



1. LSUC, Rules of Professional Conduct (2014), Rule 1.1-1

"conflict of interest" means the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer.

2. Talmud, Ketuvot 105b

אמר רבא: מאי טעמא דשוחדא? כיון דקביל ליה שוחדא מיניה, איקרבא ליה דעתיה לגביה והוי כגופיה, ואין אדם רואה חובה לעצמו. מאי שוחד? שהוא חד.

Rava said: Why is a bribe forbidden? Once one accepts a bribe from him, one's mind becomes close to him and he is like his person, and one cannot see guilt for himself. What is *shochad*? *Shehu chad* ["it is one" or "it is sharp"].

3. One vignette, three questions

While attending the same university between 2003 and 2006, Jonathan and Sara were part of a student Facebook group, occasionally commenting on each other's status updates and uploaded photographs. Jonathan left Facebook in 2006, and has neither seen nor communicated with Sara since.

- If a business wishes to retain Jonathan as legal counsel in 2015 for a suit against a business owned by Sara, does Jonathan face a conflict of interest?
- If this is considered a conflict of interest, what can Jonathan do in order to represent the business?
- If this is not a conflict of interest, is Jonathan required to inform the business of his connection to Sara at all?

Philosophy

4. MacDonald estate v. Martin 1990 3 SCR 1235

In determining whether a disqualifying conflict of interest exists, the Court is concerned with three competing values: (1) the concern to maintain the high standards of the legal profession and the integrity of our system of justice; (2) the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause; and (3) the desirability of permitting reasonable mobility in the legal profession.

5. LSUC, Rules of Professional Conduct (2014), Commentary [5] to Rule 3.4-1

The value of an independent bar is diminished unless the lawyer is free from conflicts of interest. The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Aspects of the duty of loyalty owed to a current client are the duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty to avoid conflicting interests. Current clients must be assured of the lawyer's undivided loyalty, free from any material impairment of the lawyer and client relationship.

6. Midrash, Sifra, Kedoshim 2

אל תאמר לו מכור את שדך, וקח לך חמור, ואת עוקף עליו ונטלה ממנו

Do not tell him, "Sell your field and buy a donkey," while trying to get his field from him.

7. Rabbi Moshe Isserles (16th century Poland), Code of Jewish Law, Choshen Mishpat 290:8

י"א כמו שהאפוטרופס יכול ליתנם לאחרים, כך יכול לקבל המעות לעצמו, ובלבד שיעשה בבית דין, משום לזות שפתים.

Some say that just as a guardian may invest with others, so he may accept it for his own ventures – so long as the rabbinical court oversees it, due to concern for gossip.

8. Talmud, Sanhedrin 18b

לא מלך וכהן גדול בעיבור שנה; מלך - משום אפסניא, כהן גדול - משום צינה.

Neither king nor high priest may participate in intercalation. The king due to his forces, the high priest due to cold.

9. Rabbi Avraham Yeshayah Karelitz (20th century Israel), Emunah uBitachon 3:30

הנהגה אין הזהרת השוחד מכלל המשפטים אלא מכלל החקים, שהרי לא אסרה התורה הוראה לעצמו ואדם רואה טריפה לעצמו, אף אם הוא דל וכל חייו תלויים בו.

The warning against bribes is not rational law, but engraved statute, for the Torah did not prohibit ruling for one's self, and one may examine the kashrut of his own slaughter, even if he is indigent and his entire life depends on it.

10. Rabbi Moshe Isserles (16th century Poland), Code of Jewish Law, Choshen Mishpat 163:1

כל צרכי צבור שאינן יכולין להשוות עצמן, יש להושיב כל בעלי בתים הנותנים מס ויקבלו עליהם שכל אחד יאמר דעתו לשם שמים, וילכו אחר הרוב.

For any community matter on which they cannot find common ground, they should convene all taxpayers, and they should agree that each will voice his view altruistically, and they will follow the majority.

