



February 2014

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## Recommended Citation

Steven H. Resnicoff, *The Attorney-Client Relationship: A Jewish Law Perspective*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 349 (2000). Available at: <http://scholarship.law.nd.edu/ndjlepp/vol14/iss1/12>

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## THE ATTORNEY-CLIENT RELATIONSHIP: A JEWISH LAW PERSPECTIVE

STEVEN H. RESNICOFF\*

Professors Thomas L. Shaffer and Robert F. Cochran, Jr., describe four models for approaching moral choices in the attorney-client context.<sup>1</sup> These paradigms portray the practitioner as (1) godfather, (2) hired gun, (3) guru, or (4) friend. They principally differ as to the extent to which the attorney, rather than the client, controls the relationship and the degree to which the interests of persons other than the client are considered important.<sup>2</sup>

As godfather, the lawyer perceives the client's narrowly defined interests as paramount and does "whatever it takes," irrespective of the impact on others, to promote such interests. The godfather attorney pursues this path without even consulting the client concerning ethical qualms. The hired gun approach similarly accepts the client's interests as the sole barometer of success. It differs only in that the client purportedly makes the moral choices, and the attorney "merely" follows orders.<sup>3</sup> By contrast, an attorney guru considers the consequences to third parties and, based on some set of ethical criteria, determines—essentially without input from his client—what his client's mor-

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1. See THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994).

2. See *id.* at 3-4.

3. The attorney, of course, as an independent moral agent, is fully responsible for the moral choice she makes in implementing each of the client's orders. The "hired gun" model simply describes a relationship in which the attorney erroneously fails to perceive herself as responsible for such decisions.

ally correct conduct should be and proceeds accordingly. The attorney who acts as friend, however, not only considers what might be ethically correct but engages his client in moral discourse, the purpose of which is to enable his client to make the right decision for the right reasons. The attorney friend, however, does not attempt to manipulate his client to do the right thing.<sup>4</sup>

Jewish law (*Halakha*) assumes the existence of an omnipotent, omniscient and benevolent Creator and the existence of a network of relationships—pursuant to His decree—between and among the Creator and all human beings. The purpose of this article is to examine how, in light of these assumptions and applicable Jewish law doctrines, none of the Shaffer-Cochran models adequately captures Jewish law's view of the relationship a Jewish attorney has with his client, particularly when the client also happens to be Jewish.

### I. THE GODFATHER AND HIRED GUN APPROACHES

The godfather and hired gun models may be based on the belief that the adversary system requires an attorney to act as though his client's narrowly defined interests are of almost exclusive importance. Consequently, other societal values—of the community as a whole and of other individuals—are sacrificed to advance the client's legal interests. For example, to further the client's interests, the attorney is often not required—and sometimes not even allowed—to make certain disclosures that could powerfully promote the quest for truth and justice in a given case, that could protect innocent persons from harm (whether emotional, financial or physical) or wrongful criminal conviction, or that could safeguard the public from a client's propensity for future criminality.<sup>5</sup> Godfather and hired gun attorneys may similarly justify their use of morally questionable tactics, such as

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4. See SHAFFER & COCHRAN, *supra* note 1, at 50-51.

5. Although the American Bar Association has *proposed* Model Rules of Professional Conduct ("ABA Rules"), each jurisdiction must adopt its own rules. While an examination of all of the various approaches to confidentiality would exceed the scope of this paper, a few observations are apt. Under ABA Rule 1.6, for instance, an attorney would not be *required* to voluntarily disclose any information relating to the representation of a client (whether the information came from the client or not) even if disclosure were necessary to prevent the client from murdering someone. While states have generally rejected this extreme approach, they, too, impose various important restrictions on an attorney's duty and right to disclose information. Moreover, while an attorney is typically directed to represent his client zealously, he is not instructed to give any consideration to the independent interests of others. Comment 1 to ABA Rule 1.3 states: "A lawyer should act with commitment and dedication to the

sully the reputations of honest people,<sup>6</sup> on the adversary system.

Where the means they employ are unobjectionable, perhaps godfather or hired gun attorneys believe that they bear no responsibility for the evil results to which their efforts contribute. Such an attorney, for instance, may rely on the rationalization that it is the client, not the attorney, that actually utilizes the judgment to do wrong—such as by wrongfully collecting money or avoiding some responsibility.

Jewish law, however, is not based on an adversarial litigative system.<sup>7</sup> It does not allow for a division between an attorney's "personal" and "professional" activities.<sup>8</sup> Nor does Jewish law permit a person to voluntarily undertake "fiduciary" obligations to a client which would alter his preexisting duties of loyalty to Jewish law. Consequently, a Jewish lawyer must eschew tactics which, although technically permitted by secular law, violate *Halakha*. The lawyer's status as an attorney provides no special excuse for unscrupulous conduct.

Similarly, where a client's *objective* violates Jewish law, there are at least four reasons why a Jewish attorney could not serve as the client's godfather or hired gun: (1) it is biblically forbidden to *enable* someone to violate Jewish law; (2) it may be rabbinically prohibited to *assist* or to encourage someone to violate Jewish law; (3) in at least some cases, there is an affirmative obligation to try to prevent someone from violating Jewish law; and (4) in many instances, there may also be a duty to protect someone—

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interests of the client and with zeal in advocacy upon the client's behalf." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. 1 (1983).

The next two sentences of comment 1 are enigmatic: "However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued." *Id.* Two observations are in order. First, these sentences do not direct the lawyer to consider the interests of others but, *at most*, suggest that the lawyer *may* do so. Second, the sentences do not seem to imply that an attorney should, as a general rule, consider the substantive interests of others but, instead, seem arguably to focus on the possible avoidance of what might be perceived as "unfair," although permitted, *procedures*.

Of course, legislatures, motivated by substantive concerns, sometimes require professionals to make particular disclosures. Nevertheless, such statutes rarely apply to attorneys. *See, e.g.*, Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and Specter of Lawyer as Informant*, 42 DUKE L.J. 203 (1992).

6. *See, e.g.*, Debra Baker, *Shredding the Truth*, A.B.A. J., Oct. 1999, at 40-44.

7. *See* Dov Frimer, *The Role of a Lawyer in Jewish Law*, 1 J.L. & RELIGION 297 (1983).

8. *See, e.g.*, Samuel J. Levine, *The Broad Life of the Jewish Lawyer: Integrating Spirituality, Scholarship and Profession*, 27 TEX. TECH L. REV. 911 (1996).

including your client's adversary—from being wrongfully harmed, even if the harm is only financial.

#### A. *The Ban Against Enabling Someone to Sin*

The Torah commands that, “in front of the blind (*lifnei iver*), do not place a stumbling block.”<sup>9</sup> Among other things,<sup>10</sup> the *lifnei iver* doctrine proscribes enabling people to violate Jewish law. This aspect of *lifnei iver*, not to frustrate the Divine Will, represents an obligation directly owed to God and applies whether the person assisted is a Jew or a non-Jew.<sup>11</sup>

A classic discussion of this aspect of *lifnei iver* appears in the Talmudic tractate *Avodah Zarah*. The first Mishnah in *Avodah Zarah* states, in part, that it is impermissible to do business with idolaters for three days preceding their religious holidays. The Talmud asks if the reason for this prohibition is lest an idolater profit from such transactions. Rabbi Shlomo Yitzhaki (*Rashi*)<sup>12</sup> explains that if the idolater realizes a profit, he may—during the impending religious holiday—praise his idol for the profit. By causing this to happen, the Jew would thereby violate a specific rule against causing the name of an idol to be mentioned.<sup>13</sup> Alternatively, the Talmud asks whether the prohibition is lest an idolater use an item so purchased to worship his idol, because, under Jewish law, idol worship is forbidden to both Jews and non-Jews. By providing the merchandise used in the non-Jew's idolatry, the Jewish vender might be liable for *lifnei iver*.

