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Self Dealing in the Not-for-Profit Board Room: An Inquiry into a Trustee's Multi-Faceted Halakhic Identity

Recent charges of unscrupulous conduct on the part of rabbis and directors of nonprofits or charities such as synagogues, yeshivas and communal organizations precipitates closer scrutiny of the halakhic guidelines for resolving conflict-of-interest issues relating to these institutions.

Let's describe various scenarios which entail classic situations of self-dealing and illustrate the absence of accountability constraints. A yeshiva is seeking land to build an additional building due to severe overcrowding conditions at their facility. Abraham Cohen, a trustee on the board, is the sole broker of Century Realty Corporation, which owns a plot of land that is adjacent and is suitable for the facility. Mr. Cohen persuades a real estate broker to offer the plot to the yeshiva, but the broker fails to disclose Cohen's ownership of Century. The yeshiva's board votes to approve the purchase of the property for fair market value.

Another scenario: Same as the above, except that, prior to the purchase, Mr. Cohen discloses to the board his interest in Century and persuades the board to purchase the lot, but fails to mention that the land has been a dumping ground for toxic wastes.

One more scenario: Same as the above, except that prior to the purchase, realizing that the yeshiva requires additional capital to finance the property purchase, Mr. Cohen persuades the board to sell a vacant lot owned by the yeshiva to his nephew. Should the sale materialize, the nephew agrees to arrange for Mr. Cohen's appointment as a trustee to a municipal board. Again, Mr. Cohen fails to disclose to his board his relationship to the buyer.

In all these situations we are dealing with a "self-dealing transaction" in which the trustee has an interest, financial or otherwise.

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As a *metsuveh,*[1] i.e. as a member of our covenant-faith community, an individual may employ different stratagems to curry favor in the eyes of others. For example, Hazal sanction a businessman's use of promotional tactics such as giving presents of parched corn ant nuts to children upon entering one's store in order to attract new customers, whether in the local marketplace or a different marketplace.[2] Snatching away another's anticipated gain through such behavior is not objectionable. Similarly, a person who appointed another individual as his *shaliah* may provide him with fringe benefits above and beyond the agreed-upon remuneration for services in order to serve as an incentive for doing future work.[3]

Yet we are instructed to be not only innocent, but also to appear in the eyes of our fellowmen as innocent. Regarding the person who entered the *Bet Ha-Mikdash* office for the purpose of collecting the half-shekels contributed by the people, the mishna[4] states:

> The collector may not enter dressed in a loosely-hanging garment [with sleeves in which money can be hidden] nor wearing boots or sandals or *tefillin* or an amulet [in which money may be concealed]… For a person must be guiltless before his fellow man as before *Hashem*, as the Torah states: "You shall be guiltless before God and before Israel."

In short, for the private individual, while certain actions which may be characterized as self-serving are permissible, one must exhibit transparency vis-à-vis one's fellow man.

However, upon an individual's decision to accept a communal position, the *Sifre* states,[5] "in the past, you were under your own control; from here on in, you are beholden [obligated] to the community."

Is the *Sifre* merely advising us that one's leisure time is more circumscribed due to one's new communal position, or is the *Sifre* alluding to the fact that a communal appointment inexorably leads to new halakhic responsibilities? Does the election or appointment to public office create new

[1] *Kiddushin* 31a.

[2] *Bava Metsia* 60a; *Bava Batra* 21b; *Shulhan Arukh*, *Hoshen Mishpat* 228:18; *Teshuvot Mahaneh Hayyim*, *Hoshen Mishpat* 2:46.

[3] *Tosefta Demai* 8:2-3; *Ketubot* 98b. Unless the third party explicitly informs the agent that the fringe benefits are his; these fringe benefits should be shared with the person who appointed the agent. See *Shulhan Arukh*, *Hoshen Mishpat* 183:6, *Rema*, ad. locum. Cf. *Ran on Rif*, *Ketubot* 99b; *Netivot ha-Mishpat*, *Hoshen Mishpat* 183:13.

[4] *Hilkhot Shekalim* 3:2.Whether a violation of this proscription is biblical or rabbinic origin is subject to debate, and the ramifications of this controversy for our topic are beyond the scope of our presentation. See *Teshuvot Hesed Abraham*, *Orah Hayyim*, no. 21; *Teshuvot Iggerot Moshe, Orah Hayyim*, 2:40, 4:82.

[5] *Sifre*, Devarim 1:16.

obligations for the trustee, duties which do not exist for the private individual? Our fundamental inquiry is whether all communal self-dealing should be prohibited, or whether potential conflict-of-interest matters should be monitored and judged for fairness through a collaborative decision of the organization's lay leadership, by a *bet din* or by an administrative board. Perhaps only harmful self-dealing by a trustee should be outlawed?.

As we will show, a director's responsibility will be viewed through the prism of *hilkhot dayyanut,* (arbitration), *shemira* (bailment), and *apotropsut* (guardianship).[6] Whether his identity is to be construed as a *dayyan*, *shomer*, or *apotropos* will determine how his conflict-of-interests will be treated.

THE TRUSTEE AS *DAYYAN*

The terms "*zayin tuvei ha-ir*," (the seven townspeople), "*parnasim*" (benefactors), "*ne'emanim*" (trustees), and "*apotroposim*" (custodians), are utilized interchangeably to describe communal servants who were appointed or elected as representatives serving on Jewish municipal government or on Jewish communal institutions in the lands of our dispersion.[7]

Rishonim, in particular Sephardic ones, as well as some *Ahronim*, advanced the notion that the authority of the community and its trustees is comparable to and functions like a *bet din*, with each and every trustee serving as a *dayyan*.[8] This conclusion equally extends to trade guilds,[9] and

[6] There is another realm of halakha which impacts upon a trustee's identity, namely, *hilkhot shelihut*. This aspect of a trustee's identity is beyond the scope of this presentation.

