

On the Practice of Law According to Halacha

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I. Introduction

The practice of law as a profession has received little written scrutiny in the eyes of halacha, although it has been a profession practiced by observant Jews for many years. Much of what will be addressed in this article has not yet been discussed by the various halachic authorities in the United States.¹ This article tentatively concludes that many of the issues commonly thought to be

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1. The practice of secular law in Israel poses certain additional problems unique to Israel's status as the promised land. These issues will not be addressed in this article. For an overview of these issues, see Rabbi Waldenburg, *Tzitz Eliezer* 12:82 (and the authorities cited therein) and compare with Justice Elon, *Hamishpat Haivri*, (3d ed.) p. 1606-1613. So, too, this article does not address the role of lawyers in *beit din*. For an excellent analysis of that issue, see R. Nachmun Rackover, *Hashelichut v'ehaHarsha BaMishpat Haivri*, and Kirshenbaum, "Representation in Litigation in Jewish Law," *Dine Israel* 6:26 (1975).

This article also does not address a number of issues raised by all commercial interactions with the secular society at large, including lawyers. While undoubtedly important, these issues are not directly related to the practice of law.

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halachically problematic within the practice of law, in fact are not, and that the profession of law has many areas of practice within it that are permissible.

This article is divided into three parts, each of which addresses different issues within the practice of law. The first section addresses a number of systemic problems associated with the practice of law by Jews, the most significant of which is the prohibition of litigating in secular courts. The second section addresses some of the very common practices of lawyers which, while not a mandatory part of lawyers' professional lives, have become so common that lawyers must know the halachically permissible scope of such activity. The best example of this is assisting in interest-bearing transactions. The third section addresses some issues raised by the practice of criminal law by a Jew whether as a witness, prosecutor, or defense attorney.²

I. SYSTEMIC ISSUES

1. Litigation in Secular Courts

A. Rules

Although much has been written about the history of the

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2. An equally pressing issue is the general tension between the Sages' negative attitude toward adversarial systems of justice (and lawyers) and a Jew's practicing law in such a system. It is clear that the halacha did not encourage the use of lawyers within the system of *batei din* except in the most unusual instances, such as for a person who cannot formulate his own defense. However, this might not be relevant to a discussion of being a lawyer *within* an adversarial system of justice. Certainly halacha acknowledges that an adversarial system of justice is sometimes just and proper. As the Rashba in his responsa(2:393) stated "The propriety of advocating depends on the circumstances and upon one's inner intentions, since Jewish law, which is true, favors only that which is true and the judge is obligated to decide a matter in accordance with the truth." Thus, the repeated admonitions not to use *orchei din* (*Avot* 1:8; *Ketubot* 52b, 86a; *Rambam Hilchot Sanhedrin*, 22:10) can perhaps be limited to using *orchei din* within a system that does not require or desire them. Rabbi Dov Frimer has addressed this issue. See Frimer, "The Role of a Lawyer in Jewish Law," *1 J. Law & Religion* 297 (1983).

prohibition of litigating in secular court³ (in Hebrew, *arcaot*) and the critical role it played in continuing the development of Jewish law as a practical system of law, the scope of the prohibition can be summarized in four distinct rules:

1. In order for there to be a prohibition of litigating in secular court,⁴ both the plaintiff and the defendant must be Jewish.

Although there is a minority opinion to the contrary in the name of Rabbi Shimon Duran (*Tashbetz*, 2:290) that the prohibition applies even when a non-Jewish litigant wishes to go to a Jewish court, this opinion has been generally rejected by most authorities as not the normative opinion of halacha.⁵

2. Any time the defendant, be he Jewish or not, will not go to a Jewish court, one may, after seeking rabbinic permission, summon him to secular court.

Since the time of the *Geonim* it has been accepted that a plaintiff could resort to secular court if his opponent refused to appear before a *beit din*. Thus, for example, Rav Palti Gaon learns from the talmudic saying "if a person calls to another [to rebuke

3. This area of the halacha has been addressed in prior issues of this journal; see Krauss, "Litigation in Secular Courts," 2 *JHCS* 35 (1982). It is thus not necessary to repeat the reasons for the prohibition of *arcaot* or its many application. This article will address only its impact on lawyers and the practice of law.

Whether this prohibition is biblical or rabbinic is of some dispute; see Kovetz *HaPoskim al Choshen Mishpat* 3:26(1) (p.176). The *Sema* assumes it is rabbinic; see *Sefer Meirat Enayim, Choshen Mishpat* 26:11.

4. There is no difference among the courts of idol worshippers, non-Jewish monotheists, and secular courts for the purposes of this rule. Almost all authorities agree that the prohibition of *arcaot* applies to all non-Jewish courts of any type; see *Tashbetz* 4:6 (the prohibition applies to Muslim courts).

5. Kovetz, *supra* note 3, at p. 178-180

Even if one were to accept the *Tashbetz's* position, in this author's opinion, a lawyer may assume that a non-Jew would not consent to use a *beit din* to arbitrate his disputes, and the Jew may proceed to use secular court until the non-Jew advises him that he wishes to use a *beit din*. The non-Jewish litigant would have to indicate that he wishes to litigate in a Jewish court.

him] and he does not answer, he may throw a wall on him" (*Bava Kamma* 92b) that "From here we derive that if Reuven has a claim against Shimon, and Shimon refuses to come to *beit din*, Reuven can take him to secular court to recover what belongs to him" (Rosh, *Bava Kamma* 8:17). Rav Sherira Gaon also allows appearing before secular courts in such circumstances,⁶ and this rule is quoted by all the codes. The *Shulchan Aruch* (*Choshen Mishpat* 26:2) rules that if the defendant is stubborn and refuses to appear before a *beit din*, the plaintiff may go to a *beit din* first. If the defendant does not appear, the plaintiff should receive permission from the *beit din* to take his claim to the secular courts.

3. A litigant who wishes to go to *beit din* solely as a means of procrastination and will not abide by an unfavorable decision of the *beit din*, is not considered as one who will go to Jewish court.⁷

Another way in which a plaintiff or defendant will occasionally misuse *beit din* occurs through the mechanism of each side choosing its own judge and the two judges choosing the third judge (in Hebrew, *Zabla*). In many circumstances, as already noted by the earliest *Rishonim*, an unscrupulous person will choose as his "judge" a person who will not decide the case except in his favor, and who will not consent to the choice of the third judge unless that judge also will decide the case in his backer's favor (Rosh, *Sanhedrin* 3:2). Such "judges" unquestionably violate halacha when they behave in that manner, and sincere adherents to halacha

6. *Beit Yosef* commenting on *Tur*, *Choshen Mishpat* 26:2.

7. This is a very common event. A litigant who will not sign a binding arbitration form which, in the state of New York, allows a Jewish court to enforce its judgments in secular court, might be considered as if he will not follow the decision of the Jewish court. Many halachic authorities do not require that one first go through an unnecessary and not binding Jewish court proceeding before one goes to secular court in such a case.

On the other hand, the decision to seek a preliminary injunction before going to *beit din* is not a form of using *arcaot* in violation of halacha; *Iggerot Moshe*, *Choshen Mishpat* 2:11.

are not obligated to participate in such a hearing under any circumstances.

4. A Jewish defendant may litigate in secular court when the plaintiff improperly summons him into secular court in violation of Jewish law. Thus, from the perspective of a lawyer, the prohibition is only to represent plaintiffs, and not defendants.⁸

The reason for this rule is obvious. A Jewish defendant may litigate in secular court once improperly summoned, for the same reasons that he may summon a defendant to secular court who refuses to allow *beit din* to decide a case.⁹

The cumulative effect of these four rules is that a lawyer who wishes to observe halacha may not, under any circumstances, represent a Jewish plaintiff in a civil action when the Jewish defendant¹⁰ wishes to go to *beit din*.

Although there is one contemporary authority who disagrees (Rabbi Menashe Klein, *Mishne Halacha* 7:255; 3:214), the consensus of opinion seems to be that there is no prohibition in representing a Gentile in a legal dispute with a Jew. The logic of permitting such representation is apparent: in any situation in which the litigant may himself properly go to secular court, there is no prohibition for a lawyer to represent him in secular court. Since the non-Jewish litigant may go to secular court, a Jewish lawyer may represent him. (See also note 12).

Conceptually it should be permissible to aid one Gentile in his legal disputes with another, as they are not obligated to observe

8. See R. Ovadia Yosef, *Yechave Daat* 4:65.

9. Counterclaims may also be pressed if, as in most legal systems (see e.g. *Fed. R. Civ. Proc.* 13), they are waived if not presented. Even permissive claims, after rabbinic permission is sought, may be presented, since the plaintiff in such a case will only very rarely consent to *beit din's* deciding other claims.

10. Sometimes determining who is the defendant is quite difficult. It would appear that the identity of the "real party in interest" is determinative for the purposes of *arcaot*, and the "named party," if it does not control the litigation, is halachically irrelevant. Thus, when an insurance company fully compensates a defendant for its loss, and controls the litigation, the identity of the named party is not relevant. In cases of partial indemnification that would not be the case.

Jewish law nor to go to *beit din*.¹¹ The primary rationale for the prohibition of litigating in secular court is that Jews should use Jewish law and Jewish courts to arbitrate their disputes, and that a decision not to, and not to use *beit din*, represents an undermining of the validity of halacha. Such a rationale is obviously inapplicable in a dispute where one of the parties is not bound (according to halacha) to use *beit din* as the basis of resolving his disputes.

