

Ironing Out Tentative Agreements

Rabbi Yehoshua Wolfe

Case: Two parties arrive at some form of an ambiguous oral agreement. One party later sends a note to the other by text, email, or Whatsapp to confirm the agreement and the second party does not respond.

Question: Does the silence of the second party constitute acknowledgement and consent of the agreement as presented by the first party based on the halachic concept of *shetika kehoda'a* (silence is considered equivalent to admission)?

Answer: We find many times in the laws of *Choshen Mishpat* that silence cannot be construed as consent, but there are exceptions to the rule. In order to assess whether silence of a party in a given situation is one of those exceptions or not, we usually start by using common sense. For example, if someone tells another person, "you owe me \$100," and the latter does not respond, the silence is certainly not indicative of admission, as there is no reason for him to respond to such a claim. But if two parties have a business relationship, there is good reason for the second to respond, and we must carefully analyze the situation to consider why he did not respond.

There are some specific factors mentioned by the *poskim* that can be used to construct a protocol of how to assess the situation.

One key factor mentioned by the *poskim* is to examine whether the other party already expressed his opinion. If so, then he may have felt it was redundant. In the case under discussion, though, this factor would not apply, as he had not yet expressed his opinion.

Another factor mentioned by the *poskim* to consider is the subject of the supposed agreement. If the issue is simply a verbal statement, then it is possible that the issue was not a critical one and the second party chose not to respond but does not necessarily agree with the terms presented by the first. If, however, the claim refers to an action, such as that the first party is permitted to intrude into the second's property or take something of his, this action would be more likely to elicit a response from the second if he disagreed, and his silence can be assumed to indicate agreement.

Another thing to look at is whether it is to the advantage of the second party not to respond. If it is, then we can explain that this is the reason for their lack of response, and they do not necessarily agree with the terms presented by the first party.

The final point to consider regarding this question is whether this agreement takes place before or after the fact. If it occurs after the deal was supposedly made and the *kinyan* had been effectuated, then it isn't necessary to further clarify anything, and it can be assumed that the second party agrees to it.