The Talmud suggests there could be a practical difference between these two reasons in a case in which a Jew wants to sell an animal to an idolater. If the prohibition is based on the possi-

9. LEV. 19:14. See also R. YOSEF CARO, SHULHAN ARUKH, *Yoreh De'ah* 151:1 (16th cent.) (Hebrew). Throughout the years, the views of scores of outstanding commentators were annotated to the *Shulhan Arukh*, which has contributed to its status as the most central code of Jewish law.

10. There are several aspects to the *lifnei iver* doctrine. See generally R. YITZHAK ADLER, *LIFNEI IVER* (1988) (Hebrew). Surprisingly, there is a debate among Jewish law authorities as to whether this prohibition applies to the literal case in which one places a physical obstacle in front of a person who is visually impaired. See *id.* at 15-18 (citing various views); R. MOSHE FEINSTEIN, *IGGEROT MOSHE*, *Yoreh De'ah* 1:3 (20th cent.) (Hebrew) (stating that it applies to such a case).

11. See FEINSTEIN, *supra* note 10, at *Orah Hayyim* V:13(9) (causing another to sin is not prohibited because it is a wrong against the sinner but because it is a wrong against the Almighty).

12. R. SHLOMO YITZHAKI, BABYLONIAN TALMUD, *Avodah Zarah* 6a (11th cent.) (Hebrew) [hereinafter RASHI, TALMUD].

13. See *id.*, (citing Exod. 23:13). This prohibition, which differs from the rule against idolatry, is cited at CARO, *supra* note 9, at *Orah Hayyim* 156:1.

bility of profit, the sale should be proscribed. If, on the other hand, the prohibition is based on *lifnei iver*, the Talmud suggests that the sale should be permitted, because, presumably, the idolater already owns an animal he could use for a sacrifice. Thus, at this point in the discussion, the Talmud assumes that one violates the *lifnei iver* prohibition only if one provides help that is absolutely necessary for the commission of a sin. The Talmud queries whether this assumption is true:

If the idolater has his own animal [that he could use as a sacrifice], does this really mean that [if a Jew sells him an animal and the idolater sacrifices that animal instead of the one he already owns] there is no violation of *lifnei iver*? Was the following not taught in a *braitha* [a pre-Talmudic text that, although not included in the Mishnah, is nonetheless authoritative]:

Rabbi Natan says: "How do we know that one may not give a cup of wine to a Nazir [a Jew who has accepted upon himself certain specific strictures, including a duty to refrain from drinking wine] or a limb taken from a live animal [which, under Jewish law, may not be eaten by Jews or non-Jews] to a non-Jew?" It is taught "[a]nd before a blind man, do not place a stumbling block."

Yet if one does not hand it to him, he [the Nazir or the non-Jew] will take it himself!<sup>14</sup>

Thus, the *braitha* taken at face value implies that helping a wrongdoer commit a wrong violates *lifnei iver* even if the wrong could have been committed without the help. The Talmud, however, answers by restricting the rule of the *braitha* to a particular scenario. The Talmud states that, in the *braitha*, Rabbi Natan was discussing cases in which the Nazir and the wine—and the limb from a live animal and the non-Jew—were, respectively, "on two [different] sides of the river," such that, without assistance, neither the Nazir nor the non-Jew would have been able to acquire the forbidden substances. Consequently, providing the wine to the Nazir—and the animal limb to the non-Jew—did not merely facilitate the sin but made it possible. If the prohibited act could have been done without anyone's assistance, the Nazir and the wine—and the non-Jew and the animal limb—would have been described as being on "one side of the river." In such a case, providing help does not violate any biblical *lifnei iver* rule.

There are various ways in which a client's objectives may violate Jewish law. For example, a client may wish to collect money

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14. TALMUD, at *Avodah Zarah* 6a-b.

to which he is not entitled under Jewish law. In most monetary disputes among Gentiles, there will usually be little, if any, conflict between secular law and *Halakha*. Where one or both parties are Jewish, however, the parties' rights under secular and Jewish law may significantly differ.<sup>15</sup> If the client cannot successfully collect the "forbidden" money he seeks without the help of a *particular* Jewish lawyer, the client and the money are "on two sides of the river." If the lawyer represents the client and enables him to obtain the money, all, or virtually all, authorities would presumably rule that the attorney is guilty of *lifnei iver*.<sup>16</sup>

But what if the client could have violated Jewish law and collected the money without the help of a particular Jewish attorney? Would the client and money be considered to be "on one side of the river," thereby rendering *lifnei iver* inapplicable? The answer depends on a variety of factors. For example, assume that although the client does not need the help of a *particular* Jewish lawyer, he does need the help of *some* Jewish lawyer. Based on the personal chemistry that is essential to an attorney-client relationship, many Jews living in Israel, for instance, might simply decide not to pursue a particular claim rather than use a non-Jewish attorney, particularly if there are few local non-Jewish attorneys to choose from. Although there is a notable minority opinion,<sup>17</sup> most Jewish law authorities seem to follow the view of

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15. Although several Jewish law doctrines, such as *dina demalkhuta dina* (the law of the land is binding law) and *minhag hasoharim* (the custom of merchants) integrate many secular laws and practices into the Jewish law system, each of these principles is subject to various limitations. See generally Michael J. Broyde & Steven H. Resnicoff, *Jewish Law and Modern Business Structures: The Corporate Paradigm*, 43 WAYNE L.REV. 1685, 1765-73 (1997); Michael J. Broyde & Steven H. Resnicoff, *The Corporate Veil and Halakhah: A Still Shrouded Concept*, in JEWISH BUSINESS ETHICS (Aaron Levine & Moses Pava eds., 1999); Steven H. Resnicoff, *Bankruptcy—A Viable Halachic Option?*, 24 J. HALACHA & CONTEMP. SOC'Y 5 (1992); R. Tzvi Sandler, *Liability for Motor Vehicle Damages*, 36 J. HALACHA & CONTEMP. SOC'Y 58, 73 (1993) (arguing that neither doctrine alters the basic Jewish law as to tort liability for motor vehicle damages).

16. See generally ADLER, *supra* note 10.

17. See, e.g., R. HAYIM ELAZAR SHAPIRA, *MINHAT ELAZAR* I:53 (20th cent.) (Hebrew); R. AVRAHAM S. B. SOFER, *KETAV SOFER, Yoreh De'ah* 183 (19th cent.) (Hebrew); R. ELIEZER WALDENBERG, *TZITZ ELIEZER* XIX:32 (20th cent.) (Hebrew) (asserting that this is actually the majority view). See also R. OVADIA YOSEF, 3 *YEHAVEH DA'AT* 67 (20th cent.) (Hebrew) (citing various views). FEINSTEIN, *supra* note 10, at *Orah Hayyim* IV:71, permits a teacher to prepare a child to perform in the synagogue on the Sabbath, despite the strong likelihood that the child will desecrate the Sabbath by traveling to the synagogue in a motor vehicle. Feinstein notes that if the teacher refuses to instruct the child, someone else would do so. For this reason, Feinstein states that only the rabbinic *mesayeah* rule, see *infra* pt.I(B), and not the biblical *lifnei iver* prohibition, is at issue. Feinstein does not, however, specify whether a non-Jewish substitute

Rabbi Yehuda Rosanes (the *Mishneh LaMelekh*) and rule that the client and the money are still considered to be "on two sides of the river."<sup>18</sup> As a result, any Jewish attorney who assists the client violates *lifnei iver*.

