

## **Whistleblowing: The Requirement to Report Employer Wrongdoing**

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**Question:** To what extent does an employee have an obligation to report wrongdoing on the part of his or her employer?

**Response:** The beginning of the 21<sup>st</sup> century has seen an unprecedented wave of corporate financial scandals which resulted in thousands of people becoming unemployed and billions of dollars being lost. Enron, Global Crossing, and Worldcom are just a few of the major corporations that were either destroyed or severely damaged because of financial improprieties, especially “creative accounting.”

Employers who fail to follow the law are not only found in the corporate world – the public sector has also been hit with its fair share of scandals in the last decade including numerous cases of attempted cover-ups of embarrassing facts to the government which went so far as to include obstruction of justice, bribery, and misuse of public funds.

Companies have lied about or hidden data about their products that have cost lives. The tobacco industry was particularly notorious for this. In the 1990s, various states brought lawsuits against the tobacco industry, seeking reimbursement for Medicare costs associated with treatment of smokers. In the 1998 Master Settlement Agreement, the tobacco industry agreed to pay 46 states that were party to the lawsuit an estimated \$206 billion (the other four states reached separate settlements). The lawsuit charged “Defendants engaged in a decades long conspiracy to deceive the public about the health risks of smoking and the “addictive” nature of nicotine, suppressed the development of safer” cigarettes, wrongfully manipulated nicotine levels in cigarettes, and intentionally marketed their products to minors.<sup>1</sup>”

In many cases, problems only came to light through the efforts of insiders who reported on the wrongdoing – “whistleblowers.” The revelations that the tobacco industry knew cigarettes were dangerous but concealed that information only came to light through the efforts of two whistleblowers, Merrell Williams, a paralegal who leaked tobacco

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<sup>1</sup> State Supreme Court of California, Memorandum of Understanding in Tobacco Cases, August 5, 1998, online at <http://ag.ca.gov/tobacco/pdf/mou.pdf> .

company Brown and Williamson (B&W) documents and Dr. Jeffrey Wigand, former vice president of research and development at B&W.<sup>2</sup>

Time magazine's "Persons of the Year" for 2003 were three such whistleblowers: Cynthia Cooper, Coleen Rowley, and Sherron Watkins. Cynthia Cooper exposed the accounting shenanigans at WorldCom. Coleen Rowley let Americans know that the FBI had information that could have prevented the tragedy of 9/11, but bureaucratic mismanagement led to the information not being used. Sherron Watkins revealed the elaborate and misleading accounting Enron used to inflate profits and conceal their real financial situation from investors.

There are also cases where we wish there had been a whistleblower. Ford Motor Company knew they had a defect in the Pinto gas tank design that would result in an estimated 180 deaths over the planned production run of the car. But Ford management decided that the cost to repair the defect, about \$11 per car, was higher than the cost of the 180 deaths, so they did not fix it. Twenty seven people died before a lawsuit brought the facts to light and Ford was forced to recall the vehicles and make the repairs.<sup>3</sup> Those lives quite possibly could have been saved if a whistleblower would have reported on Ford's cold calculations on the value of a human life.

The author of this responsum was personally involved in a situation where an employer was engaged in a moderate financial impropriety. He chose to rebuke his superior, the CEO of the company, but not to take it further. In retrospect, he wondered whether he did the right thing, or whether the Jewish tradition and halakhah would have counseled taking further steps.

The question of whether to report employer wrongdoing is a very complicated question. On the one hand, from the principle of "do not stand idly by the blood of your neighbor" we know the Jewish tradition does not countenance being an innocent bystander to wrongdoing. At the same time, the Jewish tradition has typically taken a negative view of reporting wrongdoing to authorities. In times when Jews were persecuted by Gentiles, to be a מלשין, an informer, was a very bad thing indeed and could subject someone to a great deal of communal censure. The Talmud brings an example of how God Himself refuses to be an informer, refusing to tell Joshua who the sinners were.<sup>4</sup> There has long been a sense that problems within the Jewish community needed to be sorted out within the Jewish community itself.

Jews are warned against לשון הרע, gossip, and are taught not to go around sharing tales of the misdeeds of others. When discussing exceptions, generally speaking the language

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<sup>2</sup> "Tobacco Free Kids" has a comprehensive timeline of Dr. Wigand's activities in disclosing wrongdoing at B&W. <http://tobaccofreekids.org/reports/insider/timeline.shtml> It should be noted that Wigand had been terminated by B&W almost two years before he blew the whistle on them; the action still had significant risk to him, as he had signed a confidentiality agreement and expected that violating its terms would result in B&W taking legal action against him, which they did.

<sup>3</sup> Grimshaw v. Ford Motor Co., 19 Cal.App.3d 757, 174 Cal. Rptr. 348 (1981).

