

## The Ethics of Whistleblowing

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### 1. *Challenger's Whistle-Blower: Hero And Outcast*, The Scientist, Jan. 20 1990

When the shuttle Challenger blew up, the explosion lit a fuse in Roger Boisjoly's conscience. A structural engineer for Morton Thiokol Inc., the firm that later bore blame for the disaster, Boisjoly had argued against the launch the night before and, like the rest of the nation, watched in horror when the shuttle blew up. "I left the room and went directly to my office where I remained in shock the rest of the day," he recalls about that terrible morning four years ago this week. During the next eight months, Boisjoly would become both a national hero and a professional pariah...

### 2. Proposed law before the Spanish Parliament, June 14, 2018, Proposed law against corruption and protection of whistleblowers, Title 2, Article 6 (translated via Google Translate)

*Se admitirán todas aquellas denuncias que presenten una mínima apariencia de veracidad. No se admitirán a trámite las denuncias anónimas ni tampoco aquellas que no puedan sostenerse en documentos o informaciones contrastadas.* All complaints that show a minimum appearance of truth will be admitted. Anonymous complaints will not be processed, nor will those that cannot be supported by documents or contrasted information.

### Whistleblowing: Definition and History

#### 3. The CSA Group, *Whistleblowing systems – A guide* 0.3 Terms and Concepts

(b) The types of misconduct reported may range from ineptitude to mismanagement to illegality, unethical conduct, or any action that may result in harm to the organization, the public interest, or health, safety, and the environment, whether intentional or not.

(c) Whistleblowing means reporting concerns to people or entities who are believed to be in a position to take action...

(e) Disclosures are not the same as complaints. Whistleblowing is about trying to protect others from harm including harm to the organization, workforce, public, or environment. An individual who is complaining about personal matters, however legitimate, is not blowing the whistle.

#### 4. Canadians for Accountability, *About Accountability and Whistleblowing*

Whistleblowing was defined in 1972 by Ralph Nader as "an act of a man or a woman who, believing that the public interest overrides the interest of the organization he serves, publicly blows the whistle if the organization is involved in corrupt, illegal, fraudulent or harmful activity."

The definition has undergone some debate since then, but whistleblowing is now generally accepted as an act by a person or group to disclose to authorities or to the public acts of significant wrongdoing. The wrongdoing may relate to a violation of the law, unethical activities, health and safety violations or other matters which pose a risk or danger to public health, safety or interests.

#### 5. Prof. John P. McEvoy, *Whistleblowing – A Comparative Study*, Chap. 2

In the labour and employment law context, a whistleblower is an employee who discloses otherwise confidential information gained in the course of employment. The disclosed information may relate to "illegal, immoral or illegitimate practices" undertaken by or on behalf of the employer such that its disclosure is detrimental to the employer's interests. An employee seeking corrective action typically makes the disclosure "to persons or organizations that may be able to affect action" but disclosures are also made to the public at large through news and social media. Such disclosures risk the business reputation of the employer and may expose the employer to prosecution.

#### 6. Prof. Richard De George, cited in Rabbi Dr. Aaron Levine, *Moral Issues of the Marketplace in Jewish Law* pg. 426

The employee must have good reasons to believe that by going public the necessary changes will be brought about.

#### 7. Sandy Boucher, *Whistleblowing Systems*

Presentation [https://www.youtube.com/watch?v=9U8ry95S\\_QY](https://www.youtube.com/watch?v=9U8ry95S_QY)

Slides <https://pecb.com/conferences/previous-events/pecb-insights-conference-2017-2/presentations/>