[7] *Shabbat* 114a; *Kiddushin* 49b; *Teshuvot ha-Rashba* Vol. 1, no. 617; Vol. 3, nos. 389, 443; Vol. 7, nos.108, 450; *Teshuvot Rivash*, nos. 33,61; *Teshuvot Tashbets* Vol.1, no.33; *Tur, Hoshen Mishpat* 8; *Teshuvot Maharashdam*, *Orah Hayyim*, no. 33; *Yoreh De'ah*, no.175; *Teshuvot Noda be-Yehuda, Mahadura Kamma*, *Hoshen Mishpat*, no.20; *Teshuvot Hatam Sofer*, no. 6: *Likkutim,* 49. For a discussion of some of these sources, as well as others, and the conceptual framework of our presentation, see Ron Klainman, "From the Vestibule of the *Dayyan* to the Vestibule of a Public Servant," (in Hebrew) in *Studies in Jewish Law: Judge and Judgment*, eds. Ya'akov Habba and Amihai Redziner, 159 (Ramat Gan: Bar Ilan Press,5768).

[8] *Teshuvot Geonim Kadmonim*, 125; *Teshuvot ha-Rashba*, Vol. 3:411; *Teshuvot Rivash*, nos.214, 249; *Teshuvot Maharik*, *Shoresh* 17; *Teshuvot Re'em,* nos. 53,57; *Pit'hei Teshuva*, *Hoshen Mishpat* 34:27; *Mishpat Shalom*, *Kuntres Tikkun Olam* 231:23; *Hazon Ish, Bava Kamma* 4:8. For the basis of this parallel, see *Yad Ramah, Bava Batra* 8a, *Siman* 91; *Teshuvot ha-Rashba,* Vol 4, no. 142; *Teshuvot Re'em*, op. cit.; *Hazon Ish*, op. cit.; R. Z.N. Goldberg, *Mishpat Arukh* 34, 48 (p. 225). See Eliav Shochetman, "The Obligation to State Reasons for a Decision," (in Hebrew) 6-7 *Shenaton Ha-Mishpat Ha-Ivri* (5739-40), 379. There are those who denied that the community has the status of a *bet din*. See *Teshuvot R. Yosef Ibn-Migash,* no. 161.

A cursory review of *teshuvot* will indicate that authorities were selective in their use of this analogy. This matter is beyond the scope of this presentation.

[9] *Hazon Ish, Bava Kamma* 4:10.

by analogy should equally apply to any communal, synagogue, or yeshiva board.[10]

Adopting this parallel between a communal officer and a *dayyan*, an individual was fined for submitting false statements in his tax returns. Subsequently, he sought communal office. R. Yisroel Isserlein, a German fifteen century authority, ruled that he could not serve as a communal leader.[11] This ruling was later codified in the following fashion:[12]

> The elders of the community, who are appointed to deal with public or private matters, are viewed as judges, and he who is disqualified from judging due to wrong-doing cannot be appointed to sit among them.

Relying upon this ruling, R. Moshe Sofer nullified the appointment of a communal officer who had accepted a bribe to vote for a prospective communal rabbi.[13]

This same comparison of a public official to a *dayyan* extends to deriving benefit from communal decisions. A *dayyan* may not judge a case which may benefit him somehow. A *dayyan* may not preside over any matter, whether financial or nonfinancial, in which he stands to benefit from the outcome.[14] That being said, R. Yehezkel Landau, of eighteenth century Prague, issued a flat prohibition against all self-dealing transactions involving controlling persons or any other organization in which such an organization has a financial interest. Invoking the community-*dayyanut* paradigm, he argues:[15]

[10] Such a parallel was applied to a committee of Mafdal (National Religious Party), an Israeli religious political party. See *Piskei Din Rabbaniyyim* (hereafter: PDR) 7:225,250,261 (Rabbis Goldschmidt and Elyashiv). In fact, the first explicit mention of this equation deals with trustees dispensing monies from a communal charity fund. See *Talmud Yerushalmi Pe'ah* 8:6 and *Rash Sirilio* ad. locum.

[11] *Teshuvot Terumat ha-Deshen*, *Pesakim u-Ketavim*, no. 214. See also, *Pilpula Harifta, Sanhedrin* 3:300.

[12] *Rema*, *Hoshen Mishpat* 37:22; *Teshuvot ha-Rema,* no.108.

[13] *Teshuvot Hatam Sofer*, *Hoshen Mishpat*, no. 160. See also, *Teshuvot Avnei Nezer, Yoreh De'ah*, no. 465; *Arukh ha-Shulhan, Hoshen Mishpat*, 8:1.

[14] *Teshuvot ha-Rashba*, Vol 1, no. 642; *Teshuvot Terumat ha-Deshen* 354; *Shulhan Arukh, Hoshen Mishpat* 7:12, 37:19; *Shakh*, ibid. 10; *Shakh*, *Hoshen Mishpat* 237:10; *Teshuvot Hikrei Lev*, *Hoshen Mishpat*, no. 23; *Teshuvot Maharbil,* Vol. 3, nos. 119,121. Based on *Mishneh Bekhorot* 4:6, there is an implicit assumption that the definition of a vested interest which will impugn and invalidate the testimony of a witness is equally applicable to what constitutes a *dayyan*'s material interest. See e.g. *Halakha Pesuka*, Vol. 1, nos.115-124.