<sup>4</sup> BT Sanhedrin 11a

used is not when is one required to report an awareness of wrongdoing, but rather when one is permitted to do so.

In popular culture, “snitching” has become something very much looked down upon. In a 60 Minutes broadcast from April, 2007, Geoffrey Canada, a nationally recognized educator and anti-violence advocate, said “When I was growing up, kids used to talk about snitching....[but] it never extended as a cultural norm outside of the gangsters. It was not for regular citizens. It is now a cultural norm that is being preached in poor communities.”<sup>5</sup> And what is the norm in poor inner city communities often gets transmitted to the mainstream community through popular music; rap star Cam’ron said even though he had been shot several times, he would not cooperate with police in finding the people who shot him.<sup>6</sup>

Not only is there a cultural and traditional bias against reporting wrongdoing, but whistleblowing in particular is not without potentially severe personal costs, and we are not necessarily required to harm ourselves to spare someone else’s money.

University of Toledo law professor Geoffrey Christopher Rapp describes why many people would be reluctant to report employer wrongdoing. Whistleblowers of course face possible retaliation from their employer: they could be fired, denied promotion, reassigned to a less desirable assignment, etc. But Rapp adds “Potential whistleblowers face tremendous obstacles beyond direct employer retaliation. They know, for example, that bringing massive, Enron-style fraud to light could potentially lead to their current employer’s implosion. Moreover, whistleblowers may fear blacklisting from future employers who suspect disloyalty, as well as social ostracism from their coworkers. Additionally, the psychological burdens associated with whistleblowing, including the effects of public criticism and a lengthy stay in litigation’s limelight, cannot be ignored. Finally, employees may be contractually or otherwise bound in a way that deters them from blowing the whistle.”<sup>7</sup>

Reporting employer wrongdoing could not only result in the loss of one’s job, it could result in the end of one’s career. Clearly this is not a decision to be taken lightly.

Determining whether one is legally, morally, and/or halakhically obligated to report employer wrongdoing is a complicated decision tree involving a variety of factors. However, there are situations where one is not only permitted to report employer wrongdoing, but one would have a positive obligation to do so. This responsum will analyze the decision making process by breaking it down into a few key areas:

- 1) Whistleblowing and Lashon Hara
- 2) The Responsibility to Rebuke

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<sup>5</sup> 60 Minutes, April 19, 2007, highlights at <http://www.cbsnews.com/stories/2007/04/19/60minutes/main2704565.shtml>

<sup>6</sup> Ibid.

<sup>7</sup> Geoffrey Christopher Rapp, “Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers,” Boston Law Review volume 87:91, p. 95

- 3) The Responsibility to Report Cases of Pikuach Nefesh (Life is Endangered)
- 4) The Responsibility to Report Cases of Financial Loss
- 5) Does it Make Any Difference if the Parties are Jewish?

The concluding section of the responsum will provide some guidelines for how to weigh these various factors.

### **Issue 1: Whistleblowing and Lashon Hara**

Engaging in lashon hara—broadly speaking, all forms of “improper speech,” including gossip, slander, etc.—is considered a very serious violation under halakhah. The Chofetz Chaim, Rabbi Yisrael Meir HaCohen Kagen (author of “Chofetz Chaim), lists 17 negative commandments and 14 positive commandments that can be violated through improper speech.<sup>8</sup>

The first major work that detailed the laws relating to lashon hara was Chofetz Chaim. In general principle 10, the Chofetz Chaim raises the question – אחד גזל אותו או עשקו או חרפו – באחד גזל או עשקו או חרפו, “if someone stole from someone, or defrauded him, or cursed him – in what manner is it permissible to reveal the matter to people.”<sup>9</sup>

It is interesting to note the language the Chofetz Chaim uses: “in what manner is it permitted to reveal the matter to people” – not “in what manner is it REQUIRED to reveal the matter to people.” The language reflects a common bias against speaking out. Chofetz Chaim goes on to state that if someone sees someone doing something wicked to another, like stealing from him, and it is known to him that the goods have not been returned, etc., it is permissible to tell people to help those who have been transgressed against. He goes on to list seven conditions that should be met before conveying the information to others:

- 1) It should be something he saw himself, not based on hearsay;
- 2) He should reflect carefully that he is certain the behavior he saw met the requirements of being considered theft or damage;
- 3) He should first gently rebuke the wrongdoer;
- 4) He shouldn’t make the transgression greater than what it really was – don’t exaggerate;
- 5) He should be clear about his motives – that this is being done to benefit the one who was sinned against, and that the one who is reporting the matter is not going to benefit from the damage he is about to inflict to another, or that he is doing it because he hates the transgressor;

<sup>8</sup> R. Yisrael Meir HaCohen Kagen, Chofetz Chayim, Mercaz Hasefer, Jerusalem, Peticha (pp. 21 – 51).

