



Restoring the Primacy of Choshen Mishpat

## DOUBLE BILLING

Most people would consider that charging clients a few hundred dollars an hour makes for a very comfortable livelihood. Yet human nature is such that regardless of the amount a person earns, he is always looking to increase his income.

For a business owner, there are numerous approaches to take, from raising his prices to increasing sales volume, to branching out into different product lines. For a professional whose income is based solely on billable hours, however, there are only two ways to increase his income. He can either raise his hourly rate, or increase his billable hours. Raising rates is often difficult, as there are fairly standard rates for a professional of a given level of experience and competence.

That leaves increasing billable hours. When a professional is first building his practice, that is easily doable. However, a successful attorney will soon reach a plateau where he is physically capable of working only so many hours per day. At that point, it would appear that his income should stagnate.

There are, however, a number of creative methods for increasing billable hours without actually working more. However, these approaches raise ethical, legal and halachic questions, which are the focus of this article.

Perhaps the most maligned practice is double billing. An example would be an attorney who is traveling to a client meeting. Naturally, the time and expense of the trip are billed to the client. While traveling, however, the attorney receives a phone call from another client. He discusses the emergent matter, and naturally bills this client for his time as well. By doing so, the attorney is billing two clients simultaneously for the same time, thereby increasing his billable hours without actually spending more time at work.

This can also occur in court. There is often significant down time, when the parties and their attorneys literally stand around waiting for the judge to deal with their case. During these periods, an attorney may make phone calls or send emails on behalf of other clients, and again bill both parties for the same time period.

While this practice may seem unreasonable, a closer look raises some difficult questions. The attorney is traveling for the first client regardless. If he cannot double bill, in all likelihood he will simply ignore phone calls from other clients during the travel time, and instead use the down time to speak to his family, catch up with old friends, or listen to music. The net result is that double billing does not actually increase the cost to any client, as they will each end up paying for the full time

spent on their case, regardless. The only difference it makes is to the attorney, and how efficiently he may use his time.

One attorney memorably framed the question of double billing as whether he should call a second client while traveling on behalf of another client, which would allow him to arrive home in time to attend a *Daf Yomi shiur*, or whether he should instead listen to the *shiur* in his car, and then call the second client from his office later on in the evening.

Unsurprisingly there are few halachic sources that directly address this issue. Such conflicts did not exist when work involved manual labor; it was not possible to plow two people's fields at the same time. Nevertheless, there are two *gemaros* that help shed light on the matter.

The first is the *sugya* in *Bava Metzia* that deals with a laborer who began performing a job but was interrupted by an unavoidable circumstance (*ones*). In certain cases the employer remains liable to pay the workers for the full day. However, the employer's liability applies only when the employees cannot find replacement work. If there is other work available, the employee must accept the available job, and the original employer is released from his liability. If the worker fails to accept the available job, he will have no claim against the original employer.

What this seems to demonstrate is that an employee who is forced to sit around idly, unable to perform his work, is responsible to accept other employment, and if he does so, he may not double bill the original employer. Based on this, it would seem that not only is an attorney forbidden to charge both clients for his travel time, he should have a proactive obligation to fill whatever time he can with other calls or work, so as to minimize the wasted time charged to the first client.

Arguably, this would be limited to instances where the attorney cannot service the second client at a later time. Such cases are similar to the laborer who loses nothing by accepting the second job, since if he declines to take the job, it will not be available for him the next day.

In contrast, an attorney who has two clients to service, and was anticipating finishing with the first client's task and then dealing with the second client's needs at a later time, would not be obligated to 'use up' the second client's time in order to minimize the cost to the first client. Obligating him to do so would essentially be forcing him to give over the benefits of the practice that he built up for the benefit of the first client.

There is a second *sugya* that must be examined. The *Gemara* (*Bava Metzia* 12b) says that if a servant finds an

ownerless item, or *aveidah*, while performing work for his master, it belongs to his master. The *Gemara* qualifies that this applies only when picking up the *aveidah* conflicts with his obligations to his job. However, if the servant is able to pick up the lost object while continuing to perform his job, he may keep the item. The implication is that any service performed while working for another that distracts the employee from his primary job is the property of the employer, while any task that does not contradict his performance is the sole property of the employee.

What emerges from the above are two critical distinctions. To the extent that the task being performed for a second client does not conflict with his responsibilities to the first client, the attorney is entitled to reap the double gains. Thus, an attorney who makes a phone call to one client while traveling on behalf of a second client should be able to bill each for the time. Phone calls and traveling are not mutually exclusive, and the fact that one client is paying for him to travel at the same time that another is paying for the conversation does not pose any halachic conflict. If, however, a conflict exists, the first client has a claim for the benefits. Therefore, if the attorney makes a phone call for one client while reviewing a document for a second client, he would be unable to bill each for the full amount of time.

These parameters apply during the performance of the job for the first client. In the event an *oness* prevents him from performing the first client's task and he is billing simply because of the lost time, the attorney would only be able to demand compensation when he truly suffered a loss because he was idle. If, however, other opportunities were present (that do not come at the expense of future billable hours), the attorney would have a proactive obligation to service such clients and reduce the expense to the first client. Thus, an attorney who can productively use the time spent sitting around waiting for the judge to arrive may have a proactive obligation to do so.

The above reflects the basic halachic parameters of double billing. However, as in many areas of *Choshen Mishpat*, we must examine the accepted business norms, or *minhag*, before concluding what the *halachah* is. In this respect, the picture grows a bit more vague. From an informal survey, it appears that double billing is fairly common. Typically, any common practice will create a *minhag* that overrides the default *halachah* and is binding upon all parties. However, this is problematic on two levels.

The first issue is that common practice creates a binding *minhag* to the extent that it is well known by all participants. Since the practice reflects standard market behavior, a party implicitly accepts the terms by entering into an agreement without protest. Based on this logic, *minhag* can only play a role when both sides of the deal are aware of the common practice. But double billing is a practice that may be widely



known to professional attorneys, but not necessarily to their clients. While some may suspect that it occurs, it is probably not well enough known by typical clients to establish a *minhag*.

A second problem with applying *minhag* to allow such practices is that the American Bar Association, in formal opinion 93-37, specifically prohibits such billing tactics. The ABA argues that professional fees must be reasonable, and creating four billable hours out of two actual hours is inherently unreasonable. While the extent to which the formal opinion is legally binding on an attorney is debatable, there is likely an assumption by most clients that his attorney complies with the ABA's rules. Such assumptions, which the attorney is well aware of, may create an implicit condition to the attorney-client relationship that would therefore be binding on the parties, and would override the default *halachah*. Therefore it is likely that the ABA's rules that prohibit such practices in virtually all circumstances would govern as a matter of *halachah* as well.

It should be noted that neither the ABA's formal opinion nor common *minhag* place any responsibility on the attorney to proactively try to service other clients during breaks so as to minimize the expense to the first client.

As should be clear to the reader, a number of the assumptions in this article are debatable, and will not hold true in all circumstances. A cynic may argue that the legal profession is generally held in such low esteem today that most clients' working assumption is that the ABA ethics rules are not followed in practice. Furthermore, the degree to which clients are aware and accept certain billing practices varies among different client groups, which can impact the actual *halachah*. These factors make it difficult to render a clear, definitive *psak*; nevertheless the discussion demonstrates the nexus between *Choshen Mishpat*, *minhag* and laws of professional conduct in a distinctly modern dilemma. ■