[15] *Teshuvot Noda be-Yehuda, Mahadura Kamma, Hoshen Mishpat*, no. 20.

> In a matter where they are interested parties they are not *tuvei ha-ir*, and is it possible that *tuvei ha-ir* are eligible to judge for themselves? And regarding taxation matters they are interested parties, as explicitly stated by Ramah 163, that all communal needs…one must enlist all the taxpayers to preside on these matters…

In effect, utilizing a "safe harbor" approach, all matters, even tax concerns, are to be construed as vested interests, and therefore only the local citizenry may resolve these issues. Others have subscribed to this position – that all acts of self-dealing are prohibited.[16] Public office holders should act at all times in a manner that demonstrates integrity, avoid even the *appearance* of a conflict-of-interest and thus serve as an example to fellow officers and the community. Therefore, should a conflict-of-interest situation arise, one must withdraw from the decision-making process.

Clearly, in most communities, there exists the custom to allow public officials to address matters of public concern such as taxation, synagogue matters, social services, and charitable trusts. Here too, the legitimacy of this *minhag* was grounded in the status of the community as a *bet din*. Just as litigious parties may accept to resolve their differences with a panel of *dayyanim* who are disqualified – due to being relatives with one of the parties or interested parties in public matters such as taxation – similarly, a community may opt to empower *dayyanim* (and by extension, trustees) who are technically disqualified because of relation to resolve matters of a public nature.[17] However, such empowerment of the public servant's authority was never extended to allow a *dayyan* (and by extension trustees) to resolve matters tainted by a personal vested interest.[18] In effect, the parameters of the *minhag* were defined by the status of the community as

[16] *Teshuvot Rashbash*, no. 568.

[17] *Shulhan Arukh, Hoshen Mishpat* 7:12; *Arukh ha-Shulhan, Hoshen Mishpat* 7:22. Clearly, where a public servant has a financial interest in a communal organization, he must recuse himself from any matters dealing with this body. See *Teshuvot ha-Rashba*, Vol.1, no.642; *Teshuvot Hikrei Lev,Hoshen Mishpat*, no.23.

[18] *Teshuvot Rivash,* no. 195; *Teshuvot Hikrei Lev, Hoshen Mishpat*, supra n. 14; *Teshuvot Hatam Sofer, Hoshen Mishpat*, no. 163. Some public matters, such as taxation, clearly involve a communal *dayyan*'s personal interest, but nevertheless in many places the customary practice was and is to permit a communal *dayyan* the right to deliberate and vote regarding such issues. See *Shulhan Arukh, Hoshen Mishpat* 7:12; *Teshuvot Hikrei Lev*, *Hoshen Mishpat*, no. 23. Nevertheless, should the particular circumstances dictate that the *dayyanim* recuse themselves from the matter, then *dayyanim* from the outlying community should resolve the matter. See *Arukh ha-Shulhan, Hoshen Mishpat* 37: 22. These sources are equally applicable to a public servant who is comparable to a *dayyan*. See Klainman, supra n. 7, at 172.

a *bet din*. On one hand, *hilkhot dayyanut* allows for public servants to resolve matters of public concern; on the other hand, a communal official similar to a *dayyan* may not resolve any matters in which he is an interested party on a personal level.[19]

In sum, pursuant to *din* and *minhag*, a public servant, akin to a *dayyan,* is proscribed from resolving any matters in which he has a personal vested interest. Given that the scenarios described above between Mr. Cohen and the board may be characterized as self-dealing transactions, such actions should be prohibited and they would be unable to be reviewed by the board.

Without invoking the director-*dayyan* paradigm, other potential conflicts of interest were resolved in the same fashion by the application of logic. Addressing the question of whether a trustee of a private charitable foundation may sell some of its assets to a relative, R. Yosef Trani argues that this would be a self-dealing transaction and therefore prohibited. Firstly, the factor of *hashad* (suspicion) ought to preclude such an act. Furthermore, hard-nosed negotiations and bargaining tactics to soften up the potential buyer will fail to materialize with a relative. Finally, potential buyers with more attractive offers than the relative will abstain from the bidding process due to their assumption that the trustee's relative has the matter "locked up."[20]

A *dayyan*, and by extension a director, must equally distance himself from self-dealing which involves a non-financial interest. Addressing the issue of a witness with a pertinent personal interest in a non-financial matter submitting testimony, Rambam writes:[21]

> If the witness finds that he has any interest in this testimony …he should not testify regarding it…
> Just as he shall not testify in this matter due to the possibility that he is an interested party, similarly he shall not judge this matter…

Being a "*nogeia be-davar*" (an interested party) regarding nonfinancial matters has been extended to the public servant who is compared to the *dayyan*. For example, there was a *hazzan* who obligated himself to serve a particular community and subsequently claimed that the *kehillah* had breached the terms of his agreement and decided to accept a position in

[19] Cf. *Teshuvot ha-Rosh* 6:15; *Teshuvot Re'em*, no. 12.

[20] *Teshuvot Maharit, Hoshen Mishpat*, Vol. 2, no. 1.