What if a client could accomplish his objective without the help of any Jew—so long as a non-Jew would help him? For example, assume that a Nazir does not own any wine and can only drink wine if somebody either gives or sells some to him. Assume, further, that there are non-Jews who have wine and who are willing to sell it to this Nazir. Some renowned Jewish law authorities, including the Gaon of Vilna,<sup>19</sup> the *Hazon Ish*,<sup>20</sup> (and possibly Maimonides and Rabbi Aharon HaLevi (the *Hinukh*) as well<sup>21</sup>) believe that, even in this case, a Jew who sells the Nazir wine violates the biblical *lifnei iver* rule. Nonetheless, most

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teacher would be available. If only Jewish substitutes were available, Feinstein, by saying that only the *mesayeah* rule is implicated, follows the minority view.

18. See, e.g., ADLER, *supra* note 10, at 333 ("Where it is impossible [for the wrongdoer to obtain the object necessary for the sin] except from other Jews, the majority of Jewish law authorities rule strictly."); R. CHAIM Y. D. AZULEI, BIRKEI YOSEF, *Hoshen Mishpat* 9(3) (18th cent.) (Hebrew) (listing various authorities that so rule and agreeing with them); R. YOSEF BABAD, MINHAT HINUKH, *Mitzvah* 332(3) (19th cent.) (Hebrew); R. AVRAHAM DANZIG, HAKHMAT ADAM, *Klal* 130, *siman* 2 (18th cent.) (Hebrew); R. YOSEF HAYYIM, BEN ISH HAI (19th cent.) (Hebrew), cited in DR. AVRAHAM S. AVRAHAM, NISHMAT AVRAHAM IV:86 (20th cent.) (Hebrew); R. EZRIEL HILDESHEIMER, RESPONSA RABBI EZRIEL I, *Yoreh De'ah* 182 (19th cent.) (Hebrew) (writing that this is the majority view); R. YAAKOV KANIEVSKY, SEFER KEHILLOT YAAKOV II:7, II:106 (20th cent.) (Hebrew); R. SHLOMO KLUGER, RESPONSA TUV TA'AM VADA'AT, TELISA'AH II:31 (19th cent.) (Hebrew); R. HAYYIM MEDINI, SDEI HEMED, *Ma'arakhat Vav*, *Klal* 26, s.k. 9 (19th cent.) (Hebrew) (stating that this is the majority view); R. YEHUDA ROSANES, MISHNEH LA MELEKH, *Hilkhot Malveh v'Loveh* 4:2 (18th cent.) (Hebrew). See also R. YITZHAK WEISS, MINHAT YITZHAK III:79 (20th cent.) (Hebrew).

19. BIUR HA GRA, *Yoreh De'ah* 151, s.k. 8 (19th cent.) (Hebrew).

20. HAZON ISH, *Yoreh De'ah*, *siman* 52:13 (20th cent.) (Hebrew).

21. For various interpretations as to the positions of Maimonides and Rabbi Aharon HaLevi (*Hinukh*) (13th cent.), see, for example, ADLER, *supra* note 10, at 21; BABAD, *supra* note 18, at *Mitzvah* 68 (saying that, because Maimonides did not differentiate between cases involving "two sides of the river" from those involving "one side of the river," Maimonides presumably held that both cases involved biblical *lifnei iver* violations); R. ISAAC HERZOG, HEIKHAL YITZHAK, *Orah Hayyim* 42 (20th cent.) (Hebrew) (citing views that Maimonides held that providing help in a "one side of the river" constituted a biblical violation); MEDINI, *supra* note 18, at *Ma'arakhat Vav*, *Klal* 26, s.k. 17; R. SHALOM YITZHAK TAWIL, SHA'AREI SHALOM, *sha'ar* 3, *hakdamah* (20th cent.) (Hebrew) (surveying the views of numerous commentators, but personally concluding that Maimonides held that the prohibition in a "one side of the river case" was rabbinic). R. AARON SAMUEL KOIDONOVER, EMUNAT SHMUEL 14 (17th cent.) (Hebrew), and perhaps others, also ruled that the biblical *lifnei iver* rule applied even where the violator could have transgressed without the assister's help. See generally ADLER, *supra* note 10, at 23-26; TAWIL, *supra*, at *sha'ar* 3, *halakha* 1.



authorities rule that where non-Jews would sell the Nazir wine, the Nazir and the wine are considered to be “on one side of the river” and a Jew who sells the wine does not violate *lifnei iver*.<sup>22</sup> As discussed in Part IB, however, such conduct would in many instances violate rabbinic, as opposed to biblical, law.

The client-attorney scenario, however, is not entirely analogous to that of a Nazir and wine. If a Nazir drinks wine, he violates Jewish law irrespective of the quality of the wine he drinks. Thus, so long as the Nazir could—and would—purchase wine from non-Jews, it is clear that he could violate *Halakha* without the help of any Jew.<sup>23</sup>

By contrast, legal services are not fungible. One can never be sure, even if many alternative attorneys are available, that the client would succeed in obtaining the forbidden money through the efforts of anyone other than the particular Jewish attorney in question.<sup>24</sup> Attorneys provide myriad services. They inform clients as to the likely consequences of particular tactics and advise them as to which procedures to employ. They participate personally in the processes that are pursued, whether negotiative, litigative or both. They recommend what offers to make or accept, what interests to assert, and what arguments to advance. They carefully craft written documents—whether contracts,

22. See, e.g., ADLER, *supra* note 10, at 21.

23. Of course, if the same quality of wine as that sold by Jews was unavailable from non-Jews, or available only on less favorable terms, it is possible that a Nazir would not purchase from non-Jews. If so, the situation could be considered as one involving “two sides of the river.” See generally R. TZVI HIRSCH SHAPIRA, DARKEI TESHUVA, *Yoreh De'ah* 151 (19th cent.) (Hebrew).

24. Rabbi Menashe Klein makes a similar argument regarding auditors, and, partly for this reason, rules that it is forbidden for a Jew, as an auditor for the government, to audit the tax returns of other Jews. See R. MENASHE KLEIN, MISHNE HALACHOT VI:313 (20th cent.) (Hebrew); but see FEINSTEIN, *supra* note 10, at *Hoshen Mishpat* 92 (implicitly assuming that any qualitative differences among auditors—at least among those who would be hired by the government—are insignificant, by arguing that if a particular Jewish auditor would not work for the government, the government would use another auditor who would find the citizen's wrongdoing). Interestingly, an Orthodox auditor told me that there are standardized procedures that auditors apply and that, in fact, one auditor should do as good a job as the next. I doubt that many attorneys would so readily deny their uniqueness. As to the permissibility of serving as an auditor, see generally R. YEHOASHUA BLAU, PITHEI HOSHEN, *Hilkhot Nezikin*, *perek* 4, n.44 (20th cent.) (Hebrew); R. MOSHE STERNBUCH, TESHUVOT VEHANHAGOT I:807 (20th cent.) (Hebrew). As to whether a particular professional may have unique talents, see CARO, *supra* note 9, at 336 (not all physicians will be equally successful at treating a particular patient); R. MENASHE KLEIN, *supra*, at VII:115 (one tailor may be better than another and, if so, if a Jewish tailor makes immodest clothes for a particular customer, the tailor may be guilty of *lifnei iver*).

pleadings or briefs—and artfully engage in oral advocacy inside and outside of court. With respect to litigation, attorneys design strategies, select and prepare witnesses (experts and non-experts),<sup>25</sup> choose the order and manner in which to present their cases, formulate questions to pose to an adversary's witnesses, and respond, often under immediate time pressure, to unexpected twists and turns. In addition, as will be discussed in Part IB, they provide emotional support and encouragement to their clients and have to be able to interrelate to them on a personal level. In providing such services, attorneys utilize their intellectual power, their eloquence, their physical energy, and whatever other personal resources they can bring to bear.

