

Kickbacks in Halacha: The Case of the Applecider
Adapted from the writings of Dayan Yitzhak Grossman
March 31, 2022

The United States government has accused Dhirendra Prasad, an Apple employee, of engaging in multiple schemes to defraud his employer, involving corruption, theft, and fraud:

As an Apple buyer, Mr. Prasad received internal orders from Apple, requested quotes for the required parts and services from vendors, reviewed the quotes, negotiated terms, selected vendors, and placed purchase orders using Apple's purchasing system. Apple then paid vendors based on the invoice amounts Mr. Prasad entered into the system. The government expects that the evidence at trial will establish that Mr. Prasad used his position of trust at Apple to engage in multiple different schemes to defraud Apple, including taking kickbacks, stealing parts using false repair orders, and causing Apple to pay for items and services it never received resulting in a loss of more than \$10,000,000, and also that Mr. Prasad evaded tax on the proceeds of his schemes, which he also laundered.[1]

According to halacha, "stealing parts using false repair orders" and "causing Apple to pay for items and services it never received" are obviously forms of theft (*geneivah*) and tortfeasance (*hezeik*), but while "taking kickbacks" is clearly intuitively wrong, it is remarkably difficult to precisely specify the nature of the wrongdoing and to find a clear precedent for prohibiting the practice. In this article, we survey the analyses of several *Acharonim* of various cases involving kickbacks.

(It should be noted that the taking of kickbacks is often illegal, violative of the contract between agent and principal, or against generally accepted practice. In such cases, it might be prohibited under the doctrines of *dina demalchusa dina* (the law of the government is the law, i.e., recognized by halacha as binding), *kol tenai shebemamon kayam* (any stipulation is valid in monetary matters), and *minhag* (prevailing custom, often binding in monetary contexts); in this article, however, we are primarily concerned with the intrinsic halachic principles that may apply to the taking of kickbacks.)

The Divrei Chaim discusses the case of a court-appointed guardian who rented out an apartment under his guardianship for less than its fair value. He pocketed thirty rubles from the tenant "for his effort and fear (of getting caught)." The Divrei Chaim declares that were the property owner to have discovered this arrangement during the course of the lease, it would have been his choice to either refund the tenant the money he received and void the lease (because the guardian was certainly not authorized to rent out the apartment for less than its fair value, so the owner is not bound by the guardian's unauthorized action), or to demand that the guardian turn over to him the "bribe" that he pocketed,

because it is his, because the house was worth more than the amount for which he rented it to him in lieu of this bribe, and so he certainly

must return it to the owner of the house.[2]

But as we have previously noted,[3] the Divrei Chaim is discussing an agent who has committed outright theft from his principal, and he is simply making the eminently logical point that in such a case, the kickback is considered to have been stolen from the principal and so must be returned to him. This straightforward argument does not necessarily apply to less egregious forms of self-dealing, such as the case of a buyer for a business who takes a kickback from a seller in exchange for purchasing from him under reasonable and competitive terms, as opposed to unfair, below-market ones. (Of course, according to the government's allegations, Mr. Prasad went far beyond this and did engage in outright theft from Apple.) The Divrei Malkiel discusses a sale in which part of the purchase price was to be the disbursement to the seller of charity funds that were controlled by the buyer's father-in-law (or father). He argues that this is "absolute theft," as the father-in-law has no right to make a personal purchase with charity funds. He adds that even though the money was contributed to charity with the intent that the father-in-law distribute it according to his discretion, and his opinion may be that the seller is indeed an appropriate recipient of the funds, he is nevertheless an interested party (*nogeia badavar*) and may therefore not make such a decision on his own, "as it is known that officials in charge of charity (*gaba'ei tzedakah*) are like judges that the community has accepted upon itself." [4]

So while the Divrei Malkiel initially asserts that the form of self-dealing he is discussing constitutes "absolute theft," he subsequently seems to concede that this is not necessarily so if the buyer is an appropriate recipient of the funds, and he is therefore forced to fall back on condemning the seller's conduct merely on the basis of the doctrine that public officials like *gaba'ei tzedakah* have the status of judges. But while this is indeed an established halachic doctrine with respect to public officials,[5] I am unaware of any significant precedent for its application to officers or agents of private businesses, and so once again, we have no clear precedent for a prohibition against a buyer for a private company taking a kickback from a seller in exchange for purchasing from him, as long as the terms of the purchase are competitive and appropriate and he is thus not directly acting against the interests of his employer by pocketing the kickback.