[21] Rambam, *Hilkhot Edut* 16:4-5; *Shulhan Arukh, Hoshen Mishpat* 37:21; *Shakh, Hoshen Mishpat* 37:10. This conclusion equally applies to a *dayyan*. See supra n. 13. Cf. *Teshuvot Mabit*, Vol. 2, *Hoshen Mishpat*, no. 80.

another community. The members of the *kehillah* argued that the *hazzan* remained obligated to serve them. The question arose whether these members' testimony is trustworthy or whether they are "*noge'im bedavar*." The reply was that, given their abiding desire to hear the *hazzan's* melodic voice, they are considered interested parties, and therefore R. Joseph Ibn Lev argued that their testimony was to be disqualified. If a citizenry's testimony is invalidated in such a case,[22] *a fortiori* the leadership's input regarding this matter should be equally discounted. Consequently, in our case, where Mr. Cohen persuaded the board to sell a vacant lot owned by the yeshiva to his nephew, should the sale materialize, the nephew agreed to facilitate Mr. Cohen's appointment as a trustee to a municipal board. Given that such an appointment will benefit Mr. Cohen and that negotiating with his nephew may compromise the organization's assets, his opinion regarding the transaction is tainted and should be removed from consideration.[23]

THE TRUSTEE AS *SHOMER*

Halakha recognizes that obligations may be created by parties undertaking duties based upon oral or written agreements, whereby each party acquires a claim against the other which the latter is obligated to honor. A *shomer* (bailee) is obligated by dint of agreement with the *mafkid* (bailor) to safeguard the asset entrusted to his safe-keeping. In effect, a communal officer who is entrusted with dispensing, investing and dealing with public funds has the status of a *shomer*.[24]

Does a *shomer* have the right to engage in self-dealing? The beraita states:[25]

> If one deposits fruit with his neighbor and it spoils…he [the *shomer*] may not touch it: this is R. Meir's ruling. But the Sages maintain: He provides

[22] *Teshuvot Maharbil*, Vol. 1, no. 36. See also *Teshuvot Mabit*, Vol. 1, no.81.

[23] Should it be unclear whether the appointment will materialize, his present input now regarding the sale will not be tainted. See *Teshuvot Terumat ha-Deshen*, no. 354; *Shulhan Arukh, Hoshen Mishpat* 37:10. Furthermore, if the nephew explicitly states that the civil appointment is being given to him as a gift rather than as remuneration for facilitating the transaction, the trustee may accept the appointment. See *Rashi, Ketubot* 98b, s.v. *she-yesh*; *Teshuvot ha-Rashba ha-Meyuhasot le-Ramban*, no. 60.

[24] *Teshuvot ha-Geonim ha-Ketsarot*, no.276; *Teshuvot Maharam Schick*, *Hoshen Mishpat*, no. 12; *Teshuvot Ba'ei Hayyei*, *Hoshen Mishpat*, Vol. 1, no. 217; *Mahane Ephraim*, *Hilkhot Shomrim*, no. 17; *Pit'hei Teshuva*, *Hoshen Mishpat* 301:9.

[25] *Bava Metsia* 38a; *Shulhan Arukh, Hoshen Mishpat* 292:19.

a solution for them by selling them pursuant to the *bet din*'s direction, and he must sell it to strangers, not to himself.

Though the transaction has been approved by a *bet din* of experts. (*mumhin*), the asset may only be sold to a third party. Should we allow the *shomer* to buy it for himself, people will be suspicious that he lowered its value prior to acquiring it for himself. Moreover, even though the purchase received *bet din* approval, people would be unaware, either that a *bet din* functions in an administrative capacity executing appraisals or that there was a *bet din* appraisal, and will assume that the *shomer* deceived the *bet din* regarding the asset's market value.[26] Should such a transaction transpire, the sale is null and void.[27] In other words, *bet din* review is unable to validate any interested transaction.

Recall that in our scenario, a yeshiva was seeking land on which to build an addition to the yeshiva. Abraham Cohen, a trustee on the board, is the sole broker of Century Realty Corporation, which owns a plot of land that is adjacent and is suitable for the facility. Mr. Cohen persuaded a real estate broker to offer the plot to the yeshiva, but the broker failed to disclose Cohen's ownership of Century. The board voted to approve the purchase of the property for fair market value. Did Mr. Cohen act properly and is the sale valid? Given that Mr. Cohen, as a public servant, is a *shomer*, such an action of purchasing the property for himself, even due to extenuating circumstances such as the overcrowding conditions in the yeshiva, would be improper and the sale would be void. Moreover, Mr. Cohen, having the status of a *dayyan*, is proscribed from becoming involved in a transaction which entailed a personal financial interest in the outcome. In all these cases, the element of *hashad* would cloud the transactions and therefore the sale would be void even if *bet din* would sanction the sale.

THE TRUSTEE AS *APOTROPOS*

Public servants have been empowered either by election or appointment by the constituency of their communities or by voluntary associations such as synagogues, *yeshivot* and communal organizations to be entrusted

[26] *Pesahim* 13a; *Rashi, Bava Metsia* 38a; *Tosafot, Ketubot* 98a, s.v. *de-amrei*.; *Mordekhai, Bava Metsia* 428; *Perisha, Tur Hoshen Mishpat* 290:15.

[27] *Tosafot, Pesahim* 13a s.v *mai*; *Tosafot Ketubot*, supra n. 26. Cf. *Teshuvot Rivash*, no. 376; *Shulhan Arukh, Hoshen Mishpat* 73:16; *Sema, Hoshen Mishpat* 73:43 who opine that *bet din* of experts' approval would be effective.

as guardians over their assets.[28] The creation of these "trusts" and the responsibility of the trustees' vis-à-vis their boards are shaped and molded in part by *hilkhot apotropsut*.

