

The duty to avoid participation in unethical conduct

1. LSUC, 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.

2. Rabbi Moses Maimonides, Mishneh Torah, Laws of the Mourner 14:1

מצות עשה של דבריהם לבקר חולים, ולנחם אבלים, ולהוציא המת, ולהכניס הכלה, וללוות האורחים, ולהתעסק בכל צרכי הקבורה... אף על פי שכל מצות אלו מדבריהם הרי הן בכלל ואהבת לרעך כמוך...

There is a rabbinic obligation to examine the sick, to comfort mourners, to bring out the dead, to bring in the bride, to escort guests, to be involved in all burial needs... Even though all of these obligations are rabbinic, they are included in "And you shall love your neighbour as yourself (Leviticus 19:18)"...

3. LSUC, 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.

4. 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.

5. Rabbi Moses Maimonides, Mishneh Torah, Laws of Robbery 5:1

אסור לקנות דבר הגזול מן הגזול... שכל העושה דברים אלו וכיוצא בהן מחזק ידי עוברי עבירה ועובר על ולפני עור לא תתן מכשול  
One may not purchase stolen goods from a thief... Doing such things strengthens the hands of sinners and violates "Do not put a stumbling block before the blind. (Leviticus 19:14)"

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 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 (13<sup>th</sup> century France/Germany), 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 LSUC Gazette 119 at 121.

11. 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

12. LSUC, 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.

13. LSUC, 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.

14. LSUC, 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.

15. 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.

16. Talmud, Sanhedrin 73a

מניין לרואה את חבירו שהוא טובע בנהר או היה 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 the blood of your peer.

#### Question 2: Default Credibility

17. LSUC, 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.

18. 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. It strikes me that the Defendants may not have taken all the care that they should have to avoid being duped by an apparently unscrupulous client. Like Grace J. in *Bruno Appliance and Furniture* and Molloy J. in *Brunt v. Yen* I find the actions – or inaction – of the Defendants troubling, but there is no basis to find that they owed a duty of care in these circumstances. I add that Scott's failure to properly safeguard his own interests provides no excuse for the Defendants.

19. Talmud, Avodah Zarah 39b

אין לוקחין ימ"ח מה"ג בסוריא - לא יין ולא מורייס 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.

20. 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 וחתוכת 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".

Question 3: Livelihood

21. LSUC, 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.

22. 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."

23. Rabbi Eliezer of Metz (12<sup>th</sup> 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...

24. 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.

25. Rabbi Abraham Tzvi Hirsch Eisenstadt (19<sup>th</sup> century Poland), Pitchei Teshuvah, Yoreh Deah 334:19

עיינן בס' בכור שור... דברי 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!