The contemporary work *Siach Mishpat* discusses a woman who applied for a teaching position and was told by the administrator of the education department that

There are many applicants for the position and she would have to wait in line. However, if the father of the applicant would accept the son of the department administrator as a senior employee in his factory, then [the administrator] would view himself as bound in gratitude to [the applicant's father] and he would arrange employment for the woman as a teacher.

The author maintains that this arrangement is prohibited on two grounds: bribery, which the *poskim* extend from its classic context of judges to public officials in general, and deception (*geneivas da'as*), "because if the

employer would know that this employee is engaged in self-dealing—on his own behalf or that of his family—within the framework of his work, he would not engage him.” He adds that if as a result of his self-dealing he violates his instructions and makes arrangements that are against his employer’s interests, e.g., if he is charged with hiring the best worker, or accepting the best offer, or purchasing the best merchandise, and he selects a worker or offer or merchandise that is inferior from the employer’s perspective, then he is facilitating theft from his employer, and he is thus guilty of actual theft (*geneivas mamon*), and not merely *geneivas da’as*. It is clear from his analysis, however, that he maintains that *geneivas da’as* applies even in the absence of any injury to his employer’s interests.[6]

As we have seen, however, the few earlier authorities who discuss kickbacks do not mention either of the prohibitions of bribery or *geneivas da’as*, and although the extension of the prohibition of bribery from judges to public officials is indeed well established in halacha,[7] I am unaware of any precedent for extending it to the employees and agents of private businesses. (The Siach Mishpat’s case apparently involves the administrator of a public department of education, and so perhaps his invocation of the prohibition against bribery is limited to such a case, although he does not clearly articulate such a distinction.)[8]

[1]United States District Court, Northern District of California, San Jose Division. Notice of Related Case, Case 5:22-cr-00123-BLF Document 2.

[2]Shu”t Divrei Chaim *cheilek* 2 C.M. *siman* 46.

[3]Insider Traitor: Does Advantaged Trading Betray Sources or Shareholders? The Bais HaVaad Halacha Journal. Jan. 6, 2022.

[4]Shu”t Divrei Malkiel *cheilek* 5 *siman* 212.

[5]See the responsum of the Maharam of Rothenberg in Hagahos Maimoniyos *Hilchos Tefilah perek* 11 *os* 2 and Teshuvos Maimoniyos *Hilchos Kinyan siman* 27 (cited in Darchei Moshe C.M. beginning of *siman* 163 and codified by Rama *ibid. se’if* 1); Trumas Hadeshen *psakim uchesavim siman* 214 (cited in Darchei Moshe *ibid.* and codified by Rama *ibid.* 37:22); Shu”t Chasam Sofer C.M. *siman* 160 (cited in Pis’chei Teshuvah *ibid. siman* 8 *s.k.* 2), and see below n. 7.

[6]Siach Mishpat (Schwartzburt) *siman* 2.

[7]See above n. 5, and see our discussion of this topic in Ineluctably Unelectable: Voting Issues in Halacha. The Bais HaVaad Halacha Journal. Nov. 26, 2020 and Poll Payoff: What Does It Take to Undo an Election? The Bais HaVaad Halacha Journal. Dec. 3, 2020.

[8]For further discussion by this author of the issues and sources discussed in this article, see The Bais HaVaad Halacha Journal, Volume 5775 Issue XXI Parshas Ki Sisa, and Yorucha, Professional Malpractice, Part IV: Corruption and Self-Dealing (audio, video, and *mar’ei mekomos*, including the following loose transcripts of videos: Are Kickbacks Prohibited by the Torah? and If a Purchasing Agent Takes a Kickback, Does His Employer Have a Claim to That Money?)