In various contexts of commercial relations, we are mandated that one's actions are to be transparent in order to avoid *hashad*.[29] Hence, to be above suspicion, any profit derived by an *apotropos* from a personal transaction with a third party concerning orphan's assets requires the prior scrutiny of a *bet din*.[30] Invoking the parallel between guardianship for orphans and communal management, Rabbis Adas, Ya'avetz and Elyashiv ruled that avoiding suspicion in the eyes of others is an overarching concern regarding the responsibility of an *apotropos* managing a communal foundation disbursing funds to needy individuals.[31]

That being said, should the *bet din*, serving in its administrative capacity,[32] appraise the market value of the assets and determine that the sale would enhance rather than undermine the orphan's financial holdings; the self-interested transaction would be validated.[33]

[28] Usually *hilkhot apotropos* deal with persons who are incapable of taking care of their own affairs such as minors or adults who are mentally impaired; however, the institution of guardianship applies equally to an individual occupying a public office, including but not limited to trusts set up for religious purposes, i.e. *hekdesh*. *Rashba* and *Ramban* cited by *Bet Yosef*, *Yoreh De'ah* 169(end); *Rashba* cited by *Bet Yosef*, *Hoshen Mishpat* 128, 163; *Teshuvot Maharit*, Vol. 1, no. 117; *Hokhmat Adam*, 147:19, 23; *Sha'arei Uzi'el*, 1:9, 56, 64, 116.

[29] See *Tosafot*, *Bava Metsia* 32a, s.v. *bet din*; *Hiddushei ha-Ritva*, *Ketubot* 98a in the name of the *Geonim*. There are those who argue that given that he is serving as an *apotropos*, he is the "*yad*", i.e., the arm of orphans, and the agent of *bet din*. Consequently, upon purchasing the orphans' assets for himself, the guardian simultaneously is the seller and buyer, a halakhic impossibility – a person cannot sell to himself. In short, the requirement of *bet din* involvement in such a transaction is due to his status as an *apotropos* rather than to avoid *hashad*. See *Rashi Ketubot* 98a, s.v. *ma'an*; *Tosafot Ketubot*, supra n. 26; *Ritva, Shitah Mekubetset*, *Ketubot* 98a, s.v. *almanah*; *Teshuvot ha-Rosh*, no. 105:2; *Teshuvot Maharashdam, Hoshen Mishpat*, no.325.

[30] *Ra'avad* and *Nimmukei Yosef, Bava Batra* 67a; *Bet Yosef*, *Hoshen Mishpat* 290:15; *Rema, Hoshen Mishpat* 290:8. Based upon the above-cited sources, such a review and approval may be executed by a *bet din* panel of laymen. Cf. *Bah, Tur Hoshen Mishpat* 292:18. The efficacy of *bet din* oversight is equally applicable in the case of a widow engaged in an interested transaction on behalf of orphans. See *Tosafot Ketubot*, supra n. 25; *Teshuvot Rivash* no. 396; *Maggid Mishneh*, *Hilkhot Ishut* 17:13.

[31] *Teshuvot Bikkurei Asher,* Vol. 2, no. 53.

[32] See infra text accompanying note 47.

[33] *Helkat Mehokek, Even ha-Ezer* 93:45. Given that self-dealing may endanger the orphan's assets, a *bet din* must authorize the *apotropos's* actions. See *Shakh, Hoshen Mishpat* 290:10; *Sema, Hoshen Mishpat* 290:26; *Teshuvot Maharashdam, Hoshen Mishpat* 46, 349, and 434.

Consequently, in our scenario, as long as there is full disclosure by Mr. Cohen to the board of "his interests" in the sale and the *bet din* is aware that Mr. Cohen is the sole broker of Century Realty Corporation which owns land adjacent to the yeshiva which is suitable for the facility also owns land adjacent to the yeshiva which will increase exponentially in value if the yeshiva purchases a lot nearby, or knows that Mr. Cohen's nephew owns the lot which the yeshiva may purchase, such interested transactions are valid. Such a determination will be based upon the following: the transaction and its terms have been arrived at utilizing a rational and fair process, that the terms of the sale are fair and reasonable, and that the transaction is in the organization's best interests.

How does halakha view the situation if prior to the purchase Mr. Cohen discloses to the board his interest in Century and persuades the board to purchase the lot but fails to mention that the land has been a dumping ground for toxic wastes? Expounding upon the Biblical verse, "…before a blind person you shall not place a stumbling block; you should fear your God, I am God," the *Sifra* on *Torat Kohanim* instructs us:[34]

> What does "before a blind person" mean? It refers to someone who is blind regarding a matter. If he comes to take advice from you, you shall not provide advice which is improper for him.

Though there is an interdict against providing "bad advice," nevertheless a violation of this prohibition entails no halakhic-judicial remedy. In other words, if it is unclear whether there is reliance upon his advice and then there is ensuing injury, the advisor is not liable. In effect, halakha recognizes the damage as remote, i.e. *gramma*, and therefore the advisor would be exempt from liability for giving bad advice.[35] On the other hand, a trustee who has the status of an *apotropos* has a fiduciary duty to deal responsibly with any communal funds entrusted to him.[36] Absent any board by-laws to the contrary, a public servant who is comparable to a *shomer* as well as an *apotropos* is responsible for indirectly caused

[34] *Torat Kohanim,* Leviticus 19:14

[35] *Yam Shel Shlomo, Bava Kamma* 6:4; *Darkei Moshe, Tur Hoshen Mishpat* 386:4; *Rema, Hoshen Mishpat* 386:3. Should there be an expression of reliance for the advisor, Rema argues that the advisor would be liable. See Rema, *Hoshen Mishpat* 129:2. See further this writer's, "An Investment Advisor: Liabilities and Halachic Identity," *The Journal of Halacha and Contemporary Society* (Fall 2009) vol. 57, 107-127, and "The Tort of Negligent Misrepresentation of Investment Advice," *The Jewish Law Annual*, vol. 19 (2010).