11. Rabbi Moshe Sofer (18th century Hungary), Chatam Sofer Choshen Mishpat 160

אנשי ק"ק פלוגית התאספו יחד בני הקהלה לקבל עליהם רב ומורה והי' מסכימי' על ד' רבנים ליתנום אל תוך הקלפי ומי שיעלה מהם ראשון יחזור וישאלו לאנשי הק"ק אם ירבו המתרצים בו על הממאני' הרי הוא הרב... והשלישי זכה עפ"י רוב הדיעות. אחר איזה ימים הי' קול המון סוער כי הרבה מאנשי הק"ק קבלו שוחד ממון מקרובי הרב ההוא כדי למנותו עליהם...

פשוט כביעי בכותחא דהקבלה ההיא שע"י אותו המינוי בטלה מעיקרא שהרי הי' צריכי' לומר דיעותם לשם שמים כמ"ש רמ"א...

The people of a certain town gathered to hire a rabbi and teacher, and they agreed regarding four rabbis to place their names into a box, and then to vote on each name as it would be withdrawn... The third candidate won the majority of votes. After several days, the masses raised a stormy voice, for many of the people had accepted monetary bribes from the relatives of that rabbi, to appoint him upon them... It is as obvious as the kashrut of an egg in yogurt that this vote is void, for they were required to voice their opinions altruistically, as recorded by Rama...

Question 1: Does Facebook friendship demonstrate/create a conflict of interest?

12. Committee for Justice and Liberty v. National Energy Board 1978 1 S.C.R. 369

The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "*what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude....*"

13. Wewaykum Indian Band v. Canada 2003 SCC 45

[I]t cannot be addressed through peremptory rules, and contrary to what was submitted during oral argument, there are no "textbook" instances. Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.

14. Canadian National Railway Co. v. McKercher LLP, 2013 SCC 39, [2013] 2 S.C.R. 649

The rule applies where the *immediate legal* interests of clients are *directly* adverse. It does not apply to condone tactical abuses. And it does not apply in circumstances where it is unreasonable to expect that the lawyer will not concurrently represent adverse parties in unrelated legal matters.

15. *Ethical Principles for Judges*, Section E: Conflicts of Interest, E6

Owning an insurance policy, having a bank account, using a credit card or owning shares in a corporation through a mutual fund would not, in normal circumstances give rise to conflict or the appearance of conflict unless the outcome of the proceedings before the judge could substantially affect such holdings. Nor should small holdings, such as those contemplated by the *de minimis* provisions of *ABA Model Code (1990)* give rise to any reasonable question concerning the judge's impartiality. However, if the holding is more substantial, the judge should not sit...

16. C.M.M. v. D.G.C., 2015 ONSC 1681

[N]otwithstanding the passage of some 16 years since the time of the brief solicitor-client relationship, the lack of recollection of that relationship by both D.G.C. and Sachs J. prior to the release of the Decision, and the independent concurrence of Frank J. and myself in the Decision authored by Sachs J., in my view prudence dictates that the Decision be set aside, this panel stand down from this matter, and a new panel be constituted by the Associate Chief Justice to re-hear the appeal.

17. LSUC, Rules of Professional Conduct (2014), Commentary [8] to Rule 3.4-1

(d) A lawyer has a sexual or close personal relationship with a client.

18. Heffel v. Registered Nurses Association 2015 NWTSC 16

My review of cases where the issue has been dealt with indicates that while Facebook "friendship" indicates that the parties know each other, it does not, without more, establish that there is a relationship which would result in a reasonable apprehension of bias according to the accepted test. More evidence is needed.

19. Exodus 23:8

וְשֹׁחֵד לֹא תִקַּח כִּי הַשֹּׁחֵד יְעוּר פְּקֻדִים וְיִסְלַף דְּבָרֵי צְדִיקִים:

And you shall not accept a bribe, for the bribe will blind the sighted, and warp the words of the righteous.

20. Rabbi Joseph Caro (16th century Israel), Code of Jewish Law, Choshen Mishpat 7:12

כל דבר שיש לדיין בו צד הנאה, אינו יכול לדון עליו.