<sup>9</sup> Ibid, Clal 10, p. 177.

- 6) If he is able to accomplish the effect through some other means without having to engage in lashon hara, he should do so, and not speak of the matter;
- 7) His speaking about this should not result in greater damage to the transgressor than if the matter had come before a bet din.<sup>10</sup>

While these rules were written for a different situation – an individual reporting wrongdoing of other individuals – the principals are generally applicable in cases of employer wrongdoing as well. The important point here is that the rules about lashon hara do not provide an excuse or a barrier NOT to report employer wrongdoing. In the conclusion we will develop a set of guidelines specific to whistleblowing.

## **Issue 2. The Responsibility to Rebuke**

The Torah charges us with an obligation to rebuke our neighbor when we see him doing something wrong: Leviticus 19:17 commands us *לא תשנא את אחיך בלבבך הוכח תוכיח את עמיתך ולא תשא עליו חטא* “You shall not hate your brother in your heart, you shall surely rebuke your neighbor, and not bear sin on his account.”

In his commentary on this verse, Nachmanides says the way to understand the whole verse is as saying that you should rebuke your neighbor, because if you don't you will end up hating him for his sin, and then you will be a sinner, hating your neighbor in your heart. Nachmanides also brings an indication that we should apply this to non-Jews as well: the example he uses is Abraham reproving the non-Jew Avimelech.<sup>11</sup>

When we see something wrong being done, we have a responsibility to speak up. The Talmud both reinforces and limits this principle. It is reinforced in a teaching brought in Bava Metzia, which relates that the repetition of the word *הוכח* comes to tell us that you should rebuke your neighbor not just once, but even a hundred times; furthermore, we learn that from the repetition that not only is a master obligated to rebuke a disciple, but a disciple is obligated to rebuke his master.<sup>12</sup> Since a teacher is to be accorded more respect than just about anyone else, even including a parent, we could make an a fortiori argument that if one is obligated to rebuke one's master, all the more so one would be obligated to rebuke someone else, like an employer.

The Talmud limits this principle of “rebuke your neighbor” in the following passage from Yevamot: R. Ile'a further stated in the name of R. Eleazar son of R. Simeon: As one is commanded to say that which will be obeyed, so is one commanded not to say that which will not be obeyed. R. Abba stated: It is a duty; for it is said in Scripture, Reprove not a scorner, lest he hate thee; reprove a wise man and he will love thee.<sup>13</sup>

<sup>10</sup> Ibid, pp. 177-182

<sup>11</sup> Nachmanides commentary on Lev. 19:17.

<sup>12</sup> BT Bava Metzia 31a

<sup>13</sup> BT Yevamot 65b

One factor in determining whether or not there is an expectation that the rebuke would be listened to is the culture of the corporation. Some companies make a real effort to solicit input from employees and to be responsive to that input. Other companies follow a much more rigidly hierarchical model, or have a CEO who is known NOT to take criticism well.

However, a mere general sense that a rebuke will not be listened to is not sufficient to relieve a person of the responsibility to rebuke a wrong-doer.

In the Mishneh Torah, Maimonides not only brings rebuking a wrong-doer as a commandment, but he says **אם קיבל ממנו מוטב ואם לאו יוכיחנו פעם שניה ושלישית, וכן תמיד חייב אדם להוכיחו עד שיכהו החוטא ויאמר לו איני שומע, וכל שאפשר בידו למחות ואינו מוחה הוא נתפש בעון אם לא הוכיחו עד שיכהו החוטא ויאמר לו איני שומע, וכל שאפשר לו למחות בהם** “if [the rebuke] is accepted from him, fine, and if not, he rebukes him a second and third time, and the obligation to rebuke continues until the sinner hits him and says I’m not listening. Anyone who has the opportunity to protest and does not protest, he is found a transgressor of these sins, since he has the possibility to protest.”<sup>14</sup>

From Rambam’s statement, we would infer that if there is doubt whether a rebuke will or will not be listened to, there is an obligation to rebuke. Furthermore, in general a high level executive is not only responsible for his particular department, but he is part of a team leading the corporation, and the expectation is that his advice will at least be listened to, even if it won’t always be followed. Therefore, unless there were truly unusual circumstances, an executive would be expected to rebuke his employer (tactfully, of course), whereas a lower level employee could argue that the CEO would not listen to criticism coming from someone lower down in the organization.

A lower level worker might also be afraid that rebuking the CEO could harm his career, which might also argue against an obligation to rebuke.