[36] *Teshuvot ha-Rosh* 13:17; *Teshuvot Rivash*, no.465; *Teshuvot Maharits ha-Hadashot,* no. 124.

damages.[37] Consequently, in our scenario, if prior to the purchase Mr. Cohen discloses to the board his interest in Century and persuades the board to purchase the lot but fails to mention that the land has been a dumping ground for toxic wastes, he would be liable for damages.

VARYING APPROACHES TOWARD ORGANIZATIONAL MANAGEMENT OF CONFLICTS OF INTERESTS

What ought to be our response to the crisis of accountability in the not-for-profit sector?

Emerging from the foregoing discussion is how different realms of halakha – in particular *dayyanut*, *shemira* and *apotropsut* – look askance at self-dealing transactions and consequently it is understandable that one would argue for a prohibition of all such transactions. Hence, the practice of boards in our community to require disclosure of all conflicts-of-interest is to be applauded. One approach is for board members to fill out a conflict-of-interest questionnaire and sign off that they have read the organization's conflict-of-interest policy and are in compliance with it. Board members are to fill out annual disclosure forms that list the affiliations in which they have an ownership interest and, to the extent known, those affiliations of family members that are covered by the conflict-of-interest policy. Should a conflict arise, the board member must contact an officer on the board informing him of "his interest" in the matter, and recuse himself from deliberation and voting regarding this matter.

Such a communal policy provides one illustration of the numerous community-initiated ordinances (*takkanot ha-kahal*) which were passed in our communities throughout the ages. For example, in sixteen century Salonika, communal legislation proscribed members of a Jewish foundation from buying the assets of the organization. In seventeenth century Pozen, communal leaders were prohibited from conversing with the local

[37] Regarding a *shomer*'s responsibility for *gramma*, see *Teshuvot She'eilat Ya'avets*, Vol. 1, no. 85; *Teshuvot Teshurat Shai*, Vol.1, no. 593. Regarding an *apotropos*'s responsibility, see *Tosafot, Bava Metsia* 42b, s.v. *neima*; *Mordekhai, Bava Metsia* 288,390; *Teshuvot Maharshal*, no. 15; *Teshuvot Orah le-Tsaddik, Hoshen Mishpat*, no. 10. Implicit in subscribing to this view is the lack of concern that liability for damages may dissuade individuals from volunteering to work in communal service. Factoring this concern into the equation would lead one to exempt the volunteer from responsibility for damages. See the opinion attributed to Rabbeinu Hayyim in *Tosafot, Bava Metsia* 39a, s.v. *de'ei*; *Shulhan Arukh, Hoshen Mishpat* 290:20; *Shakh, Hoshen Mishpat* 72:34. This concern is equally a factor to consider regarding a charity collector. See *Pit'hei Teshuva*, *Hoshen Mishpat* 301:8.

tax appraisers regarding tax matters.[38] Implicit in these ordinances is the adoption of the perspective that a trustee is comparable to a *dayyan* and *shomer* and therefore there ought to be a flat prohibition on self-dealing regardless of whether the self-dealer benefited from the transaction or caused a loss to the organization. Given the inability to monitor properly the day to day operations of these institutions, R. Asher Weiss, a contemporary *posek* and *dayyan* serving on the Israeli Rabbinical Court, similarly argues for a blanket prohibition.[39] Adopting this approach, coupled with the *in terrorem* penalty that an unfair transaction can be rescinded,[40] provides a sure deterrent to self-dealing. A simple prohibition against all self-dealing would reinforce the fiduciary concept of loyalty, accountability, and help ensure that the mission of the organization is achieved. Moreover, given that a director is comparable to a *shomer*, *bet din* review and approval will not serve as grounds for legitimating an interested transaction.

On the other hand, our discussion of a *bet din* validating a self-interested transaction of orphan's assets belies another approach which differs from the approach emerging from *hilkhot shomrim*. As we have shown, the multi-faceted halakhic identity of a director has led to different conclusions regarding whether a *bet din* may serve as a mechanism to scrutinize self-interested communal transactions. In cases involving an *apotropos*, self-dealing transactions which have been scrutinized by a *bet din* may be permissible, whereas the identical transactions involving a *shomer* will always remain prohibited.[41] Which aspect of the halakhic identity of the public servant captures his essence? If his identity is to be defined by *hilkhot apotropos*, then *bet din* review of self-dealing transactions may be implemented. However, if *hilkhot shomrim* defines the trustee's identity, then a *bet din* review fails

[38] Yaakov Shapiro, "Deception and Violation of Trust among Public Servants," (in Hebrew) *Israel's Ministry of Justice, Halakhic Advisory Opinion*, December 30, 2008, 10, 13.

[39] R. Weiss's position was communicated in writing to Dr. Klainman. See Klainman, supra n. 7, at 183, n. 142.

In fact, under the Internal Revenue Code, Section 4941, each self-dealing transaction of a private foundation results in the levying of an excise tax on the self-dealer and on the foundation's manager if he was aware that the was self-dealing and agreed to participate in it. The penalty is imposed regardless of whether the interested director profited from the transaction or inflicted a loss on the organization. In contrast, self-dealing in a public charity is permissible, provided that the transaction was at arm's length and the charity received fair market value from it.