B. Limitations

It is important to focus on the prohibition of litigating in secular court as it applies to lawyers and not to litigants. A careful reading of *Choshen Mishpat* 26, where the halachic rules of this topic are located, indicates that the prohibition applies only to the litigants whose decision it is to use the secular courts. It would seem thus that the status of the lawyer who is the "agent" (in a certain sense) of the litigants is only that of an "aider" to the litigants, and he is not himself in violation of the underlying prohibition. This has been already noted by R. Ovadia Yosef (*Yechave Da'at* 4:65) where he states that a lawyer who aids one in a lawsuit violates only *lifnei iver*.¹²

Rabbi Menashe Klein (*Mishne Halacha* 7:255; 3:214) advances a rationale for ruling to the contrary and mandating that the substantive prohibition of litigating in secular court applies to a lawyer as well as the client. Rabbi Klein maintains that since the lawyer is the primary actor in the legal field, and the client remains in the background and is typically invisible in court, the prohibition

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11. This is true even if one accepts Ramban's opinion (Genesis 34:13) that the commandment of *dinim* incorporates Jewish commercial law into Noachide law, since it certainly does not incorporate the obligation to use a *beit din*. Many authorities reject Ramban's opinion on this issue; see e.g. R. Naphtali Tzvi Yehuda Berlin, *Ha'amek Shealah*, 2:3. See also *Teshuvot Ramo* 10; *Teshuvot Chatam Sofer* 6:14.
 12. This is also apparent from the famous dispute as to whether one can be a witness in secular court in a dispute that actually should be heard in *beit din*. Both sides only discuss whether such conduct is prohibited on *lifnei iver* grounds. No one argues that the substantive prohibition of litigating in secular court is violated by a facilitator; See *Sha'ar Hamishpat*, *Choshen Mishpat* 26:1 *Responsa of Ramo* 52.

of litigating in secular court should apply to the lawyer as well. He thus prohibits a Jew from functioning as a lawyer in any situation in which a *beit din* could in theory hear the case, as a Jewish lawyer may not appear in the secular courts.

One can argue with his analysis in a number of ways. First, there are no textual proofs in the Talmud that the prohibition applies to anybody other than the litigants since it is the client/litigant who decides where a lawsuit should be brought and who can prevent the prohibition of *arcaot* from applying. The lawyer cannot make that decision. Second, the wording of this discussion by all of the major *Rishonim* inclines one in that direction, as they all codify the primary prohibition as preventing one from being *judged* by secular courts. As the Rambam (*Hilchot Sanhedrin* 26:7) states:

All who are judged by non-Jewish law or in their courts, even if their law is similar to Jewish law, are regarded as having reviled, cursed, and committed violence against the laws of Moses our teacher.

So too, the *Shulchan Aruch* (*Choshen Mishpat* 26:1) posits:

It is forbidden to be judged before non-Jewish judges and their courts, even if they apply Jewish law and even if both litigants agree to be judged by them. One who goes to be judged by them is evil, and is regarded as having reviled, cursed, and committed violence against the Torah of Moses our teacher.

The Talmud (*Gittin* 88b) also emphasizes only the prohibition to be "judged" in secular court when it states:

Rabbi Tarfon would say: "Every place where you find non-Jewish law courts, even though their laws are like the laws of Israel, you are not permitted to resort to them for judgment, since it says, 'these are the laws that you will place before them,' that is to say, 'before them' [Jews] and not before non-Jews."

The use of the phrase "to be judged" in all of the sources seems to limit the prohibition to being a litigant.

Thus, even in the situation where all of the principals are Jewish, all acting improperly in bringing the lawsuit to secular court instead of *beit din*, logic would yet indicate that the lawyer be classified only as an aider and not as a litigant.¹³

C. *Lifnei Iver*

Having established that when it is prohibited for a litigant to use the secular courts, typically the prohibition upon the lawyer is not one of *arcaot* but of *lifnei iver*, it is worth noting that there are many situations in which it is permissible to aid one in the committing of a sin even though it would be prohibited to commit the sin oneself. There are situations where, for financial or other reasons, it is permissible to aid a sinner in the commission of his sin where, if the observant Jew would not aid him, others would do so.¹⁴ Thus, the Ramo states that any time others (perhaps even only other Jews¹⁵) can aid one in the commission of a sin, an observant Jew can do so as well, because no additional sinning occurs. According to the Ramo, it is only "pious people" who should conduct themselves according to the stricter opinion which maintains that such conduct is rabbinically prohibited.

The *Shach* and *Nodah BeYehuda* maintain that any time in which the party committing the sin is a *mumar*, that party is to be treated like a non-Jew for the purposes of this law only, since the rabbinic obligation to rebuke a sinner does not apply to an apostate.¹⁶ Thus a lawyer, whose only prohibition to litigate in

13. See also note 77.

14. Much of the discussion of the *lifnei iver* aspects of this article is more fully explained in Hertzberg & Brody, "Enabling a Jew to Sin: the Parameters." 20 *Journal of Halacha & Contemporary Society* 1 (1990) [Hereinafter *Lifnei Iver*]. The reader is referred to that article for more detail.

15. Whether the "others" can be Jews or must be non-Jews is a dispute among the latter authorities. According to many authorities, the tradition is to conduct oneself in accordance with those who maintain that the "others" must be non-Jews. This dispute, however, is not relevant to lawyers in America, as there are many Gentile lawyers. This is perhaps not true in Israel. See *Lifnei Iver*, supra note 14, at 13-14.

16. *Shach*, *Yoreh Deah*, 151:6; R. Yechezkel Landau, *Daggul Merevavah*, commenting on *id.*; *Lifnei Iver*, supra note 14 at 15-16. If the *mumar* in fact has

secular courts is based on the prohibition of "placing a stumbling block in front of a blind person" may, according to many authorities, do so in any situation where the plaintiff, who is improperly going to secular court, is himself not observant and will go to secular court with a different attorney if this attorney declines to represent him.

D. *Arcaot* and *Dina Dimalchuta*

One other issue must be addressed in a discussion of *arcaot*: the type of litigation to which it applies. Public causes of action, *i.e.*, those types of actions created by secular governments or courts under the rubric of "the law of the land is the law" and which aid the government in its task of governing (*dina dimalchuta*), may be permissibly litigated in secular court in many cases. This is obviously true of criminal cases as will be discussed in section III, but it has applications in many other areas of the law also. One may unquestionably litigate against the government or its (coincidentally Jewish) agents, such as the Securities and Exchange Commission, the Environmental Protection Agency, or the Internal Revenue Service, or engage in any litigation where the primary cause of action was created by the secular government and involves public litigation in order to "make the world a better place"¹⁷ and not to resolve individual disputes (even if individual disputes are incidentally resolved).

the status of *tinok shenishbah* the *Shach's* leniency alone would not apply. However, the *Daggul Meravavah's* transformation of *mumar* to *maizid* would probably still allow for this leniency. According to the *Daggul Merevavah*, so long as the person is knowingly transgressing and will not heed rebuke, there exists no rabbinic prohibition. It therefore becomes possible to consider a person a *tinok shenishbah* vis-a-vis many halachot and yet consider him a *maizid* with regard to the rabbinic prohibition of *lifnei iver*. For an explanation of why this is so, see *Chazon Ish, Orach Chaim* 87 (23) ¶ 16.

Even if one were to accept Rabbi Klein's thesis that the lawyer violates the prohibition of litigating in secular court and not merely *lifnei iver*, this is only true when the plaintiff also is Jewish and also violating the prohibition. It is counter-intuitive to maintain that a Jewish lawyer violates the prohibition of litigating in secular court when he aids someone who is properly in such a court.

17. See e.g. *Shulchan Aruch, Choshen Mishpat* 269:8 and *Sema* 21.

Classifying such litigation is not always easy. For example, one might argue that declaring bankruptcy is a private, rather than public, action and therefore improper or ineffective under Jewish law to the extent it diminishes the rights of the Jewish creditors, and a lawyer may not aid a Jew in such a declaration. However, there is a responsum by Rabbi Feinstein to the contrary, stating that it is permissible to avail oneself of the secular bankruptcy laws and that such laws are valid according to halacha as "the law of the land" (*Iggerot Moshe, Choshen Mishpat 2:62;3 Halahcha URefuah* 348 (1983)). The rationale for Rabbi Feinstein's opinion is that bankruptcy was instituted not only to protect an individual debtor or creditor, but to further a general governmental interest in the organized economy and to encourage investment in the economy. Thus, when the secular government allocates the debtor's assets in a manner contrary to that used by halacha,¹⁸ a Jew must honor this division, even to the extent of returning money already in his control. Rabbi Feinstein states:

Thus, the laws promulgated by the government in the case of one who indebted himself and does not have the ability to pay back his debts — what is called bankruptcy — and he is a debtor to many creditors, and the government appoints a commission of three men to divide the money and property to all creditors in proportion to the money owed to them, [these laws] are valid: It is prohibited for any creditor to take for himself because this is one of the laws applicable to all in the country and thus falls under the rubric of "the law of the land is the law" as the Ramo states. This is even more true in a corporation which involves Gentiles [as creditors as well].

While Rabbi Feinstein does not explicitly state that the discharge of an individual's contractual debts in bankruptcy is recognized by halacha, he clearly implies this when he says "It is prohibited for any creditor to take for himself [absent permission

18. *Ketubot 93a; Shulchan Aruch, Choshen Mishpat 104.*

from the Bankruptcy Court].'' After the assets are distributed, no further permission will ever be given — under American law¹⁹ — to take future monies of the debtor. Rabbi Feinstein expresses no doubt that this is correct in the case of a corporation, (which never after a bankruptcy liquidation, and rarely after a bankruptcy reorganization, receives new capital) due to the presence of shareholders.²⁰

While it is possible to disagree with Rabbi Feinstein's application to bankruptcy (although no one has done so in print), there are many areas of the law where the government's purpose is to benefit society as a whole and not to create rules of individual dispute resolution, even though such rules have incidentally been created. For example, the Environmental Protection Agency, in the process of seeking funds to pay for environmental cleanup of toxic waste dumps, frequently will reorder the priority of liens on a property so as to insure adequate funds to pay for a cleanup (see 42 U.S.C. #9607-08). This type of reorganization frequently will affect the rights of private parties. Once a plan of this type is approved, it would appear that the halacha recognizes the reorganization of the obligations even between the original Jewish landowner and a Jewish lienholder, for the same reason explained in Rabbi

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19. Actually that might not necessarily be true. The questioner in the responsum resided in Switzerland, where a bankrupt debtor receives no discharge for unsatisfied debts. Creditors holding claims related to pre-petition debts receive a certificate stating the amount unpaid. The creditor, however, is stayed from collecting on the debt as long as the debtor has not been able to gain 'new fortune.' Therefore, "in Swiss practice, the defense of not having gained 'new fortune' effectively prevents creditors from collecting on their claims." Huber, "Creditor Equality in Transnational Bankruptcies," 19 Vand.J. Transnat'l L. 741 (1986).
 20. One could understand this responsum as an application of the *Shach's* opinion (*Choshen Mishpat* 73:39) that in any case in which the halacha was silent, *dina dimalchuta* provided the mandatory answer (the *Chazon Ish* (*Choshem Mishpat*, essay 616) thought this wrong) or that if the case involved a common commercial practice, *beit din*, when hearing the case, should assume that the parties have made a condition of accepting the secular law. A careful reading of the responsum indicates that the approach of the *Shach* was not what was intended.