We learn from the Talmud that we are each responsible to correct others who are within our sphere of influence. In tractate Shabbat we learn **כל מי שאפשר למחות לאנשי ביתו ולא מיחה - נתפש על אנשי ביתו, באנשי עירו - נתפש על אנשי עירו, בכל העולם כולו - נתפש על כל העולם כולו** “Whoever has the ability to protest against the members of his household when they are doing something wrong but does not protest, is punished for the transgressions of the members of his household. One who can protest against the people of the town but does not do so is punished for the transgressions of the people of his town. Further, one who can protest against the entire world but does not is punished for the transgressions of the entire world.”<sup>15</sup>

It is also important to note that if the prospective whistleblower is himself personally engaged in an inappropriate act he could be held accountable halachically because of the principle **אין שליה לדבר עבירה**, there is no agency in sin. An individual who commits a

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<sup>14</sup> Rambam, Mishneh Torah, Hilchot Deot 6:7

<sup>15</sup> BT Shabbat 54b

sin—like theft—is guilty of theft, even if he is doing it at someone else’s direction.<sup>16</sup> And under secular law, violating the law on behalf of your employer can land you in jail.<sup>17</sup>

We conclude that an executive (but not necessarily a lower-level employee) is obligated to rebuke his employer in a case of wrongdoing; for a lower-level employee, it is admirable, but not necessarily obligatory to rebuke his employer in the case of wrongdoing. However, if a lower level employee refrains from rebuking his employer because he does not believe he will be listened to, there may still be an obligation to report the wrongdoing to others.

The obligation to rebuke someone doing wrong extends to the person doing the wrongdoing, not to others. In Hilchot Deot, Rambam says המוכיח את חברו בין בדברים שבינו לבין בדברים שבינו לבין המקום, צריך להוכיחו בינו לבין עצמו, וידבר לו בנחת ובלשון רכה ויודיעו לבניו, בין בדברים שבינו לבין המקום, שאינו אומר לו אלא לטובתו להביאו לחיי העולם הבא “He who rebukes another, whether for offenses against the rebuker himself or for sins against God, should administer the rebuke in private, speak to the offender gently and tenderly, and point out that he is only speaking for the wrongdoer’s own good, to bring him to eternal life.”<sup>18</sup> Note Rambam specifies that the rebuke is administered privately; the person being rebuked is not being rebuked in a public way.

If one’s superior was not responsive to a rebuke, the next question is whether an employee is required to notify others, such as those higher up in a corporation, the corporation’s board of directors, or someone outside the corporation, like legal authorities. These questions will be addressed in the following sections.

### **Issue 3: The Responsibility to Report Cases of Pikuach Nefesh (Life is Endangered)**

The nature of the employer’s wrongdoing clearly is an important factor in deciding whether or not to report it. A design flaw that could lead to the loss of hundreds of lives—or a drug with dangerous side effects that could lead to thousands of deaths—is obviously in an entirely different category than a low level fraud that costs a company a few thousand dollars.

Clearly, the most serious situation is one in which lives are threatened. There have been many cases of corporations concealing information that led to the deaths of many people. Besides the tobacco industry and Ford Pinto gas tanks mentioned earlier, the Vioxx recall is a somewhat more recent example; according to ABC News, Merck, the manufacturer of Vioxx, faces 7,000 product liability lawsuits, largely stemming from allegations they knew the drug was dangerous long before they recalled it from the market.<sup>19</sup>

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<sup>16</sup> BT Bava Kama 51a, Beit Yosef Hoshen Mishpat 410:8

<sup>17</sup> Business Law Text and Cases, Virginia G. Maurer, Harcourt Brace Jovanovich, 1987, p. 131.

<sup>18</sup> Mishneh Torah, Hilchot Deot 6:7

<sup>19</sup> <http://abcnews.go.com/Business/YearInReview/story?id=1434340>

It is well known that as a matter of halakhah, שאין לך דבר שעומד בפני פקוח נפש חוץ מעבודה זרה וגילוי עריות ושפיכות דמים— nothing stands in the way of pikuach nefesh (to save a life)— save for the three cardinal sins of public idol worship, sexual transgressions, and murder.<sup>20</sup> Not only does saving lives take precedence over any other commandment – including, for example, the commandments relating to lashon hara – but under the principle of לא תעמוד על דם רעך, do not stand idly by the blood of your neighbor, one is OBLIGATED to violate other commandments to save a life.