Some lawyers are more knowledgeable about a certain topic, more diligent, creative, persuasive or just more fortunate<sup>26</sup> than others.<sup>27</sup> Consequently, if a particular Jewish lawyer were to refuse a case, it may be unclear in certain cases whether a replacement would be able to represent the client successfully. Even if we assume there are some attorneys who might do just as good of a job as the particular lawyer in question, the client may not be able to determine who these attorneys are. In many instances, even lawyers are unable to accurately assess the effectiveness of other attorneys with whom they have not had substantial, direct professional interaction. Assuming both that some other attorneys could do as good of a job and that the client could recognize who these attorneys are, the client, for various reasons, still might be unable to engage them without substantial inconvenience. For example, in many cases, the representation may be proscribed by some secular conflict of interest rule<sup>28</sup> or the attorneys may simply be unavailable. Even when assistance involves the provision of a fungible good, some Jewish law authorities (*poskim*) argue that if an alternative can only be

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25. An attorney often has to gauge the psychological or emotional strengths of potential witnesses, as well as the impact such witnesses will likely have on the judge or jury.

26. Rashi explains that even the Talmudic view that says "there is no 'pre-ordained fate' (*mazel*) as to Jews," only means that Jews, through prayer, can alter their fate. RASHI, TALMUD, *supra* note 12, at *Sabbath* 156b, *s.v. ayn mazel*.

27. Of course, the practical significance of such diversity may depend on the complexity and the specialized nature of a client's case.

28. There are many statutes and judicially promulgated ethics rules that disqualify attorneys from accepting particular clients. In many instances, an entire firm may be vicariously disqualified based on an actual or apparent conflict with respect to a single member of the firm. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1983).

obtained through some inconvenience, the situation is deemed to be one involving two sides of the river.<sup>29</sup>

In addition, assuming that the client was theoretically able to engage an equally effective alternative attorney, that attorney might be unwilling to provide services on terms as favorable as those of the particular Jewish attorney in question. As to the sale of goods, some authorities contend that if a non-Jewish seller does not offer wine to a Nazir on the same attractive terms as a Jewish seller, the Jewish seller would, by selling the wine, violate *lifnei iver*.<sup>30</sup> Unable to find an appropriate attorney<sup>31</sup> willing to take his case on acceptable terms, a client might even decide not to file suit altogether.<sup>32</sup> Thus, a particular lawyer's assistance may well be necessary if the client is to be able to violate Jewish law by collecting money to which he is not entitled. This is all the more likely if the client's matter requires specialized knowledge or training, limiting the number of appropriate alternative attorneys, or if the client must be personally represented in Israel, restricting the number of available non-Jewish alternatives.<sup>33</sup>

Jewish law provides principles for dealing with uncertainty. One such principle is that we rule strictly when faced with a possible violation of biblical law.<sup>34</sup> If the lawyer's assistance is critical to the client's success, then that lawyer, by enabling the client to violate Jewish law, is guilty of the biblical offense of *lifnei iver*. If there is doubt whether a client may be able to violate biblical law without the lawyer's help, we have an uncertain case of a biblical

29. See, e.g., ADLER, *supra* note 10, at 332; R. YAIR BACHARACH, HAVVOT YAIR 185 (17th cent.) (Hebrew); R. MORDECHAI YAAKOV BREISH, HELKAT YAAKOV II, *Yoreh De'ah* 23 (20th cent.) (Hebrew) (where stores are scarce and locating an alternative would require effort, the renting of a store to a Jew who will work in the store on the Sabbath is a case involving two sides of the river); MENAHEM HAMEIRI, BAIT HABEKHIRAH, *Avodah Zarah* 6a (13th cent.) (Hebrew).

30. See BACHARACH, *supra* note 29; BREISH, *supra* note 29; SHAPIRA, *supra* note 23. See also ADLER, *supra* note 10, at 332.

31. In some types of practices there is substantial personal interaction between attorneys and clients and, for the relationship to succeed, each must be comfortable with the other. As a practical matter, the number of alternative attorneys available to a particular client will depend on the client's ability to establish an effective relationship with an appropriate attorney.

32. See BACHARACH, *supra* note 29 (where a Jew sells merchandise at a lower price than others or sells on credit while others do not, we do not say that the purchaser can acquire the goods elsewhere).

33. Filing a suit typically requires a client to invest considerable time, energy and money. Even in a contingent fee arrangement, a client may have to expend sums to cover out-of-pocket expenses such as filing fees, depositions and expert witnesses.

34. See *supra* note 17.

*lifnei iver* violation, and the uncertainty rule would say that the lawyer could not represent the client.

Assuming that a lawyer's representation of a client would violate *lifnei iver*, are there any circumstances under which Jewish law would nonetheless allow the lawyer to help the client? For all practical purposes, the answer is "no," even if the refusal to represent clients wrongfully trying to collect money would cause an attorney to suffer some financial loss.<sup>35</sup>

The majority view is that *Halakha* requires that a person comply with a biblical prohibition that proscribes action,<sup>36</sup> such as *lifnei iver*, even if compliance causes him to lose all of his wealth.<sup>37</sup>

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35. Theoretically, a decision not to represent a particular client might lead to a loss of prospective revenue, whether from the client refused or because of professional sanctions, including possible disbarment. The loss of prospective revenue, as a practical matter, may in many instances be small. Lawyers often have more work than they have time for. The threat of professional sanction seems to be negligible. In most instances, secular law does not require a lawyer to accept a particular case. Even if a judge would otherwise want to impose a particular *pro bono* case on an attorney, the judge may well be sympathetic to switching assignments based on an attorney's religious convictions. Indeed, an attorney may have a right to religious freedom—whether constitutional or statutory—that would immunize him from any such sanction. *But see* Tenn. Bd. of Prof'l Responsibility, Op. 96-F-140 (1996) (religious objection to abortion held an insufficient basis for release from court appointment as attorney for a party attacking statutory restrictions on abortions). A junior attorney at a firm who refuses to represent a specific client may face the loss of future income because of reprisals from more senior members of the firm. As to all of these concerns, however, it is noteworthy that *Halakha* does not usually treat the loss of prospective income as seriously as the loss of currently held assets. *See* MEDINI, *supra* note 18, at *Ma'arakhat Hey, Klal* 59.

The most probable scenario involving a serious risk to current assets would be one in which an attorney or firm began representation of a client and only later discovered that the client's objective violated Jewish law. Secular rules regarding withdrawal from a matter already undertaken are considerably more restrictive than the rules regarding the initial decision not to take a case. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1983). If the client must pay the replacement lawyer to redo legal work (reviewing witness statements, deposition testimony, research, etc.), the withdrawing attorney may have to refund all or part of any fees he received when he did that work initially. Furthermore, an abrupt withdrawal, in certain circumstances, could cause the client to lose, triggering a malpractice judgment—and a possible disciplinary sanction—against the withdrawing attorney.