Feinstein's responsum concerning bankruptcy. Furthermore, in such a case a Jew may litigate in secular court against the government or its agent (even if the specific agent is Jewish) to enforce his societal, rather than individual, rights — even if the outcome of the case affects the private rights of other Jewish parties.²¹

The scope of the powers of the secular government under *dina dimalchuta dina* ("the law of the land is the law"), while a critical issue to observant Jews, is a topic beyond the scope of this article.²² Suffice it to state that a lawyer may not assist a client in an action which is prohibited by *dina dimalchuta*, and accepted by the halacha as a proper application of *dina dimalchuta*, since the lawyer's conduct would also violate the law of the land.²³

2. Professional Confidentiality

The bar, like many professions in America, has developed internal rules regulating the conduct of lawyers. Many of these regulations are innocuous, and address either purely professional

21. Thus for example any litigation which requires the plaintiff to function as a *quo tam* (*quo tam pro domin rege quam pro se simpos sequitur* "who brings the action as well for the king as for himself") litigant may be brought in secular court. (For further discussion of this issue, see section III:A and particularly note 79.)

22. See generally, Rabbi H. Schachter, "Dina Dimalchuta Dina" 1 JHCS 103(1981).

There are four distinct theories as to the scope of powers of the secular government under *dina dimalchuta*, each of which limit its reach. The first theory is the (societal) contract theory (Rashbam, *Bava Batra* 554b; Rashba *Nedarim* 28a) which gives *dina dimalchuta* the same power as any contract under halacha. The second theory limits *dina dimalchuta* to the power to raise taxes, and gives the secular government plenary power (based on a rental theory) only over this narrow field; see *Shach*, *Yoreh Deah* 165 #8. The third theory assigns *dina dimalchuta* the power of *hefker beit din*, but only on a *derabanan* level; *Beit Shmuel*, *Even Haezer* 28 #3. The fourth theory assigns the secular government the power of *hefker beit din hefker* on a Torah level; see *Devar Avraham*, 1 p.9.

23. In fact there might be situations in which *dina dimalchuta* is inapplicable but a lawyer could nonetheless not aid a violation of the secular law, because of his special promise (taken at the time of admission to the bar) to uphold the law (a

issues (e.g. politeness) or issues of substance whose result is in harmony with halacha (e.g. prohibition of theft). One rule, however, has created quite some controversy and poses a dilemma for observant Jews. That rule is the requirement that a lawyer keep confidential information given to him by a client even if others will be harmed through the lawyer's silence. Two versions of this regulation are in force, depending on whether the state has adopted the Model Rules or the Model Codes.²⁴

The Model Rule (Rule 1.6) states:

(a) A lawyer shall not reveal information relating to representation of a client . . .

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm;

The Model Code (DR 4-101) adopts a different formulation of the obligations of a lawyer to keep confidences. It states:

(C) A lawyer may reveal:

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

It is apparent that the professional regulations advocated by the Model Rules, and accepted in those states that have adopted them, are incompatible with the obligations of a Jew to prevent harm from befalling a fellow Jew, if possible.²⁵ The Torah requires

promise which the halacha recognizes as binding). In this case, even though citizens' actions violating the law are halachically permitted, the lawyer's conduct would be prohibited; see Rabbi A. Cohen, "On Maintaining A Professional Confidence," 7 *JHCS* 73, 78-81 (1984).

24. The Model Code was endorsed by the ABA in 1969 and the Model Rules in 1982. They differ in many ways. In theory, each state develops its own regulation guiding professional conduct; however, every state except California bases its regulations on either the Rules or the Code.

25. This has been noted by others. See Tucker, "The Confidentiality Rule: A Philosophical Perspective with Reference to Jewish Law and Ethics," 13 *Fordham Urban L.J.* 99 (1984).

a Jew to inform his fellow Jew of potential harm, based on the verse (Leviticus 19:16) "do not stand by while your brother's blood is being shed." As has been noted by many (see *Sema, Choshen Mishpat* 426:1) this obligation applies not only to saving lives but to preventing monetary loss. Thus, if there were no secular regulation of this area, a lawyer who learned that his client was planning to cause monetary loss through impropriety would be halachically obligated to warn the potential victim, and thus prevent the loss.²⁶

Most states, including New York, New Jersey, and California, have simply declined to adopt the Model Rules on this issue and instead enforce the Model Code's test, which allows for disclosure of confidences to protect a person from financial loss caused by fraud or other criminal activity by a client. Thus, the secular obligation is roughly consistent with the requirements of halacha in those states that have adopted the Code. Furthermore, that appears to be the current trend in legal ethics in the United States.²⁷

In those states that have adopted the Code as the basis for their law, the only conflict that actually occurs is when the intent of the client to harm is not sufficiently clear as to meet the standard of the Model Rules ("reasonably believes") but suffices for the halacha (which perhaps only requires "more likely than not").²⁸ In that narrow case, or in a state that has adopted the Model Rules as the basis for its decisions, a direct conflict occurs.

In such a situation a lawyer must tread gingerly. The obligation to rescue a fellow Jew from harm is a very serious one.

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26. Rabbi Cohen, in his article "On Maintaining A Professional Confidence," 7 *J. Halacha & Contemporary Society* 73 (1984), advances various reasons why the halacha might not, even in the face of loss of life, require the breaching of a confidence. It is unclear to what extent the halacha would actually accept the "policy" reasons advocated by Rabbi Cohen in the context of the practice of law. It seems logical that society never gains from allowing lawyers, who serve no therapeutic role, to keep confidences as to future misdeeds; it is only as to past misdeeds that privacy benefit is present.
27. See *Annotated Model Rules of Professional Conduct* Rule 1.6 (ABA 1984); *People v. Fentress*, 425 N.Y.S.2d 485 (Sup. Ct. 1980).
28. See Rabbi A. Cohen, "Privacy: A Jewish Perspective," 1 *J. Halacha & Contemporary Society* 53, 74-78 (1981).

However, there is no obligation to rescue one from harm if the rescuer will suffer financial harm. As Rabbi Alfred Cohen has stated:

Our research shows that the majority of halachic authorities accepts the position that a person, whose livelihood depends upon maintaining the confidentiality of revelations made to him, need not jeopardize his position by telling those secrets. Although keeping silent might violate the negative mitzvah of not standing by and allowing another Jew to be harmed, yet as long as he is not violating the mitzvah by *doing* any action and, were he to act he would endanger his own livelihood, he is permitted to remain silent.²⁹

Thus, where a lawyer knows that he will be disciplined³⁰ by his fellow lawyers and lose his ability to earn a living, it is quite possible that the obligation to rescue is suspended.³¹ Observant lawyers should, however, realize that the Model Rules enforce a rule contrary to halacha, and Jews should work to see it changed.

29. Rabbi A. Cohen, "Privacy: A Jewish Perspective," pp.53, 84; See also Rabbi A. Cohen, "On Maintaining A Professional Confidence." This rationale is even stronger when the lawyer merely allows the client to withhold material information. It would be legally improper to withhold material sought in discovery proceedings (see Fed. R. Civ. Pro. 26).

30. In this author's opinion a lawyer should violate the current interpretation of the professional regulations and do as halacha requires him to do, since it is unlikely that such a person will, in fact, be disciplined. The rationale for obeying the law discussed in note 23 is inapplicable to disciplinary rules, since they do not have the status of "law" in America. A survey of the various casebooks and hornbooks, as well as Westlaw (database MLS-CS and FLS-CS) reports no occasions where a lawyer was disciplined for disclosing information improperly when, in this author's opinion, such disclosure would be compelled by halacha.

31. An additional reason can be advanced when a lawyer breaches a confidence to avoid purely financial harm to another. Nothing is gained when one person saves his fellow Jew a sum of money when the act of saving costs an equally significant sum. See Kirshenbaum, "The Good Samaritan: Monetary Aspects" 17 *J. Halacha & Contemporary Society* 83, 84-87 (1989).

3. Oath Taking and Cross-examining

A. Swearing

According to halacha a Jew should avoid taking verbal³² oaths (where God's name is used) as part of his or her daily life, and it has become accepted that one who is pious declines to use God's name in an oath, even if such action causes the loss of money owed.³³ Accordingly, when possible, it is better to "affirm" rather than "swear" according to halacha. The United States, as well as all fifty states within the Union, accept that an "affirmation" without any invocation of God has the same legal effect as an "oath" and secular courts allow all who desire to affirm rather than swear to do so.³⁴

A related issue is the taking of an affirmation (or when permitted, an oath) by a man not wearing a yarmulke or other head covering. As an initial matter, it must be established when it is permissible for men to go without a head covering. A number of modern authorities have addressed this issue. The consensus is that if it is needed for advancement in business or in order to retain one's livelihood, it is permissible for a man to go without a head covering so long as God's name is not invoked; see *Aruch Hashulchan* 2:10 *Iggerot Moshe*, *Orach Chaim* 3:2; *Choshen Mishpat* 1:93).

