

JEWISH BUSINESSES OPEN ON SHABBAT AND YOM TOV: A CONCURRING OPINION

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This paper was submitted as a concurrence to both “Shabbat Lease Arrangement,” by Rabbi Joel Roth and Justice Norman Krivosha and “Shabbat Corporation Agreement,” by Rabbi Ben Zion Bergman. Concurring and dissenting opinions are not official positions of the Committee on Jewish Law and Standards.

The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.

The Issue

The problem with which we are faced is to find a way in which a Jewish owner of a business might formalize the transfer of the business to a non-Jewish employee on Shabbat and Yom Tov so that the Jew would not be violating the laws of those days by having the business open then. Presumably, the Jew either cannot close then (e.g., if the business is a factory that involves machines which cannot be easily turned off and on) or, more likely, does not want to close the business and lose the profits. This latter motivation is especially understandable in North America, where people often do not work on Saturday and use it for shopping and other personal errands, thus making Saturday the busiest day of the week for many retail establishments.

Judge Norman Krivosha and Rabbi Ben Zion Bergman have presented us with two (really three) alternate proposals on this subject – namely, a lease, a partnership, or a closed corporation. The assumption behind them all – and also behind the one I am about to make – is that the Jewish owner is not him or herself working on Shabbat or Yom Tov. Indeed, the whole purpose of these proposals is to enable the Jew not to work on those days so that he or she is free to observe them according to Jewish law. The cases we are all addressing, then, are those in which the business would be operated by a non-Jew on those days.

It is also assumed that the Jew and non-Jew have not already created a partnership in American law for business reasons. If they had established a formal agreement of partnership, then, presumably, they can stipulate in (or amend) their agreement such that the two of them will divide the profits and losses equally even though there will be days in which one of the partners will not be present. Such days would include Shabbat and Yom Tov, but they would also include, for example, the times in which each partner is on vacation or is ill. From the point of view of Jewish law, then, the business could legitimately remain open,

and the Jew would share in the profits and losses through *הבלעה* (literally, the “swallowing” of the profits on Shabbat and Yom Tov into the overall profits and losses of the business throughout the week).¹

In our case, then, there is no such partnership agreement, but rather the non-Jew is an employee of the Jew whom the Jew trusts to manage the business on Shabbat and Yom Tov in his or her absence. The non-Jew, however, does not own any part of the business.

The Current Proposals and their Problems

In the discussions of the Committee on Jewish Law and Standards in March and June, 1995, I, for one, have been convinced by both Judge Krivosha and by Rabbi Bergman, but on different points. On the one hand, I agree with Rabbi Bergman that Judge Krivosha’s tenancy arrangement poses problems from the point of view of Jewish law, and, on the other, Rabbi Bergman’s proposal, as Judge Krivosha points out, seems unworkable from the point of view of American law.

To take Rabbi Bergman’s points first, if the employee is construed as a tenant, as Judge Krivosha suggests, and if the landlord gives the tenant the right to sell some of the inventory of the Jew’s business on Shabbat or Yom Tov (which, after all, is the whole point of the Jew’s interest in doing this in the first place), the non-Jew is, without doubt, acting not as a tenant but as the Jew’s agent. In that case, at least as a matter of rabbinic enactment (*שבות*), it would be forbidden for the Jew to gain from the non-Jew’s sales on those days, for the Jew would be illegitimately instructing the non-Jew to sell inventory for him on Shabbat and Yom Tov in a public way (*אמירה לנכרי שבות*).² It is even worse if the Jew bought the inventory on consignment, such that it does not really transfer from the supplier to the Jew until it is bought by someone else, for then the non-Jew would effectively be buying the inventory sold on Shabbat or Yom Tov for the Jew each time he or she sells something. In that case, the non-Jew would not only be selling for the Jew, but buying as well, and, in my view, in doing either of those activities the non-Jew would be illegitimately acting as the Jew’s agent, not his or her tenant. Ultimately, as Rabbi Bergman says, when I rent a car, I have fair use of that car during the lease, but I do not have the right to sell the car or any part of it. Indeed, I must buy the gasoline myself; far from being enabled by the rental to sell some of the inventory, I must replenish whatever inventory I use. Thus the arrangement between the non-Jewish employee and the Jew is not fairly construed as a rental but is, in all honesty, a form of agency. Since, in Jewish law, “the agent of a person is like him or her,”³ Judge Krivosha’s lease, in my view, will not do the trick – that is, it will not enable the Jewish owner to have business done for him or her on Shabbat and Yom Tov in a way that distances him or her sufficiently from the transaction to free him or her from liability for transgressing the laws of Shabbat or Yom Tov.