36. *See* AVRAHAM, *supra* note 18, at IV:86 (citing authorities).

37. *See id.*; R. MOSHE ISSERLES, SHULHAN ARUKH, *Yoreh De'ah* 157:1 (16th cent.) (Hebrew) [hereinafter REMA]; MEDINI, *supra* note 18, at 107 (citing views). In the improbable event that someone threatened to kill an attorney unless the attorney helped him wrongfully collect money, there seems to be some disagreement as to whether *Halakha* permits the attorney to take the case. *See* TAWIL, *supra* note 21, at *sha'ar* 6, *halakha* 6 (citing various views). The issue

B. *The Proscriptions Against Assisting or Encouraging One to Sin*

Suppose a person needs an object in order to violate Jewish law, and that there are non-Jews who are ready, able and willing to sell it to him. As mentioned in Part IA, a number of prestigious authorities believe that a Jew who sells him the object violates the biblical *lifnei iver* rule.<sup>38</sup> The majority view, however, is that in such circumstances the person and the object are considered to be “on one side of the river,” and *lifnei iver* is inapplicable. Nevertheless, most of these authorities rule that any Jew who provides the object to a Jewish wrongdoer—whether by sale or gift—breaches a rabbinic ban, referred to as *mesayeah lidei ovrei aveirah*, against helping wrongdoers.<sup>39</sup> Thus, even if a wrongdoing Jewish client could achieve his impermissible goal by using a non-Jewish attorney, any Jewish attorney who represents the client would violate the *mesayeah* rule.

Some commentators have suggested a number of limitations to the rabbinic ban against assisting a wrongdoer. Evaluation of the extent to which these suggestions reflect normative Jewish law would require an intense analysis of Jewish law authorities that would exceed the scope of this paper. Nevertheless, even if a particular limitation might otherwise apply, the mere giving of encouragement to a wrongdoing client, while he is in the process of transgressing Jewish law, seems to be forbidden.

The Mishnah states that “one may assist non-Jews [who are tilling the field] during the Sabbatical year, but one may not assist Jews [who are tilling the field] during the Sabbatical year.”<sup>40</sup> The Talmud explains that the Mishnah does not mean

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becomes even more murky where a lesser degree of physical harm is threatened.

38. See *supra* note 10 and accompanying text.

39. See, e.g., ADLER, *supra* note 10, at 332; R. AVRAHAM GOMBINER, SHULHAN ARUKH, *Orah Hayyim* 347:1 (17th cent.) (Hebrew); R. HAYYIM OZER GRODZINSKY, *AHIEZER* III:81(7) (20th cent.) (Hebrew); R. HAYYIM HAKOHEN, LEV SHOMEA, *Ma'arekhet* 30, *oh* 39 (19th cent.) (Hebrew); R. SHABTAI MEIR HAKOHEN, SHULHAN ARUKH, *Yoreh De'ah* 151:1, *s.k.* 7 (17th cent.) (Hebrew) [hereinafter SHAKH]; R. YISROEL MEIR HAKOHEN, MISHNAH BRURAH 347:9 [hereinafter MEIR HAKOHEN, MISHNAH BRURAH] (20th cent.) (Hebrew); R. DAVID HALEVI, SHULHAN ARUKH, *Orah Hayyim* 347 [hereinafter TAZ] (17th cent.) (Hebrew); R. YOSEF ISSER, SHA'AR MISHPAT, *Hoshen Mishpat* 26:1; KLUGER, *supra* note 18; R. SHMUEL KOLIN, MAHATZIT HASEKEL, *Orah Hayyim* 347:1 (19th cent.) (Hebrew); R. YITZHAK YEHUDA SHMELKES, *Orah Hayyim* 25 (19th cent.) (Hebrew); R. SHALOM M. SHVADRON, MAHARSHAM II:93 (19th cent.) (Hebrew); R. ABDALLAH SOMEAH, ZIVHEI TZEDEK, *Hoshen Mishpat* 2 (19th cent.) (Hebrew) (citing authorities); R. SHLOMO YEHUDA BEN PESAH TZVI, EREKH SHAI, *Hoshen Mishpat* 26 (19th cent.) (Hebrew); WEISS, *supra* note 18; R. OVADIA YOSEF, YABIA OMER II, *Orah Hayyim* 15, YEHAVE DA'AT III:67.

40. MISHNAH, *Gittin*, *perek* 5, *mishnah* 9.

that one may actually work the field with a non-Jew during the Sabbatical year, but, instead, merely that one may say words of encouragement such as "May your hands be strengthened."<sup>41</sup> Maimonides writes:

One may only assist [non-Jews] . . . on the Sabbatical Year with words alone. If you see him [*i.e.*, a non-Jew] plow or seed, you may say to him "May you be strengthened" or "Succeed" or some similar expression, because they [non-Jews] are not commanded [not to till the land on the Sabbatical Year]. . . .<sup>42</sup>

The clear implication is that if Jewish law forbade non-Jews from performing such work, it would be prohibited to give them such verbal encouragement.<sup>43</sup> Rabbi Avraham Gombiner (*Magen Avraham*) makes this inference and writes that "It is good manners [*derekh eretz*] to say to someone who is working, 'May your job succeed.' But if someone is doing forbidden work, it is prohibited to say such a thing to him."<sup>44</sup> The *Mishnah Brurah* similarly cites this as a statement of normative Jewish law.<sup>45</sup> From the Talmudic source and from the unqualified statements of the *poskim*, this prohibition appears to apply even if the wrongdoer would have blithely continued with his violation without any encouragement.

From these and other sources,<sup>46</sup> Rabbi Yitzhak Weiss<sup>47</sup> and Rabbi Moshe Schick<sup>48</sup> similarly conclude that even if a person is not obligated to try to prevent someone from violating Jewish law, one is forbidden to give him verbal encouragement, at least while he is engaged in the proscribed conduct.<sup>49</sup> Indeed, Rabbi Weiss argues that at least some commentators may believe that in

41. RASHI, TALMUD, *supra* note 12, at *Gittin* 62a.

42. MAIMONIDES, MISHNEH TORAH, *Hilkhot Shmittah VeYovel*, perek 8, *halakha* 8.

43. See ADLER, *supra* note 10, at 148.

44. GOMBINER, *supra* note 39, at *Orah Hayyim* 347, *s.k.* 4.

45. MEIR HAKOHEN, MISHNAH BRURAH, *supra* note 39, at 347, *s.k.* 7.

46. See, *e.g.*, RASHI, TALMUD, *supra* note 12, at *Sanhedrin* 74-75.

47. WEISS, *supra* note 18, at IV:79.

48. R. MOSHE SCHICK, MAHARAM SCHICK, *Orah Hayyim* 303 (19th cent.) (Hebrew).

49. It is unclear whether providing such encouragement is a *lifnei iver* or *mesayeah* violation or whether it constitutes a distinct transgression of "strengthening the hands of evildoers." In his commentary to the Talmud, Rashi states that in providing verbal encouragement, it is "as if" one assisted the wrongdoer. See RASHI, TALMUD, *supra* note 12. See generally ADLER, *supra* note 10, at 148-50; WEISS, *supra* note 18, at IV:79 (arguing that some authorities might consider such encouragement to violate *lifnei iver*). None of these authorities specifically discusses the attorney-client relationship, and none explore whether providing encouragement would be permitted if the wrongdoer paid for it.

a "one side of the river" scenario, giving verbal encouragement is worse than selling the wrongdoer the object with which he commits the offense. By verbally encouraging the wrongdoer, a person conveys the clear message that he agrees with the violation of Jewish law. When someone merely sells an object, this message is not as clear. The purchaser's purpose may be unknown or uncertain or may change before the object is used. In addition, the seller could expressly articulate his personal opposition to any proscribed use.