There are those who read pikuach nefesh very narrowly, and claim that pikuach nefesh only applies in situations where there is a specific life that one can point to that will be saved (the next few sources are cited in more abbreviated fashion in “Post-Mortem Organ Donation” by R. Joseph Prouser).<sup>21</sup> For example, Rabbi Yechezkiel Landau in Noda B’Yehuda, talking about a case of doing an autopsy for purposes of medical education says אין כאן שום חולה הצריך לזה רק שרוצים ללמוד חכמה זו אולי יזדמן חולה שיהיה צריך לזה ודאי דלא דחינן משום חששא קלה זו שום איסור תורה או אפילו איסור דרבנן שאם אתה קורא לחששא זו ספק נפשות א”כ יהיה כל מלאכת הרפואות שחיקת ובישול סמנים והכנת כלי איזמל להקזה מותר בשבת שמא יזדמן היום “in this case we do not have a sick person who needs this, they only want to learn from it, perhaps there will be a sick person who needs this; in such a case it is certain that we do not push aside [other mitzvot] for such an insubstantial concern, not a prohibition in the Torah, or even a rabbinic prohibition. For if you call this kind of concern *safek nefashot*, a case where a life is potentially in danger, you will permit any kind of work for medical purposes, grinding and cooking medicines, preparing instruments such as scalpels for bloodletting, all would be permitted on Shabbat lest it might occur that on that day or evening there might be a sick person who would need these things, and we must differentiate between a concern for life that is imminent and a concern for life that is more distant; it can be difficult to differentiate.”<sup>22</sup>

But others read the concern for pikuach nefesh in a broader, more inclusive fashion. Rishon L’tzion Ben Zion Meir Chai Uziel, ruled more leniently on the same topic, saying that when an autopsy is necessary for either financial or pikuach nefesh reasons, this is not called desecration of corpse. He dismisses the case brought in masechet Hullin as dealing with a situation where there would be no benefit from examining the body. Regarding allowing cutting a body for teaching people the medical profession he says ודאי שהוא מותר גמור ואין ספק שכל רבותינו הראשונים שהיו גם רופאים מומחים הוצרכו לבדוק את גופות המתים כדי ללמוד ולהתלמד ולא חשו לאסור נוול, it is certain that it is completely permitted, there is no doubt that the Rishonim who were expert physicians needed to examine the bodies of the dead in order to learn and to teach, and there is no concern for the prohibition of desecration. In other words, such learning – even without a specific sick person who will benefit – is considered pikuach nefesh and overrides the usual prohibitions against the desecration of a body.

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<sup>20</sup> BT Yoma 82a

<sup>21</sup> “Post-Mortem Organ Donation,” R. Joseph Prouser, Reponsa of the CJLS 1991-2000, p. 178.

<sup>22</sup> Nodah B’Yehuda, R. Yechezkel Landau, Mahadura Tinyana, YD 210.

Even Rabbi Landau's more narrow reading does not really apply in the kind of cases we are talking about. With the Pinto gas tank, for example, it wasn't really a question of whether or not people might die; apparently the evidence was rather compelling that there would be additional deaths. Rabbi Landau objects to using pikuach nefesh in cases where there is no real concern that someone might die. The situation he refers to is truly a "doubtful" case, where it is entirely possible the information is not needed at all. In most whistleblowing cases involving defective products there is a greater level of certainty that someone will be harmed – it just cannot necessarily be said who.

Therefore, we rule that cases where it is known that a product is dangerous and people will be harmed are included under the rubric of pikuach nefesh. As such, not only are commandments such as lashon hara set aside, but there is a positive requirement to report the information, in keeping with the Biblical injunction "not to stand idly by the blood of one's neighbor."

While one is not required to endanger one's own life to save another person, in most whistleblowing cases this will not be a consideration. One should spend his own money to save a life, although if he does so he should be entitled to compensation.

As explained in an article by Charles Harary on [jlaw.com](http://jlaw.com),

"Saving the life of another Jew takes precedence over any monetary interest. The Torah commands, "lo ta'amod al dam re'echa," "thou shall not stand idly by the blood of thy neighbor." This verse obligates all Jews to be Good Samaritans by commanding them to rescue another Jew in distress. This obligation is so fundamental that a person must go to any extent necessary in order to save the life of a fellow Jew. Refusing to do so is considered a transgression. The mitzvah of saving another is so important, that the Rabbis enacted a law exempting the rescuer from punishment resulting from any tort committed in the course of the rescue. The basic law of torts in halakhah is that man is always forewarned and hence liable for damages whether he acts inadvertently or willfully, under coercion or voluntarily.