On the other hand, if we were to create a partnership or closed corporation, as Rabbi Bergman suggests, that might engender immense tax and inheritance problems in American law, so much so that anyone would be well advised to avoid such arrangements. Aside from the sheer burden of drawing up such documents, Judge Krivosha points out

¹ B. Nedarim 37a; B. Bava Mezia 58a; Rosh, Avodah Zarah, ch. 1, par. 25; Tur, Orah Hayyim 243, see Bet Yosef there, s.v. *הבלעה*: Mishnah B’rurah on S.A. Orah Hayyim 243:1. In general, on this, see *הבלעה* in *Encyclopedia Talmudit* 8:130ff., esp. p. 133.

² Cf. S.A. Orah Hayyim 244:1 and 252:3 for this public/private distinction.

³ M. Berakhot 5:5; B. Haggigah 10b; B. Kiddushin 41b, 43a; B. Bava Mezia 96a; etc.

that these arrangements are inadvisable for strictly business reasons. If, as we are supposing, the Jew and non-Jew have not, for business reasons, established a partnership, doing so to enable the Jew to observe Shabbat and Yom Tov would *ipso facto* give the non-Jew and his or her heirs title to a share of the business, an implication that the Jew certainly does not intend or desire. Rabbi Bergman's other suggestion, namely, forming a closed corporation, would subject the business to double taxation, and that is also a result which the Jewish owner would clearly wish to avoid.

We are left, then, with none of the three proposals – tenancy, partnership, or closed corporation – doing everything that we want them to do. The first of those is not a fair representation of what indeed is happening and, in any case, fails from the point of view of Jewish law. The second and third of the proposals may work in Jewish law but causes major problems in American law.

My Proposal: Create a Document in Jewish Law Alone

American Jews live under two legal systems, American law and Jewish law. We suffer from this in divorce law, where Jewish couples must be divorced in each legal system separately, for neither recognizes the divorce proceedings of the other. In the cases before us, I would propose that we take advantage of the First Amendment's separation of church and state by creating a document that announces at its inception in the clearest possible terms that the following document is meant exclusively as a religious document for the sole purpose of enabling the Jew named in it to follow the requirements of his or her religious tradition in observing specific sacred days within the Jewish religion. Within American law, it is not meant for any commercial or secular purpose whatsoever. It seems to me that if we were to append such notice to the top of the document we create, separately signed or initialed by both parties, any American court would see it as it is intended – namely, as a document with an exclusively religious purpose which, therefore, should not be treated by American courts at all.

I discussed this possibility with Professor Arthur Rosett, with whom I team-teach a course in Jewish law at UCLA School of Law. His fields of expertise are contract law and international law; indeed, he wrote the books that are used in many law schools on those subjects. He was not happy about the whole prospect of circumventing the Torah's command that we not work on the Sabbath, nor our "manservant or maidservant" (Exod. 20:10), but I pointed out to him that the Torah was talking about a slave who could not choose to do other than his or her master's bidding and who, if forced to work on Shabbat, would thus effectively be an extension of the master engaging in forbidden work on those days. We, on the other hand, are talking about free non-Jews who are not obligated to observe Jewish law and who might choose to work on specific days to earn some money.

Once assured that we were not trying to violate the spirit of the law through a legalistic interpretation of its letter (a good thing for laypeople to warn rabbis about from time to time!), he concurred that, from the point of view of American law, we could indeed create a document solely for religious purposes that would be held as such by American courts. We must be very clear that the parties do not want this document to have some ramifications in American law but not others; that would undermine the document's solely religious character and would therefore void its protection from review by American courts. To avoid any hint of that, the wording he suggested to me was the following:

THE PARTIES INTEND THAT THIS DOCUMENT SHALL HAVE NO EFFECT ON
THEIR LEGAL RIGHTS AND OBLIGATIONS UNDER ANY LAW OTHER THAN

JEWISH RELIGIOUS LAW. THE PARTIES SPECIFICALLY DISCLAIM THAT THIS DOCUMENT SHALL CREATE ANY OBLIGATIONS ENFORCEABLE IN THE COURTS OF ANY STATE OR IN ANY ARBITRAL TRIBUNAL.