Wherever a judge has potential benefit, he may not judge it.

21. Talmud, Ketuvot 105a

"ושוחד לא תקח" מה ת"ל? אם ללמד שלא לזכות את החייב ושלא לחייב את הזכאי, הרי כבר נאמר: "לא תטה משפט!" אלא אפי' לזכות את הזכאי ולחייב את החייב, אמרה תורה: "ושוחד לא תקח".

"And you shall not accept a bribe" – What does this teach? If this is to teach that he should not find the guilty innocent or the innocent guilty, the text already says, "You shall not warp the judgment"! Rather, even if [the payment] is encouragement to find the innocent innocent and the guilty guilty, the Torah says, "And you shall not accept a bribe."

22. Rabbi Joseph Caro (16th century Israel), Code of Jewish Law, Choshen Mishpat 7:7

אסור לאדם לדון למי שהוא אוהבו, אף על פי שאינו שושבינו ולא ריעו אשר כנפשו; ולא למי ששונאו, אף על פי שאינו אויב לו ולא מבקש רעתו, אלא צריך שיהיו השני בעלי דינים שוים בעיני הדיינים ובלבם

One may not judge a friend, even where he is not a *shushvin* or his closest friend, or one he hates, even where he is not an enemy and he does not seek to harm him. The litigants must be equal in the eyes and hearts of the judges.

23. Rabbi Joseph Caro (16th century Israel), Code of Jewish Law, Choshen Mishpat 33:1

כל הפסולים לדון פסולים להעיד, חוץ מאוהב ושונא שכשרים להעיד, אף על פי שפסולין לדון.

All who are disqualified to judge are disqualified to testify, other than a friend or enemy, who may testify even though they may not judge.

24. Rabbi Joshua Falk (17th century Poland), Sefer Meirat Einayim, Choshen Mishpat 33:1

דבעדות, המעשה כאשר היה לפניו הוא מעיד, ולא חשדינו ליה שישנה בכיוון בשביל אהבתו או שנאתו. משא"כ בדין שתולה בסברא, והמחשבה משתנה מחמת אהבתו או שנאתו אפילו בלא כונת רשע

In testimony, he testifies about what he saw, and we do not suspect that he would intentionally alter it for love or hatred. This is not so in judgment, which depends on logic; one's mind changes due to love or hatred, even without evil intent.

25. Talmud, Ketuvot 105b

היכי דמי שוחד דברים?

- כי הא דשמואל הוה עבר במברא, אתא ההוא גברא יהיב ליה ידיה, אמר ליה: מאי עבידתיך? אמר ליה: דינא אית לי, א"ל: פסילנא לך לדינא.
- אממר הוה יתיב וקא דאין דינא, פרח גדפא ארישיה, אתא ההוא גברא שקליה, א"ל: מאי עבידתיך? א"ל: דינא אית לי, אמר ליה: פסילנא לך לדינא.
- מר עוקבא הוה שדי רוקא קמיה, אתא ההוא גברא כסייה, א"ל: מאי עבידתיך? א"ל: דינא אית לי, א"ל: פסילנא לך לדינא.

What is a verbal bribe?

- Like when Shemuel crossed a river, and someone extended his hand to him. Shemuel asked, "Why are you here?" He replied, "I have litigation." Shemuel said, "I am disqualified to judge for you."
- Ameimar was judging, when a feather landed on his head. Someone removed it. Ameimar asked, "Why are you here?" He replied, "I have litigation." Ameimar said, "I am disqualified to judge for you."
- Mar Ukva spat before himself, and someone covered it. Mar Ukva asked, "Why are you here?" He replied, "I have litigation." Mar Ukva said, "I am disqualified to judge for you."

26. Talmud, Bava Batra 42b-43a

ומעידין [השותפין] זה לזה. אמאי? נוגעין בעדותן הן! הכא במאי עסקינן - דכתב ליה: דין ודברים אין לי על שדה זו...

"And [partners] may testify for each other." Why? They have an interest in their testimony! This is where they first write, "We have no claim in this [formerly jointly owned] field."