The question of taking an oath bareheaded has been addressed by a number of authorities, with various decisions given. While some prohibit such oaths (see *Responsa Nachalat Binyamin* 30), most allow such conduct if it is absolutely necessary since, according to technical halacha, a head covering is not required in those circumstances (see *Kenneset Hagedolah*, *Yoreh Deah* 157; *Beit Lechem Yehudah* (on *id.*); *Shaar Ephrayim* (on *id.*); *Beit Hillel* (on

32. Written oaths or affirmations are not recognized by the halacha as a form of oath or testimony; See *Shulchan Aruch*, *Choshen Mishpat* 28:11.

33. See *Gittin* 35a; Rambam, *Hilchot Shevuot* 12:12; *Shulchan Aruch Orach Chaim* 156:1; "Vows and Swearing," *Shana BeShanah* 5728 p. 128.

34. See generally, "Oaths and Affirmations," 58 Am.Jur. 2d 1043 #3 ("No distinction is drawn between an oath and an affirmation").

id.); *Bechor Shor, Shabbat* 118b). This is even more true under American law since an "oath" which does not mention God can be taken.

B. Proper Cross-examination

Lawyers, like all Jews, are prohibited from speaking falsely or derogatorily about people without just cause.³⁵ Many lawyers, to whom advice-giving is a central part of their professional life, must know when it is permissible (or prohibited) to repeat negative comments heard about another. The general outlines of when this type of conduct is prohibited and when it is mandated have been addressed numerous times, and do not bear repeating in this article.³⁶

One particular issue, however, is uniquely confronted by lawyers — when may one, in the process of litigating, expose a person's prior misdeeds to undermine the credibility of his testimony. It is well accepted that a lawyer may, in the process of cross-examining a witness, subject the witness to questioning if such questioning seeks to demonstrate that the witness is not telling the truth, or the complete truth, even if (or because) that embarrasses the witness.³⁷ However, it is most likely prohibited for a lawyer to attack the credibility of a witness whom the lawyer knows to be telling the truth, in order to cast *false* doubt on the truthfulness of the testimony. That would seem to be a violation of the Torah's commandment of "distancing oneself from falsehood" ("*midevar sheker tirchak*" Exodus 23:7) as well as embarrassing another in public ("*halbanat pnei chavero berabim*") for no reason.³⁸ Many violations of these laws also violate the Code of

35. The classic work on this topic is Rabbi Yisroel Meir Kagan's *Chafetz Chaim*. Three distinctly different things are prohibited: *Lashon Hara* (saying something negative though truthful about another); *motzi shem ra* (making a false negative statements about another); and *richilut* (recounting to others gossip heard about them).

36. See e.g. R. Zelig Pliskin, *Guard Your Tongue*.

37. To rule to the contrary would prevent truth seeking in many court proceedings, since the verdict often reveals one of the litigants to be a liar.

38. *Sotah* 10b. See also *Bava Metzia* 58b. *Shavuot* 30b-31a recounts an example of

Professional Responsibility for lawyers, which prohibits the presentation of evidence designed to mislead the jury or other litigants.³⁹

So, too, a lawyer may not cooperate with a client's desire to present a false defense in a civil matter. (Criminal defenses will be dealt with in part III:B.) A false defense occurs when a client seeks to deny liability based upon the plaintiff's inability to prove his case in a court of law. Thus, when a client comes to a lawyer and says that he is being sued for refusing to repay a loan, and the client states that he did in fact borrow the money from the plaintiff but that the whole transaction was oral, and the plaintiff cannot prove the loan, a lawyer may not aid the client in this false defense since the client must actually deny the loan to triumph by law. This is a clear application of *midevar sheker tirchak*, of distancing one's self from lies.⁴⁰

II. PRACTICAL ISSUES

1. Usury (*Ribbit*)

The topic of charging interest on loans is an enormously complicated one, and the tension between Jewish law and common secular commercial practice is very great. Halacha forbids⁴¹ the charging of interest on loans between two Jews absent certain circumstances — the most common being a *heter iska*. This article will assume that the typical lawyer will not be able routinely to convince clients to use a *heter iska*, and it does not address the ramifications of using a *heter iska*.⁴²

midevar sheker tirchok in a legal proceedings. It is possible that it is permitted to cast false doubt as to the truthfulness of a portion of a person's testimony, if that is needed to undermine the viability of other sections of his testimony which actually are false. See *Shulchan Aruch, Choshen Mishpat* 4:1, 28:11.

39. Model Code Of Professional Responsibility, DR7-102 (A) (4).

40. So, too, it would appear that in a civil matter a lawyer cannot seek a demurrer, based on a failure of proof on the issue of liability if he knows that money is actually owed.

41. For a general overview of this topic, see Stern, "Ribbit, A Halachic Anthology," 4 *J. Halacha & Contemporary Society* 46 (1982).

42. For an excellent recent analysis of the effect a *heter iska* has on transactions

More likely than not, it is this area, and not the prohibition of litigating in secular court, that poses the greatest challenge to one's ability to function as a lawyer according to halacha. However, these difficulties are not limited to the practice of law, but are present in all areas of commercial transactions, from real estate to banking and retail sales. In fact, the violations committed by a lawyer assisting in these transactions are of a considerably lower degree than the one actually engaging in such transactions. The primary obligation not to charge interest falls on the one engaging in the prohibited transaction, and not on the lawyer assisting. Furthermore, a lawyer, like a businessman, can establish standard practices which eliminate most halachic questions.

A. Limitations

Two initial substantive limitations exist on the scope of the prohibition to charge interest. The most significant restriction on the prohibition of charging or paying interest is that it is permissible to charge or pay interest on loans to Gentiles, businesses owned by Gentiles, or corporations controlled by or primarily owned by Gentiles. In the diaspora virtually all banks fit into this category.⁴³

The second limitation relates to Jewish-owned corporations. As has been ruled by Rabbi Feinstein and others,⁴⁴ any time the

according to American law, as well as a brief discussion of other issues relating to charging interest, see Resnicoff, "A Commercial Conundrum: Does Prudence Permit the Jewish "Permissible Venture [*Heter Iska*]?" 20 *Seton Hall L.R.* 77 (1989).

10. There are in fact many situations where a *heter iska* is halachically impossible. For example, a Jewish plaintiff who litigates in secular court against another Jew and triumphs, frequently has available the possibility of receiving pre or post judgment interest. It is improper to take such interest in some circumstances.
43. *Shulchan Aruch*, *Yoreh Deah* 159:1; R. Moshe Sternbuch, *Tam Ribbit* 81:1-4; R. Y. Blau, *Brit Yehudah* 30:16. Although this article is not the place to address this issue in detail, most authorities permit one to lend money to a *mumar*, although not to borrow money from a *mumar*; see *Shulchan Aruch* 159:2. The distinction between a *mumar* and a *tinok shenishbah* in our current society, however, is difficult to define; see *Tam Ribbit* 81:4; *Brit Yehudah* 30:8-15.
44. Rabbi M. Feinstein, *Iggerot Moshe*, *Yoreh Deah* 2:62, 63; *Shelot Uteshuvot Maharshag*, *Yoreh Deah* 5; *Shelot Uteshuvot Tsafnat Paneach* 184.

borrower does not personally obligate himself to repay the loan, but only accepts the limited liability of a corporation, no violation of the laws of taking or paying interest occurs. Obviously since the underlying interest-bearing transaction is permitted, an observant lawyer may assist in the arrangement in any situation where the borrower is borrowing as a corporate entity and not as an individual, since this entails limited rather than unlimited liability.⁴⁵ Even those who argue with Rabbi Feinstein's approach and maintain that according to halacha a corporation is treated no differently from a partnership for the purpose of borrowing with interest, do concede that a corporation's paying interest is only prohibited according to rabbinic, and not Torah, law⁴⁶ — a factor whose significance will be explained further.

Most commercial interest-bearing transactions which require the assistance of a lawyer involve the lending of money either to a corporation, from a bank, or most typically, both.

B. Ribbit Derabanan and Lawyers

From the perspective of a lawyer, one other significant limitation has to be explained. Many common forms of interest charging are only prohibited according to rabbinic decree rather than Torah law. In any situation in which only a rabbinic prohibition of interest charging is violated, the prohibition for a lawyer to aid in the prohibited transactions is one not of lending with interest, but of aiding a sinner. While this is not true in theory, since the Talmud (*Bava Metzia* 75b) recounts that all who facilitate the prohibition of lending with interest violate the biblical prohibition of lending with interest (Exodus 22:24 and Leviticus 25:36-37) as well as *lifnei iver*, it is accepted that the substantive

45. In a situation where the owner of the corporation must also sign a personal liability note, this permissive ruling does not apply. On the other hand, a limited (and perhaps even a regular) partnership that borrows on a "non-recourse" basis most likely is a corporation for the purposes of this ruling.

46. See R. Y. Blau, *Brit Yehudah* 7:66 (quoting all of the authorities who argue with Rabbi Feinstein). However, even those who argue with Rabbi Feinstein concede that only a rabbinic prohibition is involved. *Id.* n. 66.

prohibition on the facilitator does not apply when the underlying prohibition is only rabbinic in nature.⁴⁷

A careful study of the laws of *ribbit* leads one to conclude that in all transactions where the lender loans the money through the issuing of a check, rather than directly in cash or commodities, the lender violates only the rabbinic prohibition of charging interest — even if the loan were of a type that was normally biblically prohibited.

Before this is explained halachically, it is important to understand what a check is, and how it works, according to American law. While the layman might view money on deposit in a bank as a form of bailment, this is incorrect. Rather,

[s]uch funds become the property of the bank, which can commingle and use them as it sees fit . . . The depositor acquires, in return for the deposit, a claim on the bank as its general, unsecured creditor, and in some accounts, authority to write a check, payment order, or draft against that claim in favor of another person.⁴⁸

In essence, money deposited in a bank is a debt owed by the bank to the depositor. A check issued against an account with a positive balance is simply a direction to the bank to repay the debt owed to the check writer to a third-party. This understanding of a check has significant impact on the halacha, and has been widely recognized by a number of authorities. For example, many authorities treat the sale of a check at a discount,⁴⁹ (assuming there

47. See *Shulchan Aruch*, *Yoreh Deah* 160:1 and particularly, *Chave Daat*, *Yoreh Deah*, 160:1 and *S'deh Chemed* 6:26(3) (stating that most authorities agree with the *Chave Daat*). For a complete discussion of this issue, as well a discussion of whether other authorities disagree, see R. Y. Schreiber, *Tam Ribbit*, 160:1, n. 3 & 4.