If an attorney represents a client who sues in secular court to collect money to which he is not entitled under Jewish law, the client may be deemed to be in the process of his transgression from the beginning of the trial to its end, or to the collection of the money. There would be a great risk that the lawyer would wrongfully provide verbal encouragement to his client during this time.

### C. *The Affirmative Duty to Prevent a Jew from Violating Jewish Law*

In addition, Jewish law assumes both that Jews are legally responsible for each other<sup>50</sup> and that they are spiritually interrelated. Thus, improper conduct by any individual Jew not only weighs against the community as a whole, but may also adversely affect the spiritual refinement of each member of the community.<sup>51</sup> Partly as a result of this interdependence, the Torah tells each Jew who sees another committing a biblical violation that "You must admonish a member of your nation."<sup>52</sup> Indeed, if a

50. See, e.g., HEHASID, *supra* note 50, at 93, 233, 601.

51. See, e.g., ARYEH KAPLAN, HANDBOOK OF JEWISH THOUGHT II 136-37 (1990):

When a single Jew sins, it is not he alone who suffers, but the entire Jewish people. In the Midrash, this is likened to passengers on a single huge ship. Though all the passengers may be very careful not to damage the hull, if one of them takes a drill and begins drilling holes under his own seat, the ship will sink, and all will drown. In the same manner, whenever any Jew does not keep the Torah, all others are affected spiritually. Such actions may even precipitate physical suffering for the Jewish people.

52. *Lev. 19:17*. See also CARO, *supra* note 9, at *Orah Hayyim* 608. Some commentators explain that this obligation comprises two elements. The first is a duty to gently admonish someone who has violated, or seems about to violate, Jewish law. According to many authorities, this duty applies even if the person admonished will not alter his conduct. The second, based on the interrelationship established by the biblical oaths the nation took on Mounts Eval and Gerizim, requires more vigorous action to prevent another from breaching Jewish law. See SHICK, *supra* note 48; WEISS, *supra* note 9, at III:79. *But see* R. ELIEZER WALDENBURG, TZITZ ELIEZER XVII, *Kuntras Refuah BeShabbat, perek 11* (20th cent.) (Hebrew). See generally R. YEHUDA HEHASID, SEFER HASIDIM 93 (20th

Jew, A, has the ability to prevent another Jew, B, from violating Jewish law and does not do so, A incurs guilt for the offense that B commits.<sup>53</sup>

If the biblical rule being violated is not explicitly stated in the Torah, if B is not purposely violating the law, and if A is sure that B will not accept the rebuke, A should not admonish B. In such a case, it is better that B violate Jewish law unknowingly rather than knowingly.<sup>54</sup> On the other hand, if the rule is explicitly stated or B is purposely violating a particular Jewish law provision, A is obligated to rebuke him even if A is certain the rebuke will be ineffective.<sup>55</sup>

There are exceptions to this obligation. For example, A need not rebuke B if A fears that by doing so he will place himself in danger because B will retaliate against him.<sup>56</sup> In addition, several authorities rule that A is not required to rebuke B if B has completely rejected Jewish law. The Hebrew word for "your nation" (*amkhah*) is spelled with the same Hebrew letters as the word for "with you" (*imkhah*). Consequently, some say that the duty to rebuke only applies as to those Jews who are "with you" in the sense that they generally accept the validity of Jewish law.<sup>57</sup>

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cent.) (Hebrew) ("All Jews are responsible for each other. If it were not for this responsibility a person would not admonish his fellow about his fellow's sins and he would not pay attention to find out who is a transgressor and [take steps to stop him] . . .").

53. RASHI, TALMUD, *supra* note 12, at *Sanhedrin* 27a ("A person dies because of the iniquity of his brother—to teach you that everyone is responsible for each other. That is where it was possible for them to [effectively] admonish the wrongdoers and they did not do so."). See also REMA, *supra* note 37.

54. An unknowing violation is a less serious breach of Jewish law. See CARO, *supra* note 9, at *Orah Hayyim* 608. This sort of situation might arise, for example, when B is so certain that what he is doing is permitted that he will not pay any heed to A (especially if B believes that A is much less learned than he about Jewish law).

55. In this situation, B is already violating Jewish law knowingly. Consequently, the argument that "it is better for a person to violate unknowingly rather than knowingly" does not apply.

56. See, e.g., MEIR HAKOHEN, MISHNAH BRURAH, *supra* note 39, at *Orah Hayyim* 608:7. See also REMA, *supra* note 37, at 334, *Hoshen Mishpat* 12. One might expect that a person would be required to spend up to 20% of his wealth to fulfill the affirmative biblical obligation to admonish another. See YAAKOV WEISS, *Minhat Yitzhak* V:8 (Hebrew); *supra* notes 41-50 and accompanying text. Nevertheless, Moshe Isserles, see REMA, *supra* note 37, who cites Rabbi Asher Weil, seems to rule that a person need not spend *any* money to fulfill the duty to admonish. See R. ASHER WEIL, SHUT MAHARIV 157 (15th cent) (Hebrew). See generally R. ZVI HIRSCH EISENSTADT, PISHEI TESHUVAH, *Yoreh De'ah* 157, *sif koton* 5, *sif koton* 19 (citing various views, including one that suggests a possible obligation to spend all of one's money to fulfill this duty) (19th cent.) (Hebrew).

57. See, e.g., YISROEL MEIR HAKOHEN, BIUR HALAKHA, ORAH HAYYIM 608, *s.v. Aval* (20th cent.) (Hebrew) (citing various authorities); R. YEHIEL M.



In light of the large number of contemporary Jews who, unfortunately, do not observe Jewish law, one might think that this latter exception essentially “swallows the rule.” Yet there is a very important exception to the exception, because many of today’s nonreligious Jews were raised in a nonreligious environment—or even in an environment actively opposed to Orthodox Judaism. According to some authorities:

[A] person who has been brought up in a nonreligious environment where he never had the opportunity to learn about Judaism, is like a child who was abducted by gentiles, and is not considered to be doing wrong purposely. Even if he is later exposed to authentic Judaism, he is not to be blamed for rejecting it, since it is almost impossible to overcome one’s childhood upbringing. Therefore, such a person is not to be counted among the nonbelievers, and he should be approached with love and with every attempt to bring him back to the teachings of our faith.<sup>58</sup>

Consequently, if a Jewish attorney has a Jewish client, not only may it be forbidden for the attorney to enable, facilitate or encourage the client’s wrongful conduct, but he may have to affirmatively attempt to dissuade the client. Thus, Jewish law’s view of the attorney-client relationship does not mirror either the godfather or hired gun models.

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EPSTEIN, ARUKH HASHULHAN, *Orah Hayyim* 608:7 (19th cent.) (Hebrew). If, however, you may convince such a person to do the right thing, some say that you must try to do so. See, e.g., R. YOSEF BEN MOSHE BABAD, *MINHAT HINUKH* 239 (Hebrew).