"The exception is for a rescuer, for a rescuer is exempt from the damages he causes during his attempted rescue. According to the Rambam, if one chases after the pursuer in order to rescue the pursued, and he breaks objects belonging to the pursuer or to anyone else, he is exempt. The Rambam explains that this rule does not conform with the usual biblical law but is a special enactment by the Rabbis in order to prevent people from refraining to save others or being too careful during their rescue for fear of having to compensate for any damages done. In Bava Kamma, Rabba states that although this rule seems to be violating the usually strict tort law, one can justify this leniency for the public interest for if this

rule would not exist, no one would put himself out to rescue another from the hands of the pursuer.”<sup>23</sup>

The Shulhan Arukh, in fact, brings a specific requirement to “whistleblow:” The Shulhan Arukh affirms that if one sees his fellow drowning, or sees bandits falling upon him, and he can save him or hire others to save him – in other words expending his own money – and doesn’t save the person, he is a transgressor. Not only that, but ששמע עובדי כוכבים או מוסרים מחשבים עליו רעה או טומנים לו פח ולא גילה און חבירו והודיעו worshippers or collaborators conspiring to do evil to a person, or to trap him, and he does not reveal what he heard to his neighbor and inform him...” he is a transgressor.

Conclusion: in cases of pikuach nefesh, there is a positive requirement to report employer wrongdoing, even if it will come at substantial financial cost to the person reporting it.

#### **Issue 4. The Responsibility to Report Cases of Financial Loss**

In the wake of the Worldcom and Enron scandals, financial misdeeds in the corporate world have come under increasing scrutiny. There are many kinds of financial misbehavior in the corporate world. Sometimes companies engage in illegal practices, such as bribery, or theft. The most common form of corporate theft is undoubtedly misappropriation of another company’s intellectual property. In many other cases, companies engage in “creative accounting.” In one famous case in Silicon Valley years ago, a young high-tech company literally shipped bricks to claim they made a shipment so they could record the revenue. Such shenanigans defraud investors who are deceived into investing in a company which they believe is financially healthier than it really is.

If a person knows that his company is stealing from individuals or from another company, he knows that someone is being harmed. This could be seen as a case of “finding a lost object,” which the Torah instructs us to return with not just one, but two commandments.<sup>24</sup>

Many cases of corporate misdeed involve intellectual property, which is intangible, hence there is no “object” to return. It is accepted, however, that the commandment to return a lost object includes a requirement to save another person’s money. Yisroel Pinchas Bodner gives as an example if a person sees someone’s electricity needlessly being wasted, he could surmise that the owner would turn it off if he were there, and if possible a passerby should turn off the electricity.<sup>25</sup> Misappropriation of intellectual property is somewhat analogous to this example of wasting electricity: in both cases there is a loss to the owner, the owner is unaware of the loss, and the object being lost is intangible. Bodner says that to do nothing in such a case would be a transgression of both the

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<sup>23</sup>“Stealing to Save Someone’s Life, Charles Harary, esq., [http://www.jlaw.com/Articles/ch\\_stealsavelife.html](http://www.jlaw.com/Articles/ch_stealsavelife.html)

<sup>24</sup> Deuteronomy 22:1 and 22:8

<sup>25</sup> Yisroel Pinchos Bodner, Halachos of Other People’s Money, p. 143. He references Arukh Hashulhan 259 as well.

obligation to return lost objects and the prohibition against turning one's eyes from your neighbor's lost object. Theft of IP is a little different from the electricity example, however, in that in the electricity example the owner will have to pay for the wasted electricity, whereas in the IP case the owner is simply not collecting money that is due him, but he does not have to pay something to a third party.

In a case involving a Jewish organization, Rabbi Shemuel Kushilevitz was asked about a Jewish accountant who discovers that Reuven, the head of his Jewish organization, is embezzling and “cooking the books.” The accountant warns Reuven that he will publicize the matter. Rabbi Kushilevitz ruled that the accountant is allowed to publicize the matter and embarrass Reuven despite the prohibition against “embarrassing one's fellow” if there is no other way to salvage the money, because the accountant is a *shomer sakhar* (paid trustee) of the organization.<sup>26</sup>

R. David Golinkin points out “Maimonides adds in his *Sefer Hamitzvot* (Negative Commandments, No. 297) that the commandment “do not stand idly by” applies to a person who sees his friend's *money in danger and he must prevent the loss by testifying in court.*”<sup>27</sup>

Even though there may be an obligation to save others from a loss if one can do so at no cost, one is not obligated to lose wages to save someone else a loss.<sup>28</sup> This is understood by at least some *poskim* as meaning one does not have to forgo potential profits to return a lost item.<sup>29</sup> The relevance of this to whistleblowing is that if the employee feared that reporting the loss would jeopardize his job (a potential loss of not only profits, but his very livelihood), he would NOT be obligated to inform.

There are those who might argue that based on the principle *יד פועל כיד בעל הבית*, “the hand of the employee is like the hand of the employer,”<sup>30</sup> i.e., the employee is considered an extension of his employer, he should be forbidden to do anything that would cost his employer money, like reporting wrongdoing. To this we would respond that this is true as long as the employer is operating within the bounds of the law. If the employer is engaged in deceptive or fraudulent practices, there is also a requirement to “stay far from a false matter,” and not be a party to wrongdoing,<sup>31</sup> and this would overrule the employee's obligations toward his employer.