48. Smedresman & Lowenfeld, "Eurodollars, Multinational Banks, and National Laws," 64 *N.Y.U. Law Rev.* 733 (1989), paraphrasing Michie on Banks & Banking, 5A, §(A)4(b) (1983). A bank is a bailee on a safe deposit box, since it does not have the right to use the valuables in the box.

49. I.e., "A" will write a check to "B" payable immediately for \$30 and "B" will sell the check to "C" for \$25 in cash.

is money in the account to cover the check, consideration has been given for the issuance of the check, and the check is not post-dated [thus making it a violation of the criminal law to stop the check absent cause] not as a form of prohibited interest payment since all that is actually occurring is the purchasing of a debt. (See e.g. R. Chazan, *Chikrei Lev*, *Choshen Mishpat* 2:155; R. Brit Yehuda 15:17, n. 38-39.)⁵⁰

Once the mechanism by which a check works is understood, it can be argued that no biblical violation of the laws of lending with interest is possible whenever the funds loaned are transferred by check (providing that the bank used by the lender is owned by a Gentile). In any situation in which one Jew desires (in violation of halacha) to lend money with interest to another Jew, but, instead of lending the money in cash, directs that the money loaned be paid through a check, no *biblical* violation of the laws of lending with

50. Rabbi J. David Bleich, in a recent article in *Tradition*, has argued that this analysis of the halacha is incorrect because under relevant American law the issuer of the check has the right to stop the check at any time after issuing and that a check does not by itself create any obligation to the payee and is not a promissory note; see Uniform Commercial Code §3-408. Thus, discounting is improper. See Rabbi J. D. Bleich, "Survey of Recent Halachic Literature: Checks," 24 *Tradition* 74 (1989).

I believe this is an incorrect assessment of the American law for the repayment of loans. Once consideration is given for a loan, the check issued for the loan constitutes a request to transfer the debt owed by the bank from the issuer to payee. While the bank will honor the check writer's stop payment order, such an action is a fraud by the payor, is illegal, and will result in both criminal and civil penalties under American law if the check was issued with consideration. The fact that a stop check order will be honored only indicates that the law has chosen to absolve the bank from liability so as to allow the bank not to investigate the merits of each stop payment order. The issuer of the check remains liable for the amount of the check. Thus, under the Uniform Commercial Code (UCC) §2-403 it is well established that "A seller's contention that no title in goods can pass where there has been a dishonored check given for the purchase price has been rejected by the courts applying the [Uniform Commercial] Code." A. Squillante & Fonseca, *Williston on Sales*, §23-10 (p. 353) (1974). It is only in the case of a gift that American law will allow the issuer to stop payment for virtually any reason. Even in that case, however, the intentional issuing of a bad check is a crime; see Model Code §224.5

interest has occurred. This is so because the lender is actually only directing a Gentile (the bank) to transfer money the Gentile owes the lender (the money on deposit in the bank) and to convey the debt to a new (and Jewish) borrower. When the borrower cashes the check, money previously owed by the bank to the lender is now owed by the Jewish borrower to the lender. A debt owed to a Jew (and the obligation to pay interest on that debt) was transferred from a Gentile borrower to a Jewish borrower.

Although it is true that the net effect of this transaction is that one Jew owes money (and interest) to another Jew, the fact that the money was not directly transferred from one Jew to another, but rather was passed through a Gentile "middle-man" is of enormous halachic significance. While the status of using a Gentile as a front for an otherwise prohibited interest-bearing transactions is a topic of much controversy within halacha, and was a topic of significant dispute among the *Rishonim*, it is now well-accepted that the prohibition involved in authorizing an interest-bearing loan through a Gentile "middle-man" is best only a rabbinic one.⁵¹

A second reason can also be advanced for labelling virtually all interest-bearing commercial transactions as violating only *ribbit derabanan*. While the prohibition to lend with interest is violated whether cash or commodities are lent and repaid, it is also accepted that the biblical prohibition is not violated when one lends with interest a note of indebtedness (*shtar chov*) and is repaid with a note of indebtedness as well. (For example, "A" loans "B" a \$1,000 AT&T bond for a year on the condition that "B" returns to "A" a \$1,500 AT&T bond at the year's end.) Such a transaction violates

51. See Ramo, *Yoreh Deah* 168-9, 3,9,; *Brit Yehudah* 33:1-6, and the notes accompanying #6. A number of authorities maintain that this transaction is permitted; most maintain that this transaction is rabbinically prohibited. Rambam, but no other authority, maintains it is a biblical prohibition.

The basis for ruling that no biblical violation can occur whenever a Gentile "middle-man" is used, is that halacha accepts that according to Torah law, a Gentile cannot (for most actions) be an agent for a Jew. Since there would be no agency *min hatarah*, there can be no *issur torah*. The fact that the money actually originates from the Jew is what would create the rabbinic prohibition.

only the prohibition of *ribbit derabanan*.⁵² There is also no doubt that "checks have the status of notes of indebtedness" for the purpose of the laws of prohibited interest⁵³ and that in any loan in which both the loan and the repayment are by check, no violation of the Torah prohibition of lending with interest can occur. The halacha would view the two checks as identical to the two AT&T bonds in the above example. Only a rabbinic violation of the laws of lending with interest has occurred since only *shtarei chov* (notes of indebtedness) are used by the parties.

Accordingly, virtually all modern day commercial transactions involving a Jewish borrower and lender involve only *ribbit derabanan* since almost all such transactions are done through a Gentile bank and involve checks rather than cash. Any time a transaction is arranged such that the lender does not give the money directly to the borrower (and vice versa upon repayment of the loan) no biblical violation of the interest-charging prohibition has occurred.⁵⁴ As has been stated above, any time the prohibition to lend is only rabbinic, the prohibition to assist the borrower of the lender is only *lifnei iver*.

Once the prohibition on the lawyer is reduced to *lifnei iver* (as it is in all cases of *ribbit derabanan*) many liberalities come into play. This is even more true in our current legal market where there are many lawyers vying to assist a transaction, and each lawyer is capable of doing the work without the assistance of other lawyers. This situation, which is halachically classified as "*chad ibra*

Even if the bank is owned by Jews, some authorities still maintain that the lender has not violated any *issur torah*, since *ain shaliach lidevar averah*. It would be the Jewish bank that violates Torah law — the Jewish lender has only violated rabbinic law; See Ramo *Shulchan Aruch, Yoreh Deah* 160:16 and *Shach* commenting on *id*. Many authorities reject this rule; see *Brit Yehudah* 6:12 and the notes accompanying as well as R. Hoffman, *Melamed Lehoil, Yoreh Deah* 59.

52. The reasons for this ruling is beyond the scope of this article. For a complete explanation, see *Tosafot, Bava Metzia* 61a; *Tur, Yoreh Deah* 161; *Shach, Yoreh Deah* 161:1 *Chave Daat* 161:1; *Brit Yehudah* 2:7 (and particularly notes 17, 18, and 19).

53. *Brit Yehudah* 2:7 note 19. The reason this is so is explained in text above.

54. *Shulchan Aruch Yoreh Deah* 160 1-16; *Brit Yehudah* 6:1-8.

denahara" (literally "one side of the river") reduces the *lifnei iver* prohibition to at most only a rabbinic prohibition. As discussed previously⁵⁵ the scope of the prohibition of placing a stumbling block in front of a blind person is subject to dispute, and in a situation where there are many lawyers who are either not observant or not Jewish, a strong case could be made that that prohibition does not apply.

Thus, a lawyer who aids in the typical interest-bearing transaction should be aware of the various *lifnei iver* issues involved in these transactions and can, according to many authorities, conduct himself, with care, in a manner not in violation of the halacha.⁵⁶ This is particularly true in the current legal market where many other lawyers are willing to do the work if this lawyer declines to do so.⁵⁷

The laws of charging interest are among the most complex in Jewish law, and have been at tension with the general commercial practices of the society Ashkenazic Jews have lived in for more than the last 300 years, perhaps more than the last 800 years.⁵⁸ Difficult as these issues are, solutions do exist, and one should hesitate to foreclose as halachically impermissible any of the more common professions — law or other.

2. Wills and Inheritance

This section will not focus on the permissibility of a classical secular will according to halacha,⁵⁹ but rather only on the permissibility of a lawyer's writing such a will as a service (for a

55. Section I:1:C; see also *Lifnei Iver*, supra note 14.

56. See Section I:1:C and specifically note 14.

57. It is worth noting that if a religious lawyer were to involve himself in these prohibited transactions and help design them so as to reduce (even if not eliminate) the prohibitions involved, such conduct by the lawyer is permitted once the transactions are prohibited only rabbinically; see Rabbi Akiva Eiger, *Yoreh Deah* 181:6.

58. Jews charging interest to fellow Jews was a problem that already plagued the Tosafists in the 1200's France; see Tosafot, *Bava Metzia* 71A (*Kegon*).

59. For an overview of this topic in halacha, see Dick, "Halacha and the Conventional Last Will and Testament," 2 *JHCS* 5 (1982).

fee) to a client who desires to use a secular will. Since there are many halachic authorities who recognize a secular will as a post-facto valid means of transferring one's assets,⁶⁰ it is likely that a lawyer can aid in the creation of such a document — even if the lawyer himself is of the opinion that such a document is not halachically acceptable — because it is not the lawyer who is using the will, but the client, and the client will simply go to another lawyer. The prohibition upon the lawyer in this context is at best only to “place a stumbling block in front of a blind person” since the client could certainly write the will himself or go to another lawyer for the will writing. This is especially true if one accepts Rabbi Feinstein's opinion that the will validly transfers the property, and, as is the case of the typical will, the bulk of the estate is left to the halachic heirs. Even if the lawyer does not accept Rabbi Feinstein's opinion, the fact that the client does is sufficient.⁶¹ From the perspective of the lawyer, the prohibition of *lifnei iver* would not apply since the sinner thinks his conduct is

60. Two distinct issues are present when discussing secular wills: the first one is the appropriateness of bequeathing one's assets to people who are not the proper heirs according to halacha. There are numerous opinions on how much of one's estate may be left to other than the proper heirs — these opinions range from the majority to only deminimis amounts; see *Id.* p 3-7.