8. T. Rashi, H. Rosenberg; *Shaming in Judaism: Past, Present, Future*, Journal of Religion and Society 19 (2017)  
In cases where communal authority did not provide the tools for the rabbinical court to punish the transgressor or when, for whatever reason, the leaders did not want to impose such harsh punishments as excommunication, we find a further practice of public shaming, particularly within the ultra-Orthodox community, that involves a print communications medium: the *pashkevil* (wall poster). Shaming via *pashkevilim* was carried out in the spirit of the edict, "Publicize the flatterers before a defamation of Gd's name" (Babylonian Talmud, Yoma 86b). The stress here is on sins committed secretly or on people who pretend to be righteous, and the disclosure is designed to warn the public about their actions. The Yiddish word "*pashkevil*" derives from the name of a citizen of Rome by the name of Pasquino, who used to hang satires and critical comments about the pope on the pedestal of a headless statue. His name was eventually given to the statue and then to the square where the statue stood (Piazza Pasquinate); the initiative taken by one individual evolved into a common practice whereby citizens hung anonymous vilifying signs around the city. The phenomenon spread throughout Western Europe during the sixteenth century as this channel began to accompany religious and social struggles.

9. Rabbi Yisrael Meir Kagan (19<sup>th</sup>-20<sup>th</sup> century Poland), *Shemirat haLashon, Shaar haZechirah* 4  
ויש אומרים אף נובה ואין קולו נשמע, כי בהלשון הרע שלו הוא מזיקו בסתר, ובפרט אותן כתבי עמל (שקורין פאסקווילין) שעליהם נאמר ארור מכה רעהו בסתר.

And some say [one who speaks harmfully is like one who has been bitten by a rabid dog in that] he also barks inaudibly, for with his harmful speech he causes harm in secret. And especially those who write *amal* (called *pashkevilin*), regarding whom it says, "Cursed is the one who strikes his fellow in secret."

#### The Calculation

10. Chartered Professional Accountants of Ontario Act, 2017, S.O. 2017, c.8, Sched. 3  
60 (1) Every person engaged in the administration of this Act and the by-laws shall preserve secrecy respecting information or material that comes to his or her knowledge or possession in the course of his or her duties under this Act, a predecessor Act or the *Public Accounting Act, 2004*, and shall not disclose any such information or material to any person except...

(e) if there are reasonable grounds for believing that there is a significant risk of harm to any person if the disclosure is not made and that making the disclosure is likely to reduce the risk...

11. Jim Middlemiss, *Blowing the Whistle on Fraud*, Canadian Lawyer Jan. 27 '14  
Most tips come from California, followed by New York and Florida. The SEC received 62 tips from Canadians, Gray says, making it the second most active country behind the U.K. That was up from 46 Canadian tips last year. But it's not just Dodd-Frank and Sarbanes that can trip Canadian companies up when it comes to whistleblowers. Gray notes there is also the U.S. False Claims Act, which allows whistleblowers to file what's called a qui tam lawsuit against a party that has financially defrauded the federal government. "It can actually reward hefty payments to whistleblowers and impose pretty hefty fines for companies that are offside," Gray says.

12. CPA of Ontario, *CPA Code of Professional Conduct*, Section 202, Guidance 5  
Members and firms have duties to those to whom they provide professional services that arise from the nature of the relationships with the recipients of the services. Members and firms have a professional duty to act with integrity and due care and a contractual duty to provide services as defined by the terms of their engagement or employment. In certain cases, the relationship between a member or firm and those to whom they provide professional services could also be one that the courts describe as a fiduciary relationship that gives rise to fiduciary duties. Depending on the particular facts and circumstances, members who are employees may have a fiduciary relationship with their employers.

13. Rabbi Dr. Aaron Levine, *Moral Issues of the Marketplace in Jewish Law* pg. 426  
Nor is it clear that asking employees to act in that capacity would make for a productive corporate atmosphere. Such a requirement would turn a normal society into a police state or cultivate a police state mentality among its citizens.

#### 14. Talmud, Sanhedrin 73a

מניין לרואה את חברו 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 your peer's blood is shed.

#### 15. Rabbi Moses Maimonides (12th century Egypt), Book of Mitzvot, Prohibition 297

...כשנראהו בסכנת המות או ההפסד ויהיה לנו יכולת להצילו.  
...when we see he is in danger of death or loss and we are capable of rescue.