One potential barrier to reporting the activity is that most employees, especially executives, have to sign non-disclosure agreements, which they would breach if they reported the wrongdoing to a third party, which very likely could get the employee fired, and possibly make him the subject of a lawsuit. Reporting the loss anonymously would

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<sup>26</sup> R. Shemuel Kushilevitz, *Netivot Shemuel*, Volume 1, Netiv 9 (quoted by R. Isser Yehudah Unterman, *Hatorah Vehamedinah*, Vol. 9 (5718), p. 23), quoted in “To Tell or Not to Tell: Confidentiality vs. Disclosure in Jewish Law and Tradition, Prof. David Golinkin, *Insight*, Vol. 5, No. 3.

<sup>27</sup> David Golinkin, *op. cit.*

<sup>28</sup> Tur, *Hoshen Mishpat* 265

<sup>29</sup> Bodner, p. 184, citing Shulhan Arukh Harav *Hilchot Metziah* 33.

<sup>30</sup> See BT *Bava Metziah* 10a

<sup>31</sup> Exodus 23:7

still entail a violation of the confidentiality agreement. At the same time, the enforceability of confidentiality in the face of illegal activity is very much questionable.

The Sarbanes-Oxley Act of 2002 greatly expanded protection to reporters of corporate wrongdoing. One of the provisions of the act amends the US Code as follows: “Whoever knowingly, with intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title, or imprisoned not more than 10 years, or both.”<sup>32</sup> Not only that, but the Sarbanes-Oxley act requires corporations’ audit committees to set up procedures for “confidential, anonymous submission by employees of issues regarding questionable accounting or auditing matters.”<sup>33</sup>

Sarbanes-Oxley does not go so far as to REQUIRE every employee to report acts of wrongdoing.

Sarbanes-Oxley only provides whistleblowing protection to employees of public corporations; employees of private corporations, non-profit organizations, or governmental entities enjoy no such protections.

However, it should also be noted that certain employees, such as accountants, might be considered “accomplices,” and be potentially liable for prosecution, if they are aware of financial fraud and do not report it. Employees who are uncertain about their obligations under secular law to report a particular case of fraud or wrongdoing are encouraged to seek competent legal counsel.

Halachically, however, since one is not obligated to injure one’s self financially to save someone else’s money, an important factor in the decision about whether to whistleblow is proportion. Someone would not be required to endanger his livelihood to protect someone against a small loss – as it is phrased in Pirkei Avot **יֵצֵא שִׂכְרוֹ בְּהַפְסְדוֹ** “his gain goes out with his loss.”<sup>34</sup>

On the other hand, in a case where the sums involved are large – and in some cases, the money involved can be staggering, in the billions of dollars – while one might not be strictly obligated under halakhah to report the wrongdoing, one who does so is praiseworthy. We are charged to do **הַיֵּשֶׁר וְהַטּוֹב בְּעֵינֵי ה'** “to do what is right and good in the eyes of the Lord.”

Conclusion: if one can report financial wrongdoing on the part of his employer without jeopardizing his own money or livelihood, he is obligated to do so. If there is a risk of substantial loss to the one reporting the wrongdoing, he is not strictly required to do so, but if the transgression is a major one involving substantial fraud and potential loss, it is

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<sup>32</sup> Sarbanes-Oxley Act, Sec. 1107.

<sup>33</sup> Ibid., Sec. 301 (4) (B)

<sup>34</sup> Pirkei Avot 5:11

entirely appropriate to go *ליפנים משורת הדין*, beyond the strict letter of the law, and report the wrongdoing.

### **Issue 5. Does it make any difference if the CEO and/or ownership of either company is Jewish?**

The traditional sources in the Talmud often make distinctions between our obligations toward fellow Jews and our obligations toward those described as *עכו"ם* (akum). *עכו"ם* is an acronym for *עובדי כוכבים ומזלות*, “worshippers of stars and constellations.” The *Akum* were idol worshippers of low integrity; this category certainly does not describe the Gentiles of the world of today, who are law-abiding citizens who mostly worship the One God.