27. Tosafot (12th century France) to Bava Batra 43a וליסלקו

וא"ת, והא בעינן תחילתו וסופו בכשרות והכא הוי תחילה בפסול והוי כמו קרוב ונתרחק! ואור"י דלא שייך תחילתו בפסול הכא כיון שאין פסלות תלוי בגוף אלא בממון.

But don't we require that they be acceptable from beginning to end, and here the witnesses began in disqualification? They are like someone who was a relative, and is no longer related! R"i explained that the concern for having been disqualified at the outset is irrelevant here, for the disqualification is a function of money, not their person.

28. Talmud, Bava Batra 44b-45a

המוכר שדה לחבירו שלא באחריות אין מעיד לו עלי, מפני שמעמידה בפני בעל חובו. היכי דמי? אי דאית לי ארעא אחריתי, עלי דידי הדר! אי דלית ליה ארעא אחריתי, מאי נפקא לי מינה? לעולם דלית לי ארעא אחריתי, דאמר: לא ניחא דליהוי ליה רשע ולא ישלם...

"One who sells a field without responsibility [to replace it if creditors were to claim it] is not credible to testify regarding its ownership, because he wishes to use it for his creditor." But what is the case? If he owns other land, the creditor will take that! If he does not own other land, what's the difference for him [such that he would lie, if the creditor cannot take it]? This is where he owns no other land; he does not want to be, "A wicked person borrows and does not pay."

29. Tosafot (12th century France) to Bava Batra 45a מאי נ"מ

תימה, דנ"מ שיפטר אדם יתעשר! ושמה בשביל כן אין לפוסלו לעדות כיון דהשתא לא מרויח מידי.

But there is another ramification: he could become wealthy! Perhaps that would not disqualify him for testimony, since right now he would not profit [by lying].

Question 2: What should Jonathan do, if he wishes to represent this company?

30. LSUC, Rules of Professional Conduct (2014), Rule 3.4-2

A lawyer shall not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all clients and it is reasonable for the lawyer to conclude that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

(a) Express consent must be fully informed and voluntary after disclosure...

31. LSUC, Rules of Professional Conduct (2014), Commentary 0.1 to Rule 3.4-2

Rule 3.4-2 permits a client to accept the risk of material impairment of representation or loyalty. However, the lawyer would be unable to act where it is reasonable to conclude that representation or loyalty will be materially impaired even with client consent. Possible material impairment may be waived but actual material impairment cannot be waived.

32. Rabbi Joseph Caro (16th century Israel), Code of Jewish Law, Choshen Mishpat 22:1

מי שקבל עליו קרוב או פסול, בין להיותו דין בין להיותו עד עליו... אם קנו מידו על זה, אינו יכול לחזור בו.

One who accepts a relative or disqualified party as judge or witness... if there was a *kinyan*, he cannot recant.

Question 3: If this is not a conflict of interest, need Jonathan do anything at all?

33. Langstaff v. Marson, 2014 ONCA 510

[32] It has also been held that, in order to maintain public confidence in the administration of justice, the appearance of judicial impartiality is as important as the reality. In Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon, [1968] 3 All E.R. 304 (C.A.), at p. 310, Lord Denning M.R. stressed the importance of the appearance of judicial impartiality. He said...

Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand.

34. Talmud, Yevamot 24b

משנה: הנטען על השפחה ונשתחררה, או על העובדת כוכבים ונתגיירה - הרי זה לא יכנס, ואם כנס - אין מוציאין מידו...

גמ': הא גיורת מיהא הויא... אי הכי, לכתחלה נמי! משום דרב אסי, דאמר רב אסי: הסר ממך עקשות פה ולזות שפתים וגו'. (משלי ד: כד)

Mishnah: One who is suspected of illicit involvement with a non-Jew, who then converts, may not marry her. Having married her, though, we do not compel divorce.

Gemara: She is a valid convert... so why may he not marry her? As Rav Asi taught, citing Proverbs 4:24, "Remove from yourself the curved mouth, and distance gossip from yourself."