#### 16. Talmud, Arachin 16b

תנו רבנן: (ויקרא י"ט) לא תשנא את אחיך בלבבך - יכול לא יכנו, לא יסטרנו, ולא יקללנו? ת"ל: בלבבך, שנאה שבלב הכתוב מדבר. מנין לרואה בחבירו דבר מגונה שחייב להוכיחו? שנאמר: (ויקרא י"ט) הוכח תוכיח. הוכיחו ולא קבל מנין שיהזור ויוכיחנו? תלמוד לומר: תוכיח, מכל מקום. יכול אפי' משתנים פניו? ת"ל: לא תשא עליו חטא...  
עד היכן תוכחה? רב אמר: עד הכאה, ושמואל אמר: עד קללה, ורבי יוחנן אמר: עד נזיפה. כתנאי, רבי אליעזר אומר: עד הכאה, רבי יהושע אומר: עד קללה, בן עזאי אומר: עד נזיפה.

Our sages taught: 'Do not hate your brother in your heart' – Does this mean that one should not strike him, slap him or curse [alt. obstruct] him? No, for it states, 'in your heart.' The Torah only prohibits enmity in the heart. How do we know that one who sees his friend act improperly should rebuke him? It is written, 'Rebuke your friend.' If he rebuked him and it was not received, how do we know that he should rebuke him again? It is written, 'You shall rebuke [a second time]' – in any case. Should he do it until his friend's face changes color [in shame]? No; it is written, 'And do not bear sin for him.'...

How far does one go to rebuke? Rav said, "Until he hits." Shemuel said, "Until he curses." Rabbi Yochanan said, "Until he is angered." This is like a debate among sages of the mishnaic era: Rabbi Eliezer said, "Until he hits." Rabbi Yehoshua said, "Until he curses." Ben Azzai said, "Until he is angered."

#### 17. Rabbeinu Asher (13<sup>th</sup>-14<sup>th</sup> 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."

#### 18. 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.

#### 19. Talmud, Yoma 4b

מניין לאומר דבר לחבירו שהוא בבל יאמר לו 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."

#### 20. Rabbi Aharon haLevi (13<sup>th</sup> 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.

#### 21. Talmud, Pesachim 113b

כי הא דטוביה חטא ואתא זיגוד לחודיה ואסהיד ביה קמיה דרב פפא, נגדיה לזיגוד. אמר ליה, "טוביה חטא וזיגוד מינגד?" אמר ליה, "אין, דכתיב 'לא יקום עד אחד באיש' - ואת לחודך אסהדת ביה, שם רע בעלמא קא מפקת ביה."

As in the case when Tuviah sinned, and Zigud came alone to testify against him before Rav Pappa. He whipped Zigud. He said, "Tuviah sinned and Zigud is whipped?!" He replied, "Yes; the Torah says, 'One witness shall not stand against someone' and you testified alone against him. You have only given him a bad name."

22. Rabbi Moshe Feinstein (20<sup>th</sup> century USA), Igrot Moshe Yoreh Deah 4:30:1

אתרין מה שכתבתי בח"ב דיו"ד סימן ק"ג דבר מכוער הוא שהמלמד יאמר להתלמידים שאם יש מי שיודע מי עשה דבר הגנאי יודיע לו, וגורם שיקילו בלה"ר, שהוקשה לכתר"ה ודעימיה דהא הוא משום שהרב סובר שישפיע על התלמיד שלא יעשה עוד דבר הגנאי. וגם יתכן שאם התלמיד ידע שהרב יודע במעשיו ימנע מעשות יותר... הנה כתבתי שם דהיתר לכוונת תוכחה לשמה, כעובדא דרבי יוחנן בן נורי... הוא שייך דווקא כשמתעורר מעצמו לספר להרב כדי שיוכיחו, אבל לא שהרב יגזור על תלמידיו שיספרו לו אם יודעים דבר מגונה על אחד... כשמצווה להם לגלות הרי הוא כמיקל להו איסור לה"ר החמור מאוד...