As Abraham Joshua Heschel describes the Christians we live among, “Above all, while dogmas and forms of worship are divergent, God is the same. What unites us? A commitment to the Hebrew Bible as Holy Scripture. Faith in the Creator, the God of Abraham, commitment to many of His commandments, to justice and mercy, a sense of contrition, sensitivity to the sanctity of life and to the involvement of God in history, the conviction that without the holy the good will be defeated, prayer that history may not end before the end of days, and so much more.”<sup>35</sup> Heschel also quotes Rabbi Israel Lifschutz of Danzig (1782-1860) who speaks of the Christians, “our brethren, the gentiles, who acknowledge the one God and revere His Torah which they deem divine and observe, as is required of them, the seven commandments of Noah...”<sup>36</sup>

Not only are today’s Gentiles not in the category of *עכו"ם*, but stealing from a non-Jew is considered even worse than stealing from a Jew. This is because it leads to *חלול השם*, a desecration of God’s name.<sup>37</sup> It will give Jews, and by extension, our God, a bad reputation if Jews steal from non-Jews.

The Talmud instructs us to treat the non-Jew the way we treat the Jew. We are commanded to feed hungry Gentiles, visit Gentile sick, and bury the Gentile dead *מפני שלום דרכי שלום*, for these are the ways of peace, the proper way to conduct oneself.<sup>38</sup>

That one should rebuke a Gentile doing something wrong is also explicitly mentioned in *Sefer HaChasidim*: “Rabbi Judah the Pious said: when one sees a Noahide sinning, if one can correct him, one should, since God sent Jonah to Nineveh to return them to His path.”<sup>39</sup>

Especially today, where in the vast majority of nations of the world Jews and non-Jews are treated the same under secular law, we should apply the Biblical principle of

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<sup>35</sup> Abraham Joshua Heschel, *No Religion is an Island*, p. 9.

<sup>36</sup> *Ibid.*, p. 21.

<sup>37</sup> *Yerushalmi Bava Kama* 4b

<sup>38</sup> *BT, Gitin* 51a

<sup>39</sup> *Sefer HaChasidim* 1124

משפט אחד יהיה לכם כגר כאזרח יהיה<sup>40</sup> “there will be one law for you, the stranger and the citizen.” This should lead us to find our ethical and moral teachings to be equally applicable in our dealings with both Jews and non-Jews. This will lead to a קדוש השם, a sanctification of God’s name, and a furtherance of our charge to be a light to the nations.

Furthermore, as Rabbi Elliot Dorff points out in his responsum on renting synagogue facilities to Christian groups, there is the concept of יושר, “doing what is right and good in the sight of the Lord.”<sup>41</sup> For us to treat Gentiles differently on such matters than we treat Jews would not be the right thing to do.

## Conclusion

Many of the ethical situations we confront in the modern workplace are very complex. If figuring out the exact proper path under halakhah at times seems a daunting task, it is good to remember that our tradition teaches that when we appear before the heavenly Beit Din and review our lives, the first question we are asked is נשאת ונתת באמונה “did you conduct your business affairs with integrity?”<sup>42</sup> And when answering that question, it is not enough to say that you diligently followed the letter of the law, for we are taught that Jerusalem was destroyed because her inhabitants failed to be לפנים משורת הדין, they failed to go beyond the minimum requirements of the law.

Rabbi Asher Meir teaches five factors relevant to reporting wrongdoing:

1. Certainty (make sure there really is wrongdoing going on)
2. Benefit (constructive benefit to some victimized party)
3. Equity (don't report it if the harm to the wrongdoer is likely to be disproportionate to the noxiousness of the misconduct)
4. Desire (pure intent by the whistleblower—the whistleblower should not be motivated by a desire for personal gain)
5. Accuracy (if you do report wrongdoing, don't exaggerate).<sup>43</sup>

These guidelines are appropriate and in keeping with both halakhah and the ethical norms of the Jewish tradition.

## Piskei Halakhah

- 1) In any case of wrongdoing, there is an obligation to rebuke the person doing wrong if it can be assumed there is a reasonable chance the rebuke will be listened to, and the rebuke can be administered without substantial personal cost to the reporter.
- 2) In cases of pikuach nefesh, where there is a certainty or substantial likelihood of

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<sup>40</sup> Leviticus 24:22

<sup>41</sup> Elliot Dorff, Use of Synagogues by Christian Groups, Proceedings of the CJLS 1986-1990, p. 521.

<sup>42</sup> BT Shabbat 31a

<sup>43</sup> “Jewish Ethicist: Everyday Ethics for Business and Life, R. Asher Meir, Ktav, 2003.

- loss of life if information is withheld, one is obligated to report the information to appropriate authorities, even at substantial personal cost.
- 3) In cases of financial loss, if wrongdoing can be reported at no cost to the reporter, there is a positive obligation to do so. If wrongdoing would jeopardize the reporter's money or livelihood, there is no strict obligation to report wrongdoing. It is, however, appropriate to consider proportionality. It is appropriate to demur from reporting minor wrongdoing that would have a major cost to the reporter. On the other hand, in the event of major wrongdoing, it is appropriate to go **ליפנים** **משורת הדין**, beyond the minimum requirement of the law, and report it even at substantial personal cost.