That language should appear in capital letters at the top of the document and be separately initialed by both parties. He also provided me with some materials from American law that describe the basis for the procedure I am suggesting. I am attaching those materials as an Appendix.

Once we are freed from Judge Krivosha's worries about the effects of what we do in American law, we are able, it seems to me, to create a document that will best suit the purposes of Jewish law. For the reasons advanced by Rabbi Bergman and described above, that is not a tenancy agreement. Since closed corporations of the type that exist in American law do not, as far as I know, exist in Jewish law, the best option, as far as I can tell, would be to draw up a partnership agreement in Jewish law exclusively. It should state at the outset the language that Professor Rosett has provided for us. The document should be as short and as simple as possible so that observant Jews will not be impeded from completing it by its sheer size or by worry of any fine print in it.

In part of our discussion, several members of the Committee on Jewish Law and Standards suggested that we might use Judge Krivosha's tenancy agreement but construe it, for purposes of Jewish law, under the laws of קבלנות (subcontracting for piecework). The purest case of such קבלנות occurs when the Jew hires the non-Jew to do a task that the non-Jew chooses to do on Shabbat or Yom Tov but which he or she could do on other days; since the non-Jew is not obligated to observe Shabbat or Yom Tov, he or she may freely choose to work on those days, and since he or she chooses to do that of his or her own free will and could do otherwise, the Jew does not violate Jewish law even if he or she benefits from the non-Jew's work on those days.⁴ A non-Jewish manager of a business who works for the owner during the week with or without the owner present might be construed, it was suggested, in the same way – namely, as choosing to work on Shabbat or Yom Tov in order to earn a salary for those days. While that will justify the employee doing work on the Sabbath, it will not provide legal cover for the transfer of property that is involved in buying and selling, for the non-Jewish manager or salesperson buys or sells as the Jewish owner's agent and therefore it is as if the owner him or herself did the buying or selling. Therefore, a partnership agreement with part of the non-Jew's salary for work on our sacred days subsumed into his or her salary for all of the days of the week is the right way to go, for it legitimizes Jewish owners profiting from sales on the Sabbath or Festival through making those profits part of the general profits of the business (הבלעה), a well-established institution in Jewish Sabbath laws.

I have therefore voted affirmatively only on Rabbi Bergman's proposal because I think that it is the only one that satisfies the demands of Jewish law on this issue. I would agree with both Rabbi Bergman and Judge Krivosha that whatever document is used must carry a disclaimer at the very top that Jews who use it must check its legal status with their lawyer to make sure that it does not run afoul of the laws of the particular state or province in which it is being executed and that, under the laws of that

⁴ On the definition of קבלנות (hiring someone to do a specific job, however long or short it takes) and its differentiation from hiring an employee on the basis of the time he or she will work: B. Bava Mezia 77b (and Rashi on 77a, s.v., "sh'anei lei," 112a); M.T. Hilkhot Sekhirah 9:4; S.A. Hoshen Mishpat 333:5. On the implications of that distinction for hiring a non-Jew to do work on Shabbat: S.A. Orach Hayyim 244:5; 252:2. On the whole institution of hiring a non-Jew to do that which is forbidden for a Jew to do on the Sabbath, see Jacob Katz, *The "Shabbos Goy": A Study in Halakhic Flexibility* (Philadelphia: Jewish Publication Society, 1989).

state or province, the Jewish owner does not incur any liability that he or she does not intend to incur.

In concurring with Rabbi Bergman here, then, I am making another suggestion to both the Jewish owner and his or her attorney – namely, that one investigate, as per Professor Arthur Rosett, the possibility within the laws of one’s region of “punting” out of civil legal concerns entirely by announcing at the beginning of the document that it is intended solely for religious purposes. In this way, I seek to respond to Judge Krivosha’s important concerns about making sure that any document we recommend, on Jewish grounds, does not have untoward consequences in American law. (I have not investigated whether this is possible in Canada.)

