

The Halachos of Brokerage : Part I Shiur

THE BROKER/CLIENT RELATIONSHIP

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A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY SHIUR VIDEO

WHAT DOES A BROKER DO?

When approaching the topic of brokers, the first thing that we need to clarify is how to define a broker in Choshen Mishpat terms. This will have numerous halachic ramifications.

What is a broker? What does he do?

The truth is that the term broker is a very broad one. The services that are rendered by a broker vary from broker to broker.

For those who are not involved in business, the most commonly known broker is a *shadchan*. We all are familiar with what a *shadchan* does. It's important to understand that in the halachic sources, a *shadchan* is treated identically to a financial broker and has all the same halachos. For this reason, the detailed halachos that are spelled out for *shadchanim* shed light on the halachos of brokers as well.

A *shadchan's* basic service is to match a pair of people. Two people are in need of something - a boy needs a *kallah* and a father needs a *chosson* for his daughter - so the *shadchan* steps in and pairs them up. The exact thing occurs with financial brokers. Two people need something - for example, a property owner needs a buyer, and some other person needs a seller. A broker gets these two people together and facilitates the deal.

Regarding the *shadchan*, sometimes he or she comes up with a good idea, and the family takes the suggestion and works on their own to make it happen. Other times, the *shadchan* works as an intermediary between the two families. Especially during the early stages of the *shidduch* process, it is often uncomfortable or awkward for the two sides to communicate directly with each other. They need another person to be the middleman to deliver messages between them, and the *shadchan* assumes this role.

Other times, a *shadchan* needs to do some coaxing, convincing and persuading. This is another form of input that is sometimes necessary for a *shidduch* to

happen. This aspect is also relevant to a financial broker. A trade can be complicated, especially when each side is looking for the best outcome for themselves. A broker negotiates some middle ground to get both parties to feel that they are getting and giving in a fair and profitable way.

THE HALACHIC CLASSIFICATION OF A BROKER

This leads us back to our original question. How do we define a broker in *Choshen Mishpat* terms? The answer is that a broker is a paid worker. He is not much different than someone who washes your windows and collects a salary for his work. A broker, too, works on your behalf. He puts in the legwork to look for a buyer or seller. Other times, he just gives a suggestion or an idea. Since he provided a reasonable service, he deserves to get paid for that service.

A broker is not considered a partner in the deal. Even if he is collecting twenty percent on the sale, he's not a *seller*. He may look like a seller and act like one. But he's not. He's only a *worker*.

The ramifications of this is how a client becomes beholden to a broker. Normally, when you make a monetary deal - whether a sale, a lease, a partnership, or a *shibud* (lien on a property) - the agreement is only binding with a formal *kinyan* procedure. Whatever *kinyan* is used - be it signing a contract, *kinyan suddar*, or giving money - the *kinyan* act finalizes the agreement. When hiring a worker, the agreement is finalized even without any *kinyan* act. Just by speaking with the worker and telling him that he'll get paid fifty dollars creates a full-fledged obligation on the employee to follow through and the employer to pay the agreed upon amount, provided that the worker started to work, or at least started to travel to the workplace.

With a broker as well, the Maharashdam, as well as many other *poskim*, point out that a client is bound to a broker after just communicating with him. Even though no contract was signed, and no *kinyan* was

performed, once the broker does his job, he collects his commission. If any verbal offer is made to a broker, or if an offer is made with email or text, once he acts upon it, he is owed his fee. There is no way to wiggle out and renegotiate the terms. The original offer remains in place.

To illustrate: Let's say you run a daycare center and you are desperate for *morahs* or substitutes, and you place an ad in the classified section of the weekly paper: "Offering \$250 for anyone who finds a *morah* or substitute teacher for so-and-so daycare. Call or text...". You get a voice message on your answering machine from a cute seven-year kid who tells you that he or she had a real good counselor in camp last year... so you give it a try...and you end up hiring that person. You now owe that child \$250. The offer in the ad is enough to create a binding commitment because it is a clear, communicated offer of payment for a service.

IF THE CLIENT IS DISSATISFIED OR WITHDRAWS FROM THE DEAL

As we explained above, the very nature of a broker's service is making a deal happen. In this sense, it reflects the appearance of a sale more than a service. This doesn't change what we explained earlier - that the basis of a broker's salary is like that of a paid worker; however, the terms and conditions that govern a broker's commission is similar to a sale. This means that the same way that a sale is not complete until the final closing and nothing happens until the property is actually transferred, a broker also only gets paid if and when the deal is completed. If, for whatever reason, the deal didn't ultimately happen, he gets nothing, no matter how much time and effort he invested.