58. KAPLAN, *supra* note 51, at 151 (citing authorities, some of which do not seem to support the precise statements made in his text). A number of *poskim* indicate that many contemporary Jews, especially those raised by non-observant parents, should be considered to be such “child-abductees.” See, e.g., R. YISROEL REISMAN, *THE LAWS OF RIBIS* 98, n.17 (1990) (citing Rabbi Shimon Grinfeld and Rabbi Avraham Isaiah Karelitz for the rule that non-observant Jews who were not raised in an orthodox home must be treated just as observant Jews regarding prohibitions concerning interest-bearing loans). See also R. YAAKOV EITTLINGER, *BINYON TZIYON HEHADASHOT* 23 (19th cent.) (Hebrew); R. DAVID ZVI HOFFMANN, *MELAMED LEHOVEL*, *Orah Hayyim* 5, 29 (19th cent.) (Hebrew); R. AVRAHAM ISALAH KARELITZ, *Hazon Ish, Yoreh De’ah, Hilkhot Sheitah* 2:16 (19th cent.) (Hebrew); R. CHAIM KOENIG, *SHUT HUKEI HAYIM NISHMAT SARAH, Hoshen Mishpat* IV:20 (20th cent.) (Hebrew) (citing authorities); R. YEHIEL YAAKOV WEINBERG, *SERIDEI EISH* II:10 20 (20th cent.) (Hebrew); R. MOSHE STERNBUCH, *TESHUVOT VEHANHAGOT, Orah Hayyim* 1:132, 319, 363 20 (20th cent.) (Hebrew).

D. *The Duty to Prevent Someone—Even the Other Party to a Lawsuit—From Being Harmed*

Jewish law requires a Jew to save another who is in danger.<sup>59</sup> Perhaps the clearest textual basis for this rule is the verse that states: "Do not stand idly by your fellow's blood."<sup>60</sup> Nonetheless, other authorities assert that the duty to rescue arises from the verse, "If your fellow is missing something, you shall restore it to him."<sup>61</sup>

This duty applies even when the threat is financial.<sup>62</sup> If a client seeks to collect money to which he is not entitled under Jewish law, the client's attorney is obligated to try to save the adversary from this financial loss. Although Jewish law does not require an attorney to risk a large personal financial loss to save someone else from a loss, it would demand that the attorney attempt to convince his client to refrain from such wrongful conduct.

## II. THE FRIEND AND GURU APPROACHES

Both the lawyer as friend and lawyer as guru models require attorneys to consider the interests of others, not merely the interests of their clients. Shaffer and Cochran eloquently argue that the lawyer as friend model is to be preferred.<sup>63</sup>

According to Shaffer and Cochran, the lawyer as friend manifests this friendship by engaging the client in moral discourse designed to promote the client's ability "to determine the good."<sup>64</sup> They repeatedly emphasize that the greatest moral growth comes from voluntarily doing that which is good.<sup>65</sup> Nevertheless, if, despite an attorney's earnest efforts at moral discourse, an impasse is reached, Shaffer and Cochran believe that the proper course for the attorney is to resign.<sup>66</sup> They firmly

59. See generally Aaron Kirschenbaum, *The Bystander's Duty to Rescue in Jewish Law*, in *JEWISH LAW AND LEGAL THEORY* (Martin P. Golding ed., 1993).

60. *Lev.* 19:16.

61. *Deut.* 22:2; see also RASHI, *TALMUD*, *supra* note 12, at *Sanhedrin* 73.

62. See, e.g., R. J. DAVID BLEICH, *CONTEMPORARY HALAKHIC PROBLEMS II* 77 (1994); R. YISROEL MEIR HAKOHEN, HAFETZ HAYIM, *Be'er Mayim Hayyim, Hilkhot Issurei Rekhilut* 9:1 20 (20th cent.) (Hebrew).

63. See BLEICH, *supra* note 62, at 44.

64. See Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-At-Law: Lessons From Dostoyevsky*, 35 *HOUS. L. REV.* 327, 378 (1998). I cite this article on several occasions as representing the Shaffer-Cochran position, because I believe that as to these issues Prof. Cochran's views are shared by Prof. Shaffer as well.

65. See *id.* at 380.

66. See *id.* at 352.

assert that the lawyer should not use any "unequal power" or influence to impose his will on the client.<sup>67</sup>

There are, of course, various practical problems with the Shaffer-Cochran approach. Resigning, for instance, is not always legally permitted. An attorney of record, for instance, often needs court approval,<sup>68</sup> which may not be granted.<sup>69</sup> In addition, Shaffer and Cochran acknowledge that there are power imbalances in attorney-client relationships, and that the attorney must continuously regulate the "intensity" of her discourse in order to encourage her client without overcoming her client's own will.<sup>70</sup> It may be unreasonable to expect that attorneys will walk this tightrope without falling. Often they may err by providing insufficient guidance and a client may commit a wrong that could have been avoided.

Moreover, Jewish law disagrees on substantive grounds as well. According to Jewish thought, a person's character is influenced by his actions (*nifal lifie pe'ulotov*).<sup>71</sup> Doing the right thing is deemed to be *per se* good, even if it is not done for the right reason. Certain secular thinkers acknowledge that by doing

67. *See id.* at 379:

Lawyers cannot become a friend to every client, but they might discuss moral issues with a client in the way that they would discuss moral issues with a friend, not imposing their values on the client, but not being afraid to influence the client. . . . The lawyer as friend engages in moral conversation with the client but leaves decisions (including a decision such as whether to confess) to the client. Such a lawyer seeks not to impose.

68. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (1983).

69. *See, e.g.*, Tenn. Bd. of Prof'l Responsibility, Op. 96-F-140 (1996). In addition, Shaffer and Cochran do not discuss the possible practical ramifications of withdrawal. For example, withdrawal may only be permitted if there will be no harm to the client's interests. But a client who engages new counsel may have to spend a considerable amount of money in hourly bills while the new attorney becomes familiar with the file, bills that would have been unnecessary had the original counsel stayed on. It is not entirely clear whether they think counsel should resign, even if this means counsel has to disgorge fees that were previously earned.

70. *See, e.g.*, Cochran, *supra* note 64, at 392:

A lawyer should measure her words during conversation with a client. If a lawyer is too intense, she may overcome the client and there will be no mutual discourse. However, there is also the danger that if the lawyer is not sufficiently intense, the client may not take the moral issue seriously. Therefore, a lawyer should regulate the intensity with which she engages the client in moral discourse.

71. *See* R. AHARON HALEVI, SEFER HAHINUKH, *Commandments* 16 (13th cent.) (Hebrew). *See generally* Steven H. Resnicoff, *A Jewish Look at Lawyering Ethics—A Preliminary Essay*, 15 *TOURO L. REV.* 73, 102-03 (1998).

good on one occasion, a person finds it easier to do so again.<sup>72</sup> Jewish belief goes further, contending that even doing good for the wrong reason brings a person to do good for the right reason.<sup>73</sup> In contrast, by committing wrongful deeds, a person becomes desensitized to their wrongfulness and is increasingly likely to repeat them.<sup>74</sup>

Interestingly, the social psychology theory of cognitive dissonance suggests an arguably similar phenomenon when it describes the "induced-compliance paradigm":

In this paradigm, a person is persuaded to behave in a way (acting "not-X") that is contrary to her attitudes ("I believe X"). Since the action-cognition ("I acted not-X") cannot be changed, the individual will reduce the dissonance by changing the original attitude to "I believe not-X."<sup>75</sup>

According to this theory, if a person who does not believe in the rightfulness of certain good acts is convinced to do the acts, the consequential cognitive dissonance may cause him to change his attitudes and regard the deeds as rightful.<sup>76</sup>

72. See WILLIAM SHAKESPEARE, *HAMLET* act 3, sc.4, lines 176-87:

Good night; but go not to my uncle's bed;

Assume a virtue, if you have it not.

