

May One Retract on an Agreement Before the Contract is Signed?

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Case: In negotiations between parties, the process often begins with a term sheet, where an initial agreement is drafted. At a later date, the lawyers will draft the final, formalized version.

Question: During the interim agreement, before the final agreement is executed, is it halachically permitted for either of the parties to back out?

Answer: This situation is a common one, where one of the parties attempts to renege on the deal after reaching an interim agreement, but before the formal contract is signed.

At first glance, it would seem that the question can be resolved based upon a passage in the Gemara. The Gemara in *Bava Basra* discusses a case where someone bought property and made an agreement with the seller that a contract should be written. The Gemara discusses what the halacha is if the contract is not ultimately written, and whether that allows the buyer to retract on the deal. The Gemara rules that it depends: If they stipulated explicitly that writing a contract is a condition in the sale and the sale is only valid if there is a contract, then one can retract on the agreement at any point before the contract is drawn up. But if they did not explicitly agree that writing a contract was included as a condition for the sale, then the parties may not back out of the agreement.

In most interim agreements today, there is no clause added that writing the contract is a necessary condition in the agreement's validity. Therefore, it would seem that the interim agreement is binding and one may not back out during the time period before a formal contract is drafted.

However, the answer is not so simple. The *Taz* and *Bais Shmuel* in *Even Ha'ezer* discuss *shidduchim* (engagements), which customarily began as oral agreements related to the financial aspects of the engagement, such as how much money would be provided to the couple and the like. This was then always formalized into a document.

The *Taz* says that the ruling of the Gemara in *Bava Basra* that the halacha depends upon whether writing a contract is explicitly part of the agreement is applicable only to property transactions, where contracts were not always written. However, regarding engagements, where contracts were always used, it is assumed that the contract is a contingency to the agreement and one can retract in the interim. Moreover, the lack of a formal contract would invalidate the deal.

Based on this, since contracts are usually used today for marital or real-estate agreements, parties would be halachically permitted to retract during the interim stage, and should therefore take proper steps to protect themselves during this time.

Question: In almost all negotiations and agreements, there are additional clauses and components to the agreements added by the attorneys towards

the end. Can one argue based on this that the initial agreement was never considered any form of agreement?

Answer: It is true that the agreement is never truly complete before the attorneys have included their additions. Thus, the question becomes whether an incomplete agreement can be considered binding.

The *Taz* in the passage mentioned above calls the agreements concerning *shidduchim* to be *roshei perakim* (highlights), as these were the key elements that were agreed upon, even though the comprehensive agreement with all of the details was not finalized until a later date. Thus, in such a case, the *Taz* still rules that such an agreement is binding for *shidduchim* and one cannot back out afterward.

A valid agreement would constitute the following: If the key issues are agreed upon, and one wishes to be bound by the agreement regardless of the details, then it is considered valid (assuming that the proper *kinyanim* were made). In such a case, one may no longer back out.