This is most clearly demonstrated in a *teshuva* written by the Rosh. The Rosh deals with a case in which a property owner hired a broker to sell his house. The broker found someone and negotiated pricing and all other details with him. Everything panned out and it looked like smooth sailing. But when he contacted the property owner with the good news, to his dismay, he declined the offer because of his personal enmity to that particular buyer.

The Rosh rules that the broker gets no commission. He does, however, point out that the client must pay him for his expenses and hours put into the work because he did work on the client's behalf. But as far as the 5 or 6 percent commission is concerned, he doesn't get it.

This is where a broker differs from regular service providers. If you hire an interior designer and, in the end, you say, "Sorry I hate the look. I'll reimburse you for the hours and materials, but won't pay the full payment. I need to start again from scratch. I need to redo the whole thing." Unfortunately for you, you must pay the designer, regardless of whether you like the work or not. With a broker, however, if you're not fully satisfied, he gets no pay. The reason for that is because the commission or fee is paid for the execution of the deal. As long as the deal didn't happen, for whatever trivial reason, there's no commission.

There still is one caveat. The broker only gets no pay because the seller was dissatisfied with the product delivered by the broker. If, however, the seller just decides not to sell the house anymore after the broker did the work of finding a buyer and brought the deal to closing, the broker gets full commission. (This is the ruling of the Aruch Hashulchan, 185:13.)

This can be very common. It can happen with a real estate property, when a seller backs out and the buyer waives the contract. In such a case, the seller still has to deal with the broker. As with many areas in Choshen Mishpat, however, if there is an established convention or *minhag* on how to deal with such a case, we follow the common practice because the unwritten rule of every agreement is to follow the established *minhagim* pertaining to the deal. If, however, there is no *minhag* otherwise, the broker collects his commission.

To go back to our daycare case, if the daycare owner decided at the last minute that he'll make do with the *morahs* that he has without expanding, he still owes money to the child who gave the referral because the suggestion was completely successful on the child's end. The daycare owner withdrew from the agreement, which keeps him bound to the child who acted as a fully qualified broker. If, however, at the last minute one of the existing *morahs* in the daycare decided to extend her hours, thereby eliminating the need for a new *morah*, and because of that this new referred *morah* was not hired, the child will not get a commission. If that were the case, the client didn't withdraw from the deal; he found a better option first. He'd rather hire an existing member of staff rather than train in someone new. And as long as he didn't sign with the new *morah*, he's still open for other options. And when something better comes up, it's ultimately his choice.

DESPERATE PRICING

The next thing to discuss is something that is prone to happen in the world of brokerage.

Take the following example: Someone signs on a property without a mortgage contingency. He needed to give the offer he gave because of bidding over the property. He signs the contract and gives a \$30,000 deposit. He applies for a mortgage, but certain complications creep up and he's denied. It's two weeks before closing, and he has no mortgage and no cash for closing. He's at risk of losing his \$30,000 deposit, plus thousands of dollars of expenses he laid out for inspections, appraisals, etc. His only chance is to gather two or three equity partners for the full purchase price in order to preserve some of his money. What does he do? He goes to shul and, after davening, he tells the *chevra* in the coatroom that he's offering \$18,000 to anyone who finds him a partner. Twenty minutes later, he has three partners lined up and all is well.

The coatroom broker shows up at the closing and asks, "Where's my 18k?" The fellow says, "Come on. I was totally desperate. I was frantic. My money was going down the drain before my eyes. I said that but I didn't really mean it. I'll give you 4 or 5 thousand. That's a reasonable commission. But not quite \$18,000."

The basic halacha in this case is that the broker does not get the full \$18,000. This is illustrated in the Gemara in a case of a man who's escaping from jail and is desperate to cross a river to get to safe territory. He spots a fisherman riding a boat and calls out, "I'll give you a gold coin. Please take me across the river!" The Gemara rules that, after crossing, the fellow may say

that he wasn't serious. He can pay the going rate for the ferry service, and no more.

The principle behind this ruling is that for an agreement to be binding, it needs to be clear to all parties that it is serious. In desperate situations with exorbitant fees, it is apparent that the offer was not really serious and, therefore, is not binding.

There are, however, sources in the *Poskim* which seem to say that the previous rule does not apply to brokers. The Bais Yosef (264) quotes the Hagahos Maimonis as saying that brokerage fees can be unlimited. On the other hand, the Rema rules that even a *shadchan* or broker cannot collect exorbitant fees. Based on the Shach there, the idea seems to be as follows: There are certain cases where there is an established industry based on desperate clients. For example, certain hard moneylenders will broker a jumbo loan overnight for a desperate client - but they'll charge a very high commission. This constitutes an established industry for instant loan approval for desperate customers which comes along with a very high cost. When someone is working outside the industry parameters, however, such as the fisherman in the case in the Gemara, there is no established industry for a fisherman rafting a jail runaway across the river. This fisherman is just exploiting the desperate individual and is not entitled to the inflated price.

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