The second issue is whether a will is a halachically valid means of transferring assets after death — *i.e.* is the property devised through a will actually owned by the legatee or by the heirs mandated by Torah law. This is the fundamental issue from the perspective of a lawyer, because if the transfer is not valid, the lawyer is assisting in a theft. Rabbi Feinstein states that such a method of transfer is valid; see *Iggerot Moshe, Even Haezer* 1:104. Although some authorities argue with him — see Dayan Grunfeld, *The Jewish Law of Inheritance* and R. Feivel Cohen, *Kuntres Midor L'dor: Laws of the Torah Relating to the Writing of a Will and the Distribution of One's Estate* — certainly it is appropriate to rely on Rabbi Feinstein's opinion as to the validity of the transfer as most authorities acknowledge that at the least the transfer is valid; see *Maharsham* 224; *Binyan Zion* app. 24; *Sefer Ikre Hadat, Orach Chaim* 21; *Perach Mateh Aharon* 1:60. Even Rabbi C.O. Grodzinski states that a *beit din* would enforce such a will, although he thinks they are halachically improper; see *Michtavei Achiezer* 3:24.

61. This is based on the fact that one may, without violating *lifnei iver*, assist a person in an action that some authorities consider permissible if the person

proper, and has competent halachic authorities who agree with him, and others will do the aiding if an observant lawyer does not.

The substantive prohibition of devising one's estate to heirs other than those directed by the Torah — a prohibition whose scope is subject to great dispute, and the severity of which is limited by the Talmud's statement that one who does so acts only "without the spirit of the Sages"⁶² — seems on its face not to apply to merely assisting in the creation of such a document.⁶³ Of course, in a situation where a will considered halachically valid by all authorities would be drafted if the client knew about the various opinions, it is unquestionably preferable to encourage the client to draft such a document.

Thus it is very likely that no significant halachic problems are associated with a lawyer's writing a will for a client, even if there are halachic difficulties associated with a person's using a will of this type as a way to devise all or most of his estate. The lawyer's role in will writing is not one of being a principal, but only that of an aider. In particular once the client leaves the bulk of his estate to family members who would inherit under Torah law, virtually all the halachic obstacles to being a lawyer for such a will disappear.

3. Arbitration

As a general rule, halacha favors the use of compromise (*peshara*) rather than law (*din*) to resolve legal disputes.⁶⁴ Thus, it is certainly appropriate for a Jewish lawyer to encourage the use of arbitration as a substitute for litigation between two Jewish clients who cannot privately settle their dispute and will not go to *beit din*. Ideally such an arbitration would take place under the direction of a

himself accepts this opinion, even if the aider does not. See *Lifnei Iver*, supra note 14, at 16, 25-32.

62. *Bava Batra* 133b; Rambam, *Hilchot Nachalot* 6:11; *Shulchan Aruch, Choshen Mishpat* 282:1.

63. Thus it is only considered "preferable" not to be a witness for such document; see Rambam, *Hilchot Nachalot* 6:11; *Shulchan Aruch, Choshen Mishpat* 282:1.

64. See Bressler, "Arbitration and the Courts in Jewish Law," 9 *J. Halacha & Contemporary Society* 105, 107-112 (1985).

beit din, although compromise or arbitration is certainly valid under the direction of secular arbitrators.⁶⁵

A frequently asked question is whether an observant Jew *must* consent to the use of secular binding arbitration (*i.e.*, not from a *beit din*) rather than use the secular courts in a case where the defendant will not go to *beit din*. For example, in the case of an observant Jewish plaintiff in a lawsuit in which the Jewish defendant refuses to go to a *beit din*, but indicates that he would consent to a secular arbitrator, is such a defendant considered as one who "will not go to a Jewish court" thus permitting an observant Jew to summon him to secular court, or must the observant Jew consent to secular arbitration to spare the defendant from having to litigate in secular court?

It is this author's opinion that the plaintiff need not consent to secular arbitration in this case, since according to halacha, arbitration is not mandatory and can never be imposed upon a plaintiff or defendant without his consent.⁶⁶ Therefore, the plaintiff may compel the defendant to use a *beit din* or may use the secular courts once the Jewish courts give him permission to do so. It is worth noting, however, that the decision to use arbitration is especially desirable because arbitration is preferred over *din* and, additionally, one is saving the defendant from violating the prohibition of litigating in secular court.

4. Family Law Issues

The interaction between halacha and secular law is most problematic in the field of family law (*i.e.*, marriage, divorce, and child custody). It is in this area that many of the values that are at the core of halacha have been rejected by normative American society. This corruption of family values has, in a few circumstances, even had significant impact on the practices of the Orthodox community in America. When an attorney practices

65. Rabbi Akiva Eiger, *Choshen Mishpat* 3; Rabbi Eliezer Waldenburg, *Tzitz Eliezer* 11:93.

66. See *Shulchan Aruch*, *Choshen Mishpat* 12:1-3.

family law either between two Jews or (regrettably enough) between a Jew and a Gentile who are married or seeking to become married, it is very important to analyze carefully the halachic implications of the legal advice given.

Unlike halacha, where marriage and divorce are essentially private contracts, the United States requires family arrangements to be sanctioned by the government — in the case of divorce and custody, by the courts.⁶⁷ Thus, lawyers are frequently called upon to advocate, and mediate, disputes between spouses who are seeking a divorce and disputing custody of the children.

A number of basic issues need to be addressed. As an initial matter, a lawyer may not advise a client, for financial or social reasons, to stay married to someone whom the halacha prohibits one from living with.⁶⁸ Thus, in an intermarriage, it is incumbent upon the lawyer either to give no advice as to how to salvage the marriage or to counsel the client not to try to save the marriage. Giving advice to continue a halachically prohibited relationship is most likely a Torah violation of *lifnei iver*. It is possible that even advising a client how to salvage a marriage which is only rabbinically prohibited is itself a Torah violation of *lifnei iver*.⁶⁹

Similarly, it would seem incumbent upon an observant attorney who is aiding a Jewish couple seeking a divorce to advise the couple that they must also seek a divorce which is proper according to halacha. While a lawyer may continue to represent clients who have indicated that they will seek only a secular divorce,⁷⁰ experience from many rabbis in this field indicates that many non-religious couples will in fact seek a halachically proper

67. I have addressed some of these issues elsewhere; see "The Establishment of Maternity and Paternity in Jewish and American Law," 3 *National Jewish Law Review* 117,147,153 (1988).

68. This was first pointed out in a slightly different context by R. Yosef while discussing the role of a therapist; see R. Ovadia Yosef, *Yabia Omer* 3:21 where he discusses numerous issues that relate to being a marriage counsellor for non-religious Jews.

69. See *Lifnei Iver*, supra note 14, at 15 n.14.

70. For reasons explained in Section I:1:C and *Lifnei Iver*, supra note 14.

divorce once the obligation to do so, and the consequences of not doing so, are clearly presented to them.

So too, it would seem that it is prohibited for a religious lawyer to aid a religious Jew who is seeking to use the halachic requirement that a couple be properly divorced (*i.e.*, that a *get* be given) in order to demand money from a spouse lest he or she be left halachically incapable of remarrying. Aiding or encouraging a person to extort money as payment for a *get* when such conduct is prohibited would undoubtedly violate both the "bad advice" and "aiding a sinner" aspect of *lifnei iver*.⁷¹

Child custody arrangements are also problematic. Courts in the United States will not allow the arbitration of child custody disputes in any forum other than the secular court. Thus, while a *beit din* can decide such matters, its decision can be challenged in court by a dissatisfied parent. Unlike monetary disputes, which most states enforce without reviewing the merits of a *beit din's* determination, courts in custody disputes will review all arrangements *de novo*. Thus, notwithstanding halacha's clear rules for determining the appropriate parent (or other) to receive custody, in the case of divorce or incapacity, there is no guarantee that the court will accept them.⁷²

It would be a serious violation of halacha for a lawyer to advise a client to refuse to go to *beit din* to arrange child custody matters, or to ignore the ruling of *beit din* once its judgment is given. The use of the secular courts, which place considerably less emphasis on the proper religious training of children, can (absent a prior agreement between the parents) result in arrangements

71. Unlike many situations where the lawyer's advice or assistance is only "one side of the river," in the context of providing advice of this type the religious lawyer is most properly categorized as "two sides of the river" since in reality only religious attorneys best provide this type of advice. Nor is this a case of permissible *lifnei d'lifnei* as that too is prohibited when all the participants are Jewish; see Tosafot, *Avoda Zara* 15a.

72. For recent English articles on this topic, see Warburg, "Child Custody: A Comparative Analysis" *Israel Law Review* 14:480 (1981); Schaeffer, "Child Custody, Halacha and Secular Approaches," 6 *JHCS* 33 (1983).

contrary to the dictates of halacha and thus the best interest of the child. These considerations are even more true when one of the parents seeks to withdraw from the Orthodox community. In such a circumstance it is obviously better that an observant Jew not represent that parent in court, in that the lawyer cannot argue that it is "in the best interests of the child" to be placed in the custody of the non-observant parent. The presence of an observant lawyer advancing this argument might actually add credibility to the non-observant parent's claim.

In short, child custody arrangements ordered by *beit din* will not automatically be honored by the secular courts, and it is a violation of halacha, as well as a grave damage to the child, for a lawyer to assist the court in declining to follow the order of *beit din*.