In the discussion of the Committee on June 14, 1995, Rabbi Joel Roth objected to my proposal, stated at that time only orally, on the grounds that this is even more of a subterfuge (הארמז) than any of the other proposals. I think not. On the contrary, it seems to me that this is the most honest and straightforward of all of the proposals because it spells out at the very beginning exactly what the intentions of the parties are so that not only the parties, but any judge in either American or Jewish law will understand exactly what the parties intend and what they do not intend. In fact, the document I am proposing is even less ambiguous than the wedding contracts (כתובות) that we all use, for those never say that they are for religious purposes only and, as a result, American courts have interpreted them in a variety of ways, from a pre-nuptial agreement to be given legal effect in American law to a religious document that should not be given such effect.⁵ The document which I am proposing for Jewish businesses which are to be open on Shabbat and Yom Tov, in contrast, says candidly and clearly exactly what legal effects it is to have by identifying the legal system in which it is to be operative and that in which it is not to be. In Jewish law, of course, there is a kind of double-reverse here, for the document establishes a partnership while stating also (or at least understanding by implication) that the secular law which governs such matters is not to pay attention to this partnership. In other words, this is a partnership in Jewish law, but Jewish law itself defers to secular law to define and govern partnerships (“the law of the land is the law” – at least in commercial matters).⁶ The tenancy proposal, though, involves even more of a subterfuge because it pretends that the non-Jewish worker is a tenant rather than the agent that he or she really is. Truth to tell, the very nature of what we are trying to do here requires a legal fiction of some sort, one that we are clearly prepared to accept, and the legal fiction involved in my proposal, I think, is more clearly announced and therefore less dishonest than the tenancy arrangement. Moreover, as I stated above, I also think that it is, from the point of view of Jewish law, the only legally effective way to proceed, for it “calls a spade a spade” in acknowledging that the non-Jew is indeed going to be transferring property in ways that will benefit the Jew on Shabbat and Yom Tov.

⁵ *Wener v. Wener*, 59 Misc. 2d 959, 301 N.Y. Supp. 2d 237 (Sup. Ct. 1969); 33 App. Div. 2d 50, 312 N.Y. Supp. 2d 815 (2d Dept. 1970); *In re Estate of Armin H. White*, 78 Misc. 2d 157 (1974); *Brett v. Brett*, (1969) 1 All. E.R. 1007 (Ct. App.); *Margulies v. Margulies*, 42 App. Div. 2d 517, 344 N.Y. Supp. 2d 482 (1st Dept. 1973); *Matter of “Rubin” v. “Rubin”*, 75 Misc. 2d 776, 348 N.Y. Supp. 2d 61 (Family Ct. 1973); *Pal v. Pal*, 45 App. Div. 738, 356 N.Y. Supp. 2d 672 (2d Dept. 1974); and *Avitzur v. Avitzur*, N.Y. Court of Appeals, 58 N.Y. 2d 108, 459 N.Y. 2d 572 (1983). For a discussion on how civil courts have handled the conflict of laws involved in Jewish divorce, see Rabbi Elliot N. Dorff and Arthur Rosett, *A Living Tree: The Roots and Growth of Jewish Law* (Albany: State University of New York Press, 1988), ch. 15; for a discussion of how Jewish sources have handled it, see *ibid.*, ch. 14.

⁶ B. Nedarim 28a; B. Gittin 10b; B. Bava Kamma 113a; B. Bava Batra 54b-55a; and see Dorff and Rosett, *A Living Tree*, pp. 515-23.

With this proposal added to Rabbi Bergman's responsum for the consideration of the Jewish owner and his or her attorney then, I leave it to Rabbi Bergman or anyone else on the Committee who, like him, knows this area of the law better than I do, to draw up such a partnership agreement.

APPENDIX

E.A. Farnsworth, *Contracts*, 2d ed. (Boston: Little, Brown, 1990), pp. 122-3:

3.7. INTENTION NOT TO BE BOUND. Parties to agreements, especially routine ones, often fail to consider the legal consequences of the actions by which they manifest their assent. The fact that one gives the matter no thought does not impair the effectiveness of one's assent, for there is no requirement that one intend or even understand the legal consequences of one's actions. For example, one who signs a writing may be bound by it, even though one neither reads it nor considers the legal consequence of signing it. This rule, making a party's intention to be legally bound irrelevant, has the salutary effects of generally relieving each party to a dispute of the burden of showing the other's state of mind in that regard and of helping to uphold routine agreements.

