

The Halachos of Brokerage : Part II Shiur

CO-BROKERING, AND VOLUNTEER BROKERING

Rav Aryeh Finkel

A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY SHIUR VIDEO

THE HALACHOS OF CO-BROKERING

Co-brokering is when more than one broker is involved in making a deal happen. In the last shiur, we mentioned the case of the Teshuvos HaRosh, where the seller declined to sell to the buyer that the broker found because of his personal enmity toward that buyer. The Rosh ruled that the broker doesn't get the agreed-upon commission, he only receives reimbursement for expenses and hours.

The Rosh does mention parenthetically that if the owner later sells to the same buyer a week later, the broker obviously gets the commission because he was the one who found the buyer.

The Rema (185:6) quotes this Rosh but changes the case slightly. He describes a case where the seller uses another broker to arrange for the house to be sold to the same buyer that the first broker had suggested. He cites the Rosh as saying that the first broker gets the commission because he was the one who found the buyer in the first place.

The Noda B'Yehuda points out the discrepancy between the original wording of the Rosh and the way he is cited by the Rema, and explains something very important. He says that since the sale ended up being completed through a broker, and not by the seller himself, the brokering service was a combination between the two brokers. He further says that we can see that the first broker hadn't completed the service because, apparently, he hadn't been successful in persuading the seller to loosen up and sell to his enemy. It took another broker's influence to convince him to sell. So, of course, the second broker gets something. He says that the Rema just meant that the first broker will *also* get a commission because he started the deal. This means that they split the commission.

What we glean from this is the following important principle: The product of the brokerage can be distributed among multiple people, and they all deserve a share in the commission.

Consider the following case: Someone has a rental unit and is looking for tenants. A local rental agency finds a good tenant who is willing to rent long-term for a good rate. The agency charges commission of a half-month's rent. Everything is looking good until the potential tenant backs out because he realizes that he cannot move to the neighborhood unless his children are accepted into the local school which he prefers. The landlord then asks a friend who has some pull to get this tenant into that school in order to save the rental contract. This friend is now a co-broker. He did an action that convinced the tenant to go through with the deal, so he deserves part of the commission. The rental agency alone couldn't pull it off because of the schooling issue. This means that when the rental agency takes the commission, this individual gets a portion of it.

Now, let's say the rental agency manager says, "I'm also friendly with the school principal. I could've also gotten the kid into that school. You just didn't give me a chance." According to Halacha, it doesn't matter. Even though he says he could have done it, the fact is that he didn't do it and someone else did. Someone else completed the deal and deserves a portion of the commission.

CUTTING OUT A BROKER

What if the landlord knew all along that the rental agency can complete the deal because he also has pull but he deliberately decides to cut him off because he has a cousin who has pull with that principal and he figures, "Why not give a little *parnassah* to my cousin? I'll call him and request that he get the kid into the school. This way, the agency will have to share the commission with him."

The Noda B'Yehuda writes that even in such a case the second person gets a share in the commission because the fact remains that the first broker didn't complete the deal and the second person did. The Aruch Hashulchan adds that it is improper for a person to do such a thing. This is a violation of *ani hamehapech bechararah*. The first broker was involved in a business endeavor and had the ability to profit fully from it, but someone else came along and pulled it away from him. This is wrong to do and Chazal label a person who does this a *rasha*.

This means that special attention should be paid in these cases to ensure that a client shouldn't bring in another broker to help out the deal if the first broker is fully capable of completing it all by himself. The Aruch Hashulchan does say, however, that if you have hesitations about the skills of the first broker and you're not sure that he can really pull it off, then you may invite other brokers to help out, even though this will shave off some of the first broker's commission.

SUPERFLUOUS SERVICES

Returning to the case where the rental agency had no pull in the school, which led to the deal being temporarily off: What if the owner called another rental agency who he felt was a little more connected around town and asked him to get the deal going, and, sure enough, that broker managed to use his connections and got the kid into school, which resuscitated the rental deal?

This case is different than the above because the second broker who culminated the deal was a rental agency as well and he also had ways to access potential tenants who are seeking to move into town. In this case, the second broker claims that he wants the full commission

because the first broker's contribution brought about no benefit to the landlord because the second broker could have done the whole deal himself from the beginning.

The Shev Yaakov discusses a similar case regarding *shadchanim* (as we mentioned in the first shiur, the Poskim often equate the halachos of *shadchanim* with that of monetary brokers.) The Shev Yaakov rules that in this case the full commission goes to the second broker.