III CRIMINAL LAW

Three distinct issues are involved in an attorney's practicing criminal law according to halacha. The first is when is it permissible to inform upon a person for committing a crime and to be a witness at trial; the second, and related issue, is whether one may be a prosecutor of criminals. The third issue is whether one may represent a person who has been accused of a crime, and what types of defenses can one present.⁷³

1: Being a Witness, Informer, or Prosecutor

There are no contemporary written responsa which prohibit being a witness against or informing upon a Jew who has committed a violent crime. It is worth quoting a statement by Rabbi Herschel Schachter, a *Rosh Yeshiva* at Yeshiva University, which appeared in the first issue of this journal, on this topic:

73. It goes without saying that a lawyer may represent his client in a plea bargaining situation where the client is going to plead guilty but seeks a reduced sentence. In such cases the lawyer is not actually functioning as an officer of the court at all. Such negotiations are the end result of more than 98 percent of the criminal indictments issued in the United States.

One critical point should however be added: there is no problem of "mesirah" in informing the government of a Jewish criminal, even if they penalize the criminal with a punishment more severe than the Torah requires, because even a non-Jewish government is authorized to punish and penalize above and beyond the law, "shelo min hadin" for the purpose of maintaining law and order. However, this only applies in the situation where the Jewish offender or criminal has at least violated some Torah law.⁷⁴

Accepting this opinion as the normative one in halacha, it is permissible and perhaps even a fulfillment of the commandment to punish evil, to inform on, and be a witness against, people who have committed violent crimes. Of course, a person who testifies must be scrupulously careful that he tells only the truth as he knows it. Given the fact that we are lacking our own system to punish violent criminals, it seems incumbent upon all Jews to aid the government in its just prosecution of crime, as no other mechanism exists to prevent the triumph of chaos over order.⁷⁵

To a great extent being a prosecutor is similar to being a witness — both vitally aid in the prosecution of criminals. In

74. Rabbi H. Schachter, "Dina Dimalchuta Dina" 1 *Journal of Halacha & Contemporary Society* 103, 118 (1981).

75. For a fascinating proof to this proposition, see *People v. Drelich*, 506 N.Y.S.2d 746 123, A.D.2d 441 (2d App. Div. 1986). In this case, Mr. Drelich appealed his murder conviction on the grounds that his confession of the "brutal stabbing murder of his 23-year-old pregnant wife" to his communal rabbi ought not to have been admitted at trial. The rabbi testified against the defendant and recounted the confession, which resulted in his conviction. The court determined that no rabbi-penitent privilege attached, as "the defendant's communications to Rabbi were made for the secular purpose of seeking assistance in the retention of counsel, and in negotiating with the prosecutor's office and securing other assistance in connection with the preparation of his defense to the charges."

At trial the rabbi testified that his action in bringing this issue to the attention of the secular authorities, and his testimony at trial, were both compelled by halacha as a fulfillment of the obligation to eradicate evil ["*uviarta hara mikerbecha*"]. Rabbi Menashe Klein appears to prohibit this type of conduct; see Rabbi M. Klein, *Mishne Halacha* 7:285. For a response, see Rabbi S. Turk, *Pri Malka* 876:2.

situations in which it is permissible to inform on a Jew for the commission of a crime, and thus assist in his imprisonment, one might think it is also permissible to be the prosecutor against him. However, that is not completely correct. The Talmud (*Bava Metzia* 83b-84a) states:

Rabbi Eliezer the son of Rabbi Shimon once met an officer of the Roman government who had been sent to arrest thieves. He gave the officer shrewd advice as to how to detect them. Upon hearing this, the government appointed Rabbi Eliezer to arrest thieves, which he proceeded to do. Rabbi Yehoshua ben Korcha rebuked him, asking how long he [Rabbi Eliezer the son of Rabbi Shimon] would give over Jews to be executed by the Roman government. Rabbi Eliezer replied, "I am weeding out thorns from the vineyard." Whereupon Rabbi Yehoshua retorted, "Let the Master of the vineyard weed out the thorns."

A similar thing befell Rabbi Yishmael the son of Rabbi Yosi. The prophet Eliyahu appeared to him and rebuked him . . . "What can I do — it is the royal decree," responded Rabbi Yishmael. Eliyahu retorted, "Your father fled to Asia, you flee to Laodicea."

Thus, two of the greatest talmudic sages were rebuked for being professional prosecutors.

A number of *Rishonim* advance an explanation for this reprimand which changes its focus. The Ritva (commenting on *id*) rules that it is only scholars and rabbis of the caliber of Rabbi Eliezer and Rabbi Yishmael who should not be prosecutors or police officers — and even for these individuals such conduct was not prohibited, but only frowned on. According to this mode of analysis, it is only rabbis who should not engage in this type of work — but all others may.

Even if one were to decline to accept the Ritva's analysis, it is possible to distinguish between aiding a mobster or tyrant and aiding the government of the United States of America, a government which has been classified by all modern authorities as a

righteous government.⁷⁶ The *Shulchan Aruch* (*Choshen Mishpat* 388:9-10) explicitly limits the prohibition of *mesirah* to reporting a Jew to an *unjust* government. Accepting this mode of analysis, it is only prohibited to aid a government in the prosecution of criminals if the government, like the Roman government, is not a fair and just one. It would be permissible to be a prosecutor in the United States according to this mode of analysis.⁷⁷

Additionally one could argue that any action which the secular government may take within the scope of the rule of *dina dimalchuta dina* (the law of the land is the law) which is binding on Jews, the government may enforce through criminal and civil penalties, and Jews may aid in this enforcement. The keeping of law and order is unquestionably one such function. A proof to this can be found in Rabbi Feinstein's decision allowing one to be a tax auditor for the government in a situation where the audit will result in the prosecution of Jews for evading taxes.⁷⁸ He allows such conduct on the grounds that the secular government is entitled to collect taxes and thus a Jew may aid them in that proper goal.⁷⁹

76. See *Iggerot Moshe Choshen Mishpat* 29 and Rabbi Schachter, *supra* note 74, at 118 ("A 'mossur' is one who aids a pirate, or a crooked government official or a tyrant").

77. The *hashavat aveidat akum bechinam* problem is not significant because the Jew is being paid to work; he is not working for free. So too, the prohibition found in *Choshen Mishpat* 28:11-12 is inapplicable when the legal advice or testimony is both true and paid for (or the withholding of it would cause a *chillul hashem*).

78. Rabbi M. Feinstein *Iggerot Moshe, Choshen Mishpat* 1:92. It is incorrect to maintain that Rabbi Feinstein is referring to a tax auditor who can only recommend civil and not criminal penalties, as no such position exists. Rabbi Feinstein's rationale hinges on the legitimacy of the government's collection of taxes, and not on the penalties available to the government.

79. Another example can be found in Rabbis Henkin and Feinstein's well known opinion that rent control regulations are binding on Jewish landlords when they lease apartment to Jewish tenants; *Iggerot Moshe Choshen Mishpat* 2:55. It seems apparent that once rent control is binding on Jews, one may be a governmental inspector for the agency which is charged with insuring that the rent control regulations are observed.

In summary, in any situation in which the secular government may, according to halacha, enforce its laws against Jews, and a Jew is breaking that law in a way that indicates he is a danger to society, it is permissible for an observant Jew to aid the government, either as a prosecutor or as a witness, to apprehend the criminals.

2. Defending the Guilty

Having established that it is permissible to aid in the prosecution of criminals, it is now necessary to determine if one can aid criminals in their defense, and if so, what type of help is permitted. According to the American adversarial system of justice, while a lawyer may not lie on behalf of his client, he must defend his client zealously even if he knows the case against his client is factually true. This is so because the government bears the burden of proving guilt beyond a reasonable doubt in all criminal cases.

An initial question must be addressed: may a person, according to halacha, plead "not guilty" to a crime that he knows he has committed but which the government cannot prove, or must an observant Jew plead guilty if he actually is guilty? It would appear that one may plead innocent even if one knows that one is factually guilty. According to halacha, a confession is not admitted in court, and in fact does not prove guilt.⁸⁰ Requiring a person to plead guilty if he actually is, and thus waive his right to a trial, is tantamount to requiring a person to confess to his crime. An observant Jew thus may plead innocent so as to force the government to prove its case according to law.⁸¹

80. Rambam, *Hilchot Sanhedrin* 18:6; R. Norman Lamm, "The Fifth Amendment and Its Equivalent in Jewish Law," 17 *Decalogue Journal* (Jan. 1967).

81. While it might appear to some that a defendant is lying when he pleads "not guilty" when he knows he is factually guilty, such is a misunderstanding of American law. A defendant need not plead to any offense. In the absence of any plea, a plea of "not guilty" is entered (in harmony with the notion of innocent until proven guilty). Thus, by entering a plea of "not guilty", a defendant does not assert that he is actually innocent — that he can only do through testimony — but only that he wishes to be tried in a court of law. A proof to this comes

So too, when the government has not proved its case, a defense lawyer may advise the jury to acquit his client simply because the evidence has not proved "beyond a reasonable doubt" that his client is guilty. This is true, in this author's opinion, even if the client has told the lawyer that he is factually guilty. In the American legal system, just like halacha, the government bears the burden of proving each element of a criminal charge, and in any situation in which the government has not done so the defendant is legally entitled to an acquittal. Any other rule is tantamount to requiring an observant Jew who is actually guilty of a crime to plead guilty according to the halacha, even if the government cannot prove its case to the satisfaction of the jury. A Jew, like all other citizens, is entitled to a trial in which the government meets its burden of proving guilt.

The scope of a lawyer's role in aiding a criminal defendant is directly connected to a discussion in the Talmud (*Niddah* 61a) where Rabbi Tarphon was approached by a group of people who were fleeing the authorities. It had been rumored that these people had committed a murder. Rabbi Tarphon declined to help them, but rather urged them to hide themselves. The reason R. Tarphon declined to aid is in dispute — and this dispute is critical to understanding the halachic status of criminal defense work.

Rashi states that the reason R. Tarphon would not help these people was because if they were guilty, helping them would be halachically prohibited. This would imply that it is halachically prohibited to aid defendants who *might* be guilty. Tosafot and Rosh (quoting the *Sheiltot*, Numbers 129) disagree and argue that the

from the legal rule that a person who testifies that he is innocent when he is not actually innocent, can be prosecuted for perjury, but merely pleading "not guilty" when one is actually guilty, is not grounds for a perjury charge.