That monster, custom, who all sense doth eat

Of habits evil, is angel yet in this,

That aptly is put on. Refrain tonight,

And that shall lend a kind of easiness

To the next abstinence: the next more easy;

For use almost can change the stamp of nature

And either [tame] the devil or throw him out.

73. See, e.g., RASHI, *TALMUD*, *supra* note 12, at *Nazir* 23b.

74. See *id.*, at *Yuma* 86b, 87a; *Moed Koton* 27b; *Kiddushin* 40a; *Erekhin* 30b; YALKUT SHIMONI, PARSHAS BEHAR, Remez 661 (cent. unknown) (Hebrew). Under special circumstances, Jewish law requires or encourages acts that would ordinarily be considered morally problematic. Thus, in order to promote peace, Jewish law sometimes permits "white lies." Even so, however, Jewish authorities emphasize that such practices are only allowed occasionally. Otherwise, they could become habitual. See, e.g., YAAKOV FISH, TITEIN EMES LEYAAKOV 49 (3d ed. 1986) (*citing various poskim*) (Hebrew); cf. R. HAYIM BEN MOSHE ATTAR, OHR HA-HAYIM, *Mikrot Gedolot, Deuteronomy* 13:18 (18th cent.) (Hebrew).

75. Davida H. Isaacs, "It's Nothing Personal"—But Should it Be?: *Finding Agent Liability for Violations of the Federal Employment Discrimination Statutes*, 22 N.Y.U. REV. L. & SOC. CHANGE 505, 528 (1996). See generally LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957); ROBERT A. WICKLUND & JACK W. BREHM, *PERSPECTIVES ON COGNITIVE DISSONANCE* (1976).

76. Secularists who agree that this process takes place may complain that such attitudinal changes are "artificially" induced. Jewish law commentators, however, would more likely be pleased as the person's perspectives became harmonized with *Halakha*.

Because Jewish law recognizes the great value of proper deeds—even when they are not entirely the product of a person's totally unfettered autonomy, it rejects the Shaffer-Cochran choice of attorney withdrawal as the means to resolve an impasse.<sup>77</sup> Instead, it would urge the Jewish attorney to use all of his persuasive powers to convince the client to do what is right because this, according to Jewish belief, is truly in the client's best interest. Indeed, when ancient Israel was governed by religious leaders whose authority was directly attributable to Moses, those leaders would, in appropriate circumstances, use various coercive methods to accomplish compliance with Jewish law.<sup>78</sup>

Jewish law rejects the withdrawal option for other reasons as well. Under the Shaffer-Cochran approach, although the attorney may arguably be the client's friend, he is not apparently a friend to anyone else. If a crooked client is bent on harming others, the Shaffer-Cochran reliance on withdrawal exposes the client's helpless victims to his will. By contrast, Jewish law would not allow an attorney to sacrifice such innocent victims. Instead, by struggling to convince the client to do the right thing—even if this choice is "imposed" on him by virtue of the lawyer's leverage—the lawyer would help both the client and those he would otherwise harm.

Recall, also, that under Jewish law, the client—and the entire Jewish community—bears collective responsibility for each individual's conduct. By persuading the client to act properly, the client and the nation face a more favorable Divine judgment.

In emphasizing results—for the client, for non-clients and for the community—rather than merely the objective of moral discourse, Jewish law's view of the attorney-client relationship resembles that which Shaffer and Cochran call the guru model. Perhaps the most important difference is that the attorney does not purport to be the ultimate judge of what is right and wrong, but defers to Jewish law. In the many instances where Jewish law permits client discretion, Jewish law would not prescribe any par-

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77. Shaffer and Cochran seem to believe that proper conduct, even when coerced, results in some "influenced moral growth," but just that when such conduct is voluntary "deeper moral growth" is achieved. See, e.g., Cochran, *supra* note 64, at 380. From their own perspective, then, one may ask whether the Shaffer-Cochran model is yet another instance in which the "best" is the enemy of the better. While arguably promoting some fully voluntary moral growth (the "best"), the Shaffer-Cochran model abandons the possibility of perhaps much more substantial "influenced" growth (the "better").

78. Whether, and under what conditions, the resort to physically coercive measures may be appropriate in modern times is a subject of substantial debate. See, e.g., Steven H. Resnicoff, *Physician-Assisted Dying: Halachic Perspectives*, J. HALACHA & CONTEMP. SOC'Y 47, 82-83 (1999).

ticular course of action by the attorney, despite his or her personal moral sensitivities.

Furthermore, Jewish law itself affords the client an active role in ascertaining whether an action is permitted, irrespective of the attorney's opinion. The answer to many *halakhic* questions are unclear or subject to debate even among those who are highly trained in Jewish law. This is in part explained by Jewish law's conceptual depth and its sensitivity to factual nuances. Jewish law encourages individuals to establish personal relationships with Jewish law experts, who, by virtue of the understanding they develop regarding such individuals, become increasingly qualified to provide them Jewish law guidance. Where a client has sought advice from an established Jewish law authority, the attorney is not obligated in any way to dissuade the client from implementing such advice, even if the attorney's own advisor, if he had been asked, would rule otherwise. Similarly, there are instances in which internal Jewish law principles permit a litigant to adopt any of the alternative positions articulated by certain classical Jewish law authorities.<sup>79</sup>

Of course, to the extent that the Jewish law approach would encourage an attorney to "impose" his views on his client, Jewish law would impinge on the current cultural inclination favoring client autonomy. Perhaps any objection to this approach could be minimized if the attorney disclosed his vision of the attorney-client relationship at the outset. Yet it seems that many attorneys are influenced by ideological or other non-religious values, which they fail to disclose. Although the subject is beyond the scope of this paper, it is possible that all attorneys should, through introspection, ascertain their ideals and share them openly with prospective clients. Such conversations might be a good beginning toward more meaningful—and more honest—relationships.

#### CONCLUSION

Neither the purported institutional interests of an adversarial system of justice nor the interests of a particular client justify, under Jewish law, the amorality of the godfather or hired gun paradigms. His status as an attorney provides no excuse for engaging in religiously prohibited tactics. Moreover, where a client's objective violates Jewish law, the attorney, as a general rule, may not enable, facilitate or encourage that goal. Where the attorney can persuade the client to autonomously adopt the cor-

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79. See, e.g., R. HAYIM BENVENISTE, *KENNESET HA'GEDOLAH, PRINCIPLES OF KIM LI 25* (17th cent.) (Hebrew).

rect course of conduct, Jewish law resembles the lawyer as friend model. However, the importance of accomplishing good results for the client, for the community, and for affected third parties demands that the attorney use all of his persuasive repertoire to convince the client to act correctly. Unlike an attorney-friend, who fears infringement of the client's moral autonomy, the Jewish lawyer cannot simply walk away from a client—thereby abandoning the client, the community and third parties—when he might otherwise use his superior rhetorical skills, intelligence or experience to successfully sway the client to the right path. Nevertheless, the Jewish model, unlike the lawyer as guru approach, affords the client an important role in the determination of what it is that Jewish law in fact demands.