He brings an interesting proof to this idea. The verse attributes to *bnei Yisroel* the mitzvah of bringing the bones of Yosef into *eretz Yisroel*. Chazal point out that Moshe Rabenu was the one who was involved in the mitzvah throughout the time that the nation was in the Midbar. Despite this, since *bnei Yisroel* completed the mitzvah, it is entirely attributed to them.

On the other hand, the Shev Yaakov proves from other sources that we do attribute a mitzvah to the other people who were involved as well – not solely to the one who completed it. He explains that with the bones of Yosef it was different because the *bnei Yisroel* had the ability to start the mitzvah, but they left it Moshe as a way of honoring him. Since they were the ones who completed it, and they also had the ability to start it and do the entire thing, it is credited completely to them.

HIRED BROKER VS. SELF-APPOINTED BROKERS

Rav Moshe Feinstein (Igros Moshe, Choshen Mishpat, Chelek 1, Siman 49) writes an important note about this Shev Yaakov which will be very relevant. He says that we only negate the first broker if he was not actually hired by the client, but rather acted as a freelance broker who sends suggestions to property owners.

In other words, the rental agency manager was the one who initially approached the landlord with the idea on his own volition, and then worked on it, hoping to strike the deal successfully. In this case, we apply the Shev Yaakov's principle that if he ultimately did not benefit the landlord at all he receives nothing. However, if the first broker was hired by the landlord, which is usually the case with these kinds of agencies, the first broker will not lose his portion of commission by the fact that the deal was culminated by a second broker, even though the second broker could have done the entire arrangement.

Rav Moshe explains this by noting that there is a fundamental difference between these two types of brokers - a hired broker and a freelance broker who independently offers deals to people. The first type of broker receives his payment as a salary because he is a hired worker. The second type, however, gets paid for the benefit that he created for the client.

This second type of broker can be compared to the Gemara's case of "yored", in which someone goes into someone's field without being hired and works the field. The owner of the field must pay him something for his work because he benefited from him and he must pay for that benefit. Here too, the broker benefited the landlord and he must be compensated for that.

In this case, since the payment is only due because of the benefit the landlord received, we need to analyze whether he actually provided a benefit, which means that we have to determine who contributed to the creation of the profits. Since the first broker didn't complete

the deal, and the one who did complete it could have started it as well, the first broker is not considered to be a contributing factor to the benefit of the landlord.

If the first broker had been a hired worker, however, his payment is for successful work – not for providing the ultimate benefit – and he did do that. Since he was successful in finding a tenant who eventually did sign on the deal, he would deserve at least a portion of the commission.

RIGHT PERSON, WRONG DEAL


The Rif in Bava Metziah discusses a case of a person who buys a property and invests money into improving it. After he sunk his money into the property, a previous debtor of the seller who had a lien on the property comes along and seizes it as payment. The halacha is that the seller must reimburse the buyer for the money he spent on the property; however, if the seller has no money, the buyer cannot demand payment from the debtor.

The question is raised, why can't he demand money from the debtor as a "yored" because he provided him benefit? The Rif answers that the man did not make these improvements in order to benefit the debtor; rather, he did it for himself. When he made the improvements, he had no intention of getting paid for it; therefore, he cannot ask for payment.

The Avnei Nezer applies this concept to a case of a *shadchan*. Someone suggested a *shidduch* which the girl's family declined. Capitalizing on his idea, some other *shadchanim* came along and suggested this boy for the younger daughter of that same family – and this *shidduch* ended being successful. The first *shadchan* then demanded some *shadchanus* for his initial input.

The Avnei Nezer ruled that the first *shadchan* is not entitled to any remuneration because the *shidduch* that he suggested never happened and the second *shidduch* was not his suggestion. Yes, he brought up the idea and initiated the process that led to a benefit for the family, but this was not done in order to be paid for what ended up happening. He never intended to suggest a *shidduch* for the younger daughter. This only indirectly came about his input. He, therefore, had never intended to be paid for that.

This is relevant in brokerage as well. When someone gives a referral, he only gets paid for the deal which he intended. For example: Someone hires an agent to find him a potential house to purchase, but the seller ends up deciding not to sell. The buyer then decides to rent that very house for a while until he finds a good house to buy. He does not owe commission to the agent because this is a totally different deal, even though it came up through his suggestion.

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