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SURVEY OF RECENT HALAKHIC PERIODICAL LITERATURE

PROFESSIONAL SECRECY

Judaism places stringent restrictions upon disclosure of confidential information regardless of whether the information is received in the course of a professional relationship, ship, as a secret non-professional communication, as the result of an inadvertent or accidental disclosure, or through a third party.

The prohibition against divulging personal information concerning another person is derived from the biblical verse "Thou shalt not go as a bearer of tales among your people" (Leviticus 19:16). Such activity is forbidden even when it is not accompanied by malicious intent and even if the information is not derogatory in nature. As formulated by Rambam, *Hilkhot De'ot* 7:2, "Who is a tale-bearer? One who carries reports and goes from one person to another and says, 'So-and-so said this' or 'Such and such have I heard about so-and-so.' Even if he tells the truth, [the tale-bearer] destroys the world."

Despite this stricture against disclosure of confidential information, which results in a moral code even more restrictive in some respects than presently accepted canons of professional confidentiality, Jewish law acknowledges that in certain circumstances even professional confidences must be revealed.

The position of Halakhah with regard to disclosure of professional confidences is examined by Rabbi Shiloh Raphael in the Av 5738 issue of *Assia.* Earlier discussions of the topic include those of Rabbi Ya'akov Breish, *Chelkat Ya'akov,* III, no. 136 and Rabbi Eliezer Waldenberg in his most recent volume, *Tzitz Eli'ezer,* XIII, no. 81. The earliest source which presents a detailed discussion of the principles governing disclosure of medical information is *Chafetz Chaim,* the classic text dealing with Jewish law as it applies to slander, defamation of character, talebearing and the like.

The particular situation discussed in *Chafetz Chaim, Hilkhot Issurei Rekhilut, Klal* 9, is that of a person seeking disclosure of medical information concerning a prospective marriage partner. *Chafetz Chaim* rules that, in principle, such information may be divulged. Disclosure is, however, restricted in the following four ways: 1) The presence of a disease or physical defect may be disclosed. However, a vague, general weakness or deficiency which does not immediately compromise health may not be disclosed. 2) The nature or extent of a disease or injury must not be exaggerated in any way. 3) The sole motivation prompting disclosure must be the benefit of the

person to whom the information is supplied. No disclosure may be made when prompted, even in part, by personal animosity. 4) Disclosure is permissible only when there exist reasonable grounds for assuming that the information divulged will be the determining factor in terms of the contemplated marriage. Such information may not be divulged if there is no reason to assume that the ultimate decision will be affected thereby.

These provisions of Jewish law apply not only to disclosure of information with regard to a prospective marriage partner, but, *mutatis mutandis,* are applicable with regard to disclosure of information to a prospective employer as well. It is quite evident that these provisions of Halakhah reflect a balance between considerations of privacy and considerations of potential harm or damage which may accrue to another party. No person has the right to divulge information of a personal nature concerning a fellow man simply to satisfy the curiosity of a third party. By the same token, such information may not legitimately be disclosed simply in order to make a dossier complete. The crucial consideration is the "need to know" in the sense of avoiding potential harm. It follows, therefore, that, for example, information which has no bearing upon job performance may not be revealed. Since the information in question is not necessary to prevent harm or financial loss the privacy of such information may not be violated.

Respect for privacy and the inviolability of the professional relationship certainly do not take precedence over protection of the lives and safety of others. The overriding obligation to protect the lives of others is of sufficient weight to oblige the physician to take whatever measures may be necessary to elimnate the danger. Thus, for example, a physician must inform the motor vehicle bureau that his patient is an epileptic and should be denied a driver's license. The obligation to violate the confidential nature of the physician-patient relationship in such extreme situations is included within the "law of pursuit." A person engaged in an act which will lead to the death of another must be prevented from causing such death even if the act is entirely unintentional. R. Elijah of Vilna, *Bi'ur ha-Gra, Choshen Mishpat* 425:10, states explicitly that the "law of pursuit" applies even in the absence of intention to do harm.

Rabbi Breish argues that it is not merely permissible but obligatory to reveal information designed to avert personal tragedy or financial loss. Rambam, *Hilkhot Rotzeach* 1:13, followed by *Shulchan Arukh, Choshen Mishpat* 426:1, rules that if an individual "hears that gentiles or apostates are plotting misfortune" for another person, he must bring the matter to that person's attention. Failure to do so, declares Rambam, constitutes a violation of the commandment "You shall not stand idly by the blood of your fellow" (Leviticus 19:16). *Be'er Mayyim Chaim, Hilkhot Issurei Rekhilut* 9:1, dem-

onstrates that this admonition applies not only to preservation of the life of another person but also to preservation of money or property.

Rabbi Breish argues that disclosure under such circumstances is mandated, at least according to some authorities, by virtue of another commandment as well. "Thou shalt not place a stumbling block before the blind" (Levitcus 19:14), is understood in rabbinic sources as prohibiting an individual from causing another person to "stumble" by committing a transgression and also prohibits giving detrimental advice in mundane matters. Rambam, *Hilkhot Rotzeach* 12:4, extends the concept not only to providing direct aid in committing a sin but also to "strengthening the hands of transgressors." *Mishneh le-Melekh, Hilkhot Kela'im* 1:6, maintains that even a passive stance may constitute "strengthening the hands of transgressors" and hence is forbidden by Rambam as a "stumbling block before the blind." *Mishneh le-Melekh* employs this thesis in explaining an otherwise difficult ruling of Rambam. Rambam rules that a Jew may not permit a gentile to utilize a tree belonging to a Jew for purposes of grafting a branch of one species to another. Even passive acquiescence constitutes a violation of the prohibition against "placing a stumbling block" [This is also the view of *Bi'ur ha'Gra, Yoreh De'ah* 295:2 and *Pri Megadim, Orach Chaim* 443:5 and 444:6, although *Derishah, Yoreh De'ah* 297, avers that the prohibition aginst "placing a stumbling block" encompasses only an overt action but does not extend to passive nonfeasance.] Rabbi Breish argues that since not only assistance in transgression but also offering poor counsel is prohibited by this commandment, "passive" counsel which is deleterious in nature is also forbidