dr. Aaron Levine, *Moral Issues of the Marketplace in Jewish Law*