[40] *Noda be-Yehuda*, supra n.15.

[41] For attempts to understand why *bet din* review will work for an *apotropos*'s self-dealing and not for a *shomer*'s or charity fund distributor's conflict situations, see *Tosafot Pesahim*, supra n. 26; *Tosafot Ketubot,* supra n. 26; *Bava Metsia*, supra n. 29.

to eliminate the element of *hashad* and therefore all self-interested transactions are to be prohibited.

The threshold question to be addressed is: what constitutes the identity of a guardian who oversees an orphan's assets as it relates to the value of *bet din* oversight? Since according to many *poskim* an *apotropos* is comparable to a *shomer*,[42] one might conclude that *bet din* review will not suffice in addressing any possible tainting of these transactions. Nonetheless, as we have shown, in the case of the *apotropos*, despite his identity as a *shomer*, *bet din* scrutiny will be effective in assessing the fairness of the transaction.[43] Moreover, absent any infraction of secular law, a *bet din* may sanction any guardian's action as long as it deems that this behavior is promoting the interests of the orphans.[44] In other words, regarding self-dealing of an overseer of an orphan's assets, *hilkhot apotropsut* trump *hilkhot shemira*.

That being said, in light of the fact that a trustee has the status of a guardian, and that in addressing communal matters decisors identify him as an *apotropos*,[45] the *halakhot* of guardianship over orphan's assets, rather than the *halakhot* of bailment, should determine the *halakhot* of a trustee's governance of communal assets.[46] Just as the *bet din* is characterized as a "father of our orphans" in terms of managing their assets,[47] a communal leader who has the status of a *dayyan* is to be viewed as a "father of

[42] Even those authorities who exempt an *apotropos* from liability for acts of negligence concur that a guardian is a *shomer*. However, in order to furnish an incentive for individuals to assume the role of a guardian, halakha exempts him from responsibility for such actions. See Ri and Rabbeinu Hayyim ha-Kohein cited in *Tosafot*, *Bava Kamma* 39a s.v. *de-i*; *Hiddushei ha-Ramban, Gittin* 52b, s.v. *halakha*.

[43] See text accompanying notes 33 and 35. Whether a board may pass a by-law that any interested transaction will be approved without review is beyond the scope of this presentation.

[44] Ramah cited in *Bet Yosef*, *Tur, Hoshen Mishpat* 290:19; Rema, *Hoshen Mishpat* 290:13; *Teshuvot Maharbil*, Vol. no. 79.

[45] *Teshuvot ha-Rashba*, Vol. 1, no. 617, Vol. 3, nos. 394,443; Vol. 5, no. 125; *Sha'arei Uz'iel*, supra n. 27.

[46] Generally, analogies are drawn between the *hilkhot apotropos* relating to orphan's assets and *hilkhot apotropos* regarding charitable foundations. See *Teshuvot ha-Ran,* no. 2; *Teshuvot Torat Emet*, no. 162; *Sha'arei Uz'iel*, Vol. 1,7:1. For example, the guidelines for investment of funds in a communal setting are derived from the guidelines relating to a guardian's responsibility. See *Teshuvot ha-Rosh* 13:17; *Teshuvot Rivash*, no. 465; *Teshuvot Binyamin Ze'ev*, no. 366. An *apotropos*'s need to manage assets prudently serves as the model for a charitable foundation's duty to act responsibly with asset allocation. See *PDR*, 1: 353, 360.

[47] *Bava Kamma* 37a; *Teshuvot Ba'alei ha-Tosafot,* no. 120; *Teshuvot ha-Rosh* 87:1; *Teshuvot ha-Rambam*, no. 381; *Teshuvot ha-Rashba*, Vol. 3, no. 201; *Sha'arei Uz'iel,* 1, pp. 249-250.

our orphans" in terms of overseeing and managing the entrusted funds of the community.[48] Yet though he is comparable to a *dayyan* who is a "father of our orphans," due to his *apotropos*-like identity, a trustee's interested transactions may pass muster if subjected to review by a *bet din* panel of three laymen.[49] In other words, a director's self-dealing may be scrutinized for fairness, and if found sound, may be approved by a *bet din*. As attributed to R. Aharon Lichtenstein of Yeshivat Har Etzion,[50] pursuant to certain *poskim*, in assessing these interested transactions, the *bet din* is serving in its administrative capacity rather than its conventional role of resolving disputes between litigious individuals. In effect, communal knowledge of *bet din* oversight of trustee's actions, similar to *bet din* scrutiny of *apotropos's* actions,[51] removes any suspicions of a trustee's self-dealing.

Additionally, given that that we are dealing with an administrative review mechanism, R. Yehuda Shaviv of Machon Zomet and formerly of Yeshivat Har Etzion[52] argues that any administrative body, not necessarily a *bet din* may review these transactions.[53]

Pragmatic considerations dictate that a self-interested transaction be validated by a board as long as it is subject to third party review. For example, historically speaking, it is unsurprising to hear that despite being an interested party, public servants would be allowed to levy monetary penalties which would be deposited in the community chest. It would seem that this practice emerged due to the fact that practical considerations dictated that such collections be handled by the local community rather than citizenry from another town.[54] As is the case with other matters, an absolute ban ignores the reality of the efficiency of interested

[48] *Teshuvot ha-Ritva*, no. 162; *Sema*, *Hoshen Mishpat* 67:50; *Sha'arei Uz'iel*, Vol. 1, page 2.