The identical distinction is present in halacha. A person is not guilty of a crime, and liable for punishment, until *beit din* actually pronounces him guilty. In civil cases, on the other hand, the obligation to repay starts at the time of the action, and *beit din* only enforces a preexisting obligation. The court establishes the status in criminal cases; in civil cases the court only reveals the already established fact.

reason R. Tarphon would not help them was because R. Tarphon was afraid that the government would punish him for helping criminals escape, and that helping the accused is actually permitted halachically. Most *Rishonim* accept the reasoning of Tosafot and Rosh (see e.g. Meiri on *id.*). According to this explanation, any help which the government allows one to provide to defendants (e.g. being a defense attorney) would be permitted.

The *Chochmat Shlomo* and Rabbi Akiva Eiger argue that this ruling of Tosafot and Rosh applies only in cases where, in the aider's (the lawyer's) mind, the guilt of the defendant is in doubt. In the case of known guilt, no help is permitted. Basing himself on this ruling, Rabbi Schachter states:

If a lawyer *knows* that his client has committed a crime, it is forbidden for him to help the criminal escape the consequences of his act, by relying on some technical legal points or other devices. The lawyer, just as any Jew, is directed by the Torah to "eradicate the evil from our midst," and may not actively assist someone to avoid his punishment.⁸²

Thus, according to Rabbi Schachter a lawyer may not advance "technical legal points or other devices" when the client is known to be actually guilty. On the other hand, it is apparent (from the Rosh, *Niddah* 9:5) that the defendant must be presumed innocent by the lawyer.⁸³

It is also important to distinguish between those situations in which the lawyer advances a false defense or "technical legal points" and those situations in which the lawyer advances defenses that truly mitigate the seriousness of the crime, or cast doubts on the validity of the government's case. For example, under Rabbi Schachter's ruling, it would seem that while a lawyer cannot advance in trial a defense of "my client did not commit the crime"

82. Schachter, *supra* note 74, at 121-122. Rabbi Schachter, in footnote 38, cites Rabbi Menashe Klein, *Mishne Halacha* 7 p.366b.

83. One could argue that all defendants who have not told their lawyers that they are factually guilty, have the status of "in doubt" until conviction at trial. The overwhelming majority of defendants are in this category.

when the client has informed his lawyer to the contrary,⁸⁴ a lawyer may advance numerous defenses which indicate to the jury that a guilty verdict is not appropriate. Thus, he may advance an insanity defense, or a defense of necessity, duress or inadvertence, providing that the client has told him that these mitigating factors are present or the lawyer reasonably believes them to be present. So, too, any rule of evidence or law whose goal is one of "truth seeking" and whose violation by the prosecution (or defense) casts doubt on the credibility of the evidence, may be invoked by a lawyer to the benefit of a client, since such rules promote justice by the court.⁸⁵

In the more typical case where the client does not tell the lawyer he is guilty and instead protests his innocence (notwithstanding the evidence to the contrary), it would seem that a complete defense would be permitted according to the Rosh and Tosafot. In such a case, a lawyer may advance all defenses which are tenably true and which the client represents as correct. Obviously a lawyer may also advance a defense that the facts as stated by the government do not constitute a crime under the relevant statute and thus the client ought to be acquitted.⁸⁶

84. And also violates many professional ethics rules; see section I:1:2 and *supra*, note 81. Obviously a lawyer may not use techniques at trial whose sole purpose is to confuse the finder of fact or to produce error and a reversal on appeal. Both of these tactics are unethical.

85. Thus, for example, both hearsay evidence and a confession given only after torture may be suppressed as the evidence's validity may be reasonably doubted. The status of the prophylactic rules occasionally promulgated by the Supreme Court in the field of criminal procedure (e.g. *Mapp v. Ohio*, 367 U.S. 643 (1961)) could be debated. While these rules were not authorized in order to insure justice in any particular case, they are part of the government's program to reduce violations of law by governmental officials and to promote justice in society at large. While the efficacy of such a policy could, and frequently is, debated by lawyers, there is little doubt that the goals these policies seek to advance are ones which the halacha respects, and also a fulfillment of the obligation to eradicate injustice from society. A balance must be struck. The damage to society through the release of criminals would have to be weighed against the injury to society through illegal, and sometimes criminal, actions of law enforcement personnel which would otherwise go unpunished. This problem does not easily resolve itself.

86. For example, in a prosecution for criminal tax fraud the defense frequently

Moreover, an understanding of R. Tarphon's dilemma different from that advocated by the *Chochmat Shlomo* is possible. The *Sheiltot* (which the *Chochmat Shlomo* did not have) and hence Tosafot and Rosh, might in fact make no distinction between known guilt and mere rumors of guilt. R. Tarphon might have hesitated to act solely out of fear of violating the secular law (and being punished for that violation). Under this explanation, the sole limitation upon aiding a person accused of a crime would be the danger to the aider. All aid permitted by the government (and hence without any danger to the provider) would be permitted. The *Aruch Lenair*, by R. Yakov Ettlinger, advances exactly such an explanation of this topic. He denies that there is any intrinsic halachic obstacle to aiding criminals who seek help — and he asserts this as Rashi's opinion as well as that of Tosafot and Rosh. He states:

In my opinion one could state that Rashi is not arguing with the *Sheiltot*. When Rashi states that it is prohibited to save the murderers, he does not mean that it is prohibited according to halacha to save them, but rather that secular law prohibits that conduct. Once secular law prohibits one from saving them, it is halachically prohibited also, since saving these individuals would involve great risk to the savior.⁸⁷

If this approach is correct, (and it certainly reflects the literal words of Tosafot and Rosh) any form of aid legally permitted by the secular society (e.g. being a defense attorney) would be halachically permitted, as it is only because of the danger to the aider that one may not act to help a criminal. In the absence of a

argues that not only was no crime committed, but that the tax return of the defendant was properly filed, and the IRS is misinterpreting the relevant tax law. It is permissible under halacha to challenge the IRS's understanding (called Regulations) of the Internal Revenue Code, as the executive branch of the federal government is *not* constitutionally given the power to interpret laws in a manner that binds citizens. That task is left to the judiciary, whose interpretation binds the other two branches as well as the citizenry. Thus, in America, *dina dimalchuta dina* applies only to laws that the judiciary sanctions as valid.

87. See also *Asifat Zekanim*, *Niddah* 61a and *Chiddushei Mahari Shapira*, *Niddah* 61a for other authorities who accept this approach.

secular prohibition to aid such individuals, there is also no halachic prohibition.

This analysis does not obviate the obligation to eradicate evil from society (*uviarta hara mekirbecha*), which is certainly applicable. Particularly when read in light of American law, Rabbi Ettlinger's position appears logical. Since the secular government *requires* that a criminal be represented by a competent lawyer at trial (if he desires one) and that a conviction is invalid absent this representation, a lawyer's participation as a defense attorney is also a fulfillment of the obligation to eradicate evil from within society, because without such representation no convictions would be valid under American law. According to the *Aruch Lenair*, the only type of aid prohibited is that which the secular government does not allow.⁸⁸

Of course, according to both approaches a lawyer may not assist a client in the creation of a false defense — *i.e.*, allow his client to commit what the lawyer knows to be perjury or to advance other improper defenses. Needless to say, such conduct is prohibited under relevant American law as well.⁸⁹

It is an over-simplification of the criminal justice system to peg (as the popular press has often done) an attorney defending one popularly deemed guilty, as engaging in improper activity and using his skill as a lawyer to the detriment of society. Numerous individuals whose guilt was never doubted by the public when their trials started have been shown, through able defenses, to be factually innocent of the charges leveled. Regrettably enough, history is also full of innocent people who were punished because of unavailable or incompetent defense attorneys. The zealous advocacy of truthful defenses enhances, rather than detracts from, justice in society.

88. On a practical level, there is nearly no distinction between the positions taken by the *Chochmat Shlomo* and the *Aruch Lenair*. The sole point in contention would be whether a lawyer could advance defense at trial not on the merits for a person who has acknowledged to the lawyer factual guilt.
89. See Subin, "The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case," 1 *Geo. J. Legal Ethics* 125 (1987) (stating that false defenses are improper and ethical lawyers do not use them); *Nix v. Whiteside*, 475 U.S. 157 (1986) (lawyer may, and most states require that he must, inform the court of a perjury by his client).

Conclusion

Although the practice of law, like all fascinating journeys, is full of pitfalls, the observant lawyer can steer clear of these snares and engage in a religiously proper, economically, intellectually, and socially rewarding practice of law encompassing many areas of law within the American legal system. This is not to say there are no limitations upon what a religious Jew may do; but with care and study these obstacles can be overcome.

Postscript

One problem many lawyers confront relates to the financial stresses one encounters periodically in the legal profession. There is pressure to over or double bill in many instances, a practice that might be a form of theft from a client. One is occasionally tempted to deceive others to avoid the financial repercussions of mistakes or to blame others when the fault lies within oneself. Law, more than most professions, leaves much to the good judgment and honesty of its practitioners, and some are occasionally enticed to violate these trusts for personal gain. It is that temptation that must be resisted.

Additionally, many attorneys, in their drive towards professional achievement, ignore other areas of life to which Torah places a high priority — from teaching one's children and being a companion to one's spouse (or even being married and having children), to compliance with kashrut and other ritual laws that can sometimes be an obstacle to professional advancement. Finally, many observant lawyers apportion their time so that there is no opportunity to continue their intellectual growth in Judaism and Torah — an error of enormous magnitude. Regrettably, in many law firms the practice of law involves a commitment in excess of 60, or even 70, hours per week. These dangers are the most serious problems confronting attorneys in the practice of law, and they are the challenge that must be met.

This article is dedicated in memory of my grandfather Morris Broyde ר' משה אהרן בן ר' יצחק יוסף who returned to his Maker on June 25, 1990 (2 Tammuz, 5750).