I will explain what I wrote in Yoreh Deah 2:103, that it is ugly for a teacher to tell students that if someone knows who did the disgraceful deed, he should inform him, causing them to take *lashon hara* lightly. Your honour and those with you were troubled, for the teacher seeks to influence the student not to repeat the disgraceful deed. Further, if the student will know that the teacher knows his deeds, he will refrain from doing it again... I wrote there that the permission for the sake of altruistic rebuke, like the case of Rabbi Yochanan ben Nuri (Arachin 16b)... is only relevant where [the informant] arouses himself to tell the teacher so that he might rebuke, but not that the teacher decree upon his students to tell him something negative about one of them... When he instructs them to reveal it, it is as though he makes the most severe prohibition against *lashon hara* light for them...

23. Talmud, Bava Metzia 58b

כל היורדין לגיהנם עולים חוץ משלשה שיורדין ואין עולין ואלו הן הבא על אשת איש והמלכין פני חבירו ברבים והמכנה שם רע לחבירו מכנה היינו מלכין אף על גב דדש ביה בשמיה

All who descend to Gehennom also ascend, except three: One who lives with another's wife, one who embarrasses another in public, and one who creates a negative nickname for another.

24. Rabbi Moses Maimonides (12<sup>th</sup> century Egypt), Mishneh Torah, Laws of One Who Wounds and Damages 5:15

המבייש את חבירו בדברים או שרקק על בגדיו פטור מן התשלומין, ויש לבית דין לגדור בדבר בכל מקום ובכל זמן כמו שיראו.

One who embarrasses another with words, or by spitting on his clothes, is exempt from payment – but the court should rein in the matter everywhere and at all times, as they see fit.

25. Rabbi Moses Maimonides (12<sup>th</sup> century Egypt), Mishneh Torah, Laws of Personalities 6:8

צריך אדם להזהר שלא לבייש חבירו ברבים בין קטן בין גדול, ולא יקרא לו בשם שהוא בוש ממנו, ולא יספר לפניו דבר שהוא בוש ממנו. במה דברים אמורים בדברים שבין אדם לחבירו, אבל בדברי שמים אם לא חזר בו בסתר מכלימין אותו ברבים ומפרסמים חטאו ומחרפים אותו בפניו ומבזין ומקללין אותו עד שיחזור למוטב כמו שעשו כל הנביאים בישראל.

One must be careful not to embarrass another publicly, whether small or great, and not to call him a name that embarrasses him, and not say anything before him that embarrasses him. When is this true? In social matters, but in heavenly matters, if he does not repent after private rebuke then one shames him publicly, publicizing his sin and scorning him to his face, mocking him and cursing him until he returns to a proper path, as the prophets of Israel did.

Practical Guidance

26. Prof. John P. McEvoy, *Whistleblowing – A Comparative Study*, Chap. 2

Another now classic arbitral award, this time in the public sector, applied what is known as the "up the ladder" approach. In *Re Ministry of Attorney General, Corrections Branch and British Columbia Government Employees' Union* (1981), two senior corrections officers grieved the termination of their employment as being without just cause. The two employees expressed their personal concerns about conditions in the provincial penal institutions during radio, television and newspaper interviews and specifically criticized workplace policies of their employer. Their purpose, as presented by them, was to promote change for the better... After reviewing relevant arbitral decisions, the arbitrator addressed the duty of loyalty (fidelity): *With respect to public criticisms of the employer, the duty of fidelity does not impose an absolute "gag rule" against an employee making any public statements that might be critical of his employer... However, the duty of fidelity does require the employee to exhaust internal "whistle-blowing" mechanisms before "going public". These internal mechanisms are designed to ensure that the employer's reputation is not damaged by unwarranted attacks based on inaccurate information. Internal investigation provides a sound method of applying the expertise and experience of many individuals to all problems that may only concern one employee. Only when these internal mechanisms prove fruitless may an employee engage in public criticism of his employer without violating his duty of fidelity.* [emphasis added] It is this "up the ladder" approach which informs Canadian law on whistleblower protection in the labour and employment context.

27. CPA of Ontario, *CPA Code of Professional Conduct*, Preamble

If the matter remains unresolved, the member should consult with other appropriate persons within the firm or employing organization for help in obtaining resolution.

Where a matter involves a conflict with, or within, a firm or an employing organization, a member should also consider consulting with those charged with governance of the organization, such as the board of directors or the audit committee...

If, after exhausting all relevant possibilities, the ethical conflict remains unresolved, the member or firm should, where ethically possible, refuse to remain associated with the matter creating the conflict...

28. CPA of Ontario, *CPA Code of Professional Conduct*, Section 206, Guidance 5-7

5) A member who participates in an engagement to provide assurance on the financial statements of an entity and who believes the financial statements of the entity contain a misstatement should communicate that belief to the person responsible for the assurance engagement. If, after consultation, the member continues to believe that the financial statements contain a misstatement, the member should communicate that belief to one of the firm's senior partners...

6) Before communicating with one of the firm's senior partners, the member referred to in Paragraph 5, should consider:

- (a) whether the concern results in a material misstatement of the financial statements;
- (b) whether the member possesses sufficient expertise and knowledge of the circumstances; and
- (c) whether the member should first discuss the matter with another person in the firm.

7) A member who is responsible for issuing an assurance report on an entity's financial statements and who believes that the financial statements prepared by the entity's management contain a misstatement should refer to the guidance contained in the *CPA Canada Handbook – Assurance* and:

- take those steps that are necessary to ensure that the financial statements are not misleading; or
- issue a report with an appropriate reservation; or
- resign from the engagement in accordance with appropriate statutory requirements.

29. CPA Ontario, The Case of the Whistleblowing CPA

<https://media.cpaontario.ca/stewardship-of-the-profession/pdfs/1007page18368.pdf>

30. Rabbi Ovadia Yosef (20<sup>th</sup> 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.

31. Rabbi Yisrael Meir Kagan (19<sup>th</sup>-20<sup>th</sup> century Poland), *Chafetz Chaim*, *Lashon HaRa* 10:2

- Only report personal experience or a verified account;
- Don't jump to conclusions about what happened, and what laws were broken;
- See if there is another way to avoid harm besides public disclosure;
- Stick to the facts; do not magnify the crime beyond its true nature and circumstances;
- There must be no personal agenda, only the altruistic goal of protecting the community and righting the wrong;
- Make sure the harm you cause to the subject is commensurate with the wrongdoing

Anonymous Whistleblowing

32. Prof. John P. McEvoy, *Whistleblowing – A Comparative Study*, Chap. 2

Common law and civil law principles and the federal and provincial statutory whistleblower protection legislation are silent on the subject of the anonymous whistleblower. Doubtless, this is because such legislation is structured in a manner to "manage" the disclosure of information about wrongdoing through internal procedures. An anonymous disclosure of information is inconsistent with an employee's duty of loyalty to the employer...

Critically, anonymous disclosure of wrongdoing without first following internal procedures intended to bring the information to the employer's attention effectively deprives the employer an opportunity to take corrective action independent of public pressure to do so.

33. The CSA Group, *Whistleblowing systems – A guide* 3.10 Confidentiality and anonymity of reports

Anonymous reports can create challenges in communicating with, or seeking additional information from, a whistleblower. To mitigate this design issue, a secure system can be established that allows communication between the anonymous whistleblower and the person receiving the report. Whistleblowing policies can make clear that anonymous reports are accepted, but ongoing communication between the whistleblower and the person receiving the report is often helpful to the investigation.

34. The Changing Workplaces Review: An Agenda for Workplace Rights (May '17), pg. 107

[A]nonymous information may lead to an inspection under the Ministry's proactive enforcement program, but it does not serve as the basis for a complaint that may be sent for investigation. This seems a reasonable way to deal with complaints in circumstances where the identity of the complainant is not known to the Ministry staff who, in cases of an anonymous complaint, are not in a position to ask questions of the complainant in order to obtain additional relevant information, to assess the validity of or motive behind such a complaint, including whether the complaint is vexatious. Ministry staff will have to make a judgment call on whether to initiate an inspection based on a number of factors including, but not limited to, the specificity of the factual allegations and the sector. This seems to be a reasonable approach.