[49] See supra n. 29. For the requirement of three laymen rather than one, see *Yerushalmi Yevamot* 2:14, with *Penei Moshe* and *Korban ha-Edah*, ad. locum.; *Shulhan Arukh Even ha-Ezer* 12:2.

[50] *Perisha, Hoshen Mishpat* 290:15. This position has been attributed to R. Lichtenstein by Klainman, supra n. 7, 184-185, n. 151.

[51] *Tosafot, Ketubot*, supra n. 26; *Tosafot*, *Bava Metsia,* supra n. 29; *Teshuvot Rivash*, no. 396; Klainman, supra n. 7, n. 106-107, 114.

[52] This position has been attributed to him by Klainman, supra n. 7, 182, n.140. For a possible precedent which allows a layman appraisal of a widow's self-interested action relating to orphan's assets, see *Rambam, Hilkhot Ishut* 17:14; *Maggid Mishneh, Hilkhot Ishut* 17:14*; Lehem Mishneh*, ad. locum.

[53] Whether a state attorney general who oversees non-profit organizations may serve in this function is beyond the scope of our presentation.

[54] See *Teshuvot Hakham Tsvi*, 131; Shapiro, supra n. 38 at 16-17. The halakhic grounds for this custom are beyond our discussion.

transactions. Interested trustees may be able to lend money or provide services at a lower rate to our communal institutions. Finally, as these institutions develop in complexity and become professionally managed, the need for interested trustees with special skills and the value of enhanced contributions becomes more crucial for the organization's economic health. Given, though, that generally speaking, directors do not receive compensation, the prospect of self-dealing may motivate trustees to serve and make financial contributions to the organization. In short, a flat prohibition of self-dealing may prove both impractical and counterproductive.

Admittedly, the tendency of directors in many instances to serve on relatively large boards leads them to defer to each other in an environment which is characterized by a lack of due diligence and administrative review. Therefore, there is a need for a board to implement a "fairness standard" in assessing an interested transaction. Such a standard would allow for a discussion of the circumstances leading to and surrounding the interested transaction, including but not limited to questions of disclosure as well as the economic implications of the transaction. Enhanced scrutiny may lead to the conclusion that the business, financial ties, or familial relationships did not "taint" the process, and that this transaction serves the mission of the organization and its financial integrity. On the other hand, their findings may lead to the conclusion that the self-dealing undermines the organization's goals and financial stability and credibility.

A *bet din* or an administrative panel delegated by the board would review the matter and utilize the following procedures in evaluating whether these deals complied with the "fairness standard": whether the interested trustee complied with the full disclosure policy as described above; whether the board environment was unbiased and objective at the time the decision was made to become engaged in the transaction; and whether there was full disclosure of all the circumstances surrounding the interested transaction by the interested director to the board.[55] Substantive considerations in managing conflict-of-interest situations would

[55] For example, if a board member using the organization's funds gave a gift or funded a trip for a prospective interested party in order to close a deal, such actions would not be construed as deriving benefit from communal assets. See *Piskei ha-Rosh*, *Bava Batra* 8:55; *Bet Yosef*, *Hoshen Mishpat* 286:3; *Shulhan Arukh*, *Hoshen Mishpat* 286:2,290:4. Clearly, prior authorization from his board for such actions would be advisable. Consequently, with board approval, any "travel miles" accrued to the purchase of plane tickets by the third party are to be credited to the director's personal account rather than to the organization's account. See *Teshuvot Shevet ha-Levi*, Vol. 9, no. 305.

entail the fairness of the transaction for the organization, the transaction's economic terms – primarily its price for the organization and the best interests of the organization. In other words, the question is not simply whether the particular director thought that the transaction would benefit the organization, but whether in the circumstances of the transaction a prudent director similarly situated would have behaved in such a fashion. Supporting documentation should be produced by the board demonstrating that the transaction was more advantageous than what the organization could have found by transacting in the marketplace. Moreover, the director's duty of disclosure is not limited to communicating the conflict-of-interest, but includes disclosing all material facts concerning the transaction itself to the board. If a man sells his used car to his sister, she assumes that he will be forthcoming about the car in a way a stranger would not, even though she knows he has an interest in the sale. The same is true of dealings between an interested director and his colleagues.[56] Finally, given that a director is comparable to a *dayyan*, he is obligated to recuse himself from deliberating and voting regarding any matter in which he has a personal interest.[57]

In sum, a reinvigoration of a director's duty of loyalty by implementing standards of transparency and scrutiny, either by adopting a flat prohibition of acts of self-dealing or by enforcing the "fairness standard," are sorely required in order to restore public faith in our communal life.

[56] A serious question remains as to whether directors who are not interested parties can pass judgment on an interested fellow director. Depending on the circumstances, delegation of review to an independent administrative body without prior board scrutiny may be in place.

[57] *Teshuvot Rivash*, no. 195; *Teshuvot Bet Yehuda*, *Hoshen Mishpat*, no. 13; *Shulhan Arukh, Hoshen Mishpat* 37:18. However, communal practice may allow for board members to vote on matters which affect the entire organization such as the raising of membership dues or building fund assessments. See *Teshuvot ha-Rashba*, Vol. 6, no. 7; *Shulhan Arukh, Hoshen Mishpat* 7:12; *Arukh ha-Shulhan, Hoshen Mishpat* 7:22; *Teshuvot Darkhei Noam, Hoshen Mishpat*, no. 22. See supra notes 18-19.