A different rule applies, however, in those unusual instances in which one *intends* that one's assent have no legal consequences. Under the objective theory, a court will honor that intention if the other party has reason to know it. And it will honor it if the other party actually knows it.

The easiest way for a party to make clear an intention not to be legally bound is to say so. In a number of commercial contexts, parties enter into "gentlemen's agreements" that state that they are not legally binding, and it is beyond question that the parties can in this way turn an otherwise enforceable agreement into an unenforceable one. The same result has been reached even though a written agreement is made as a sham, for the purpose of deceiving others, with an oral understanding that it will not be enforced.

Circumstances, rather than words, may also indicate a party's intention not to be bound. *American Law Institute, Restatement of the Law, Second, Contracts*

CHAPTER 3, SECTION 21: INTENTION TO BE LEGALLY BOUND. Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract.

COMMENT B.: AGREEMENT NOT TO BE LEGALLY BOUND. Parties to what would otherwise be a bargain and a contract sometimes agree that their legal relations are not to be affected. In the absence of any invalidating cause, such a term is respected by the law like any other term, but such an agreement may present difficult questions of interpretation: it may mean that no bargain has been reached, or that a particular manifestation of intention is not a promise; it may reserve a power to revoke or terminate a promise under certain circumstances but not others. In a written document prepared by one party it may raise a question of misrepresentation or mistake or overreaching; to avoid such questions it may be read against the party who prepared it.

The parties to such an agreement may intend to deny legal effect to their subsequent acts. But where a bargain has been fully or partly performed on one side, a failure to perform on the other side may result in unjust enrichment, and the term may then be unenforceable as a provision for a penalty or forfeiture. . . . In other cases the term may be unenforceable as against public policy because it unreasonably limits recourse to the courts or

as unconscionably limiting the remedies for breach of contract.

REPORTER'S NOTE ON COMMENT B. . . .As Comment B. indicates, most of the arguments against enforcing a "not binding" clause are based on unfairness to one party. . . .

J. Calaman and J. Perillo, *The Law of Contracts*, 3d ed. (West Publishing Company, 1987), pp. 28-9.

2-4. MUST THE PARTIES INTEND TO BE BOUND OR INTEND LEGAL CONSEQUENCES?

As asked, the question in the caption must be answered in the negative because it is well settled that the parties need not manifest an intent to be bound or consciously advert to legal consequence that might arise upon breach. . . .This rule is consistent with the rule that mistake as to a rule of law does not necessarily deprive an agreement of parties of legal effect. The same result can be reached by employing the reasonable man test because "a normally constituted person" would know, however dimly, that legal sanctions exist.

However, if, from the statements or conduct of the parties or the surrounding circumstances, it appears that the parties do not intend to be bound or do not intend legal consequences, then under the great majority of the cases there will be no contract. Two types of cases arise in this area. In one, the parties expressly agree that they do not intend to be bound. In the other, the parties do not expressly so agree but the conclusion is reached from the surrounding circumstances.

Under the majority rule, when the parties expressly state that they do not intend to be bound by their agreement or do not intend legal consequences – the so-called gentlemen's agreement – the courts conclude that a contract does not arise. The type of case envisaged is one where the parties enter into agreements regulating commercial relations but further agree that the agreement is to create no legal obligation. In such a case, as stated above, the general rule is that the agreement is not binding. There is, however, a strong minority current which hold that, when the parties have acted under the agreement and it is unfair not to enforce the agreement, it should be enforced. Such cases have been explained as instances where "the principle of reimbursing reliance is regarded as overriding the principle of private autonomy." Failure by one party to perform may also result in his unjust enrichment, presenting an additional ground for enforcement in contract or quasi contract. Many of the minority cases have involved pension plans upon which employers could reasonably expect employees to rely and which in fact did induce reliance. In addition, the minority view has been used in bonus and employee death benefit cases. Under the majority rule no protection is available to an employee where the agreement explicitly stated that it was non-contractual. This is one of the abuses the Pension Reform Act of 1974 was designed to curtail.

As indicated above, the intent not to be bound or to intend legal consequences need not be stated in so many words: it may be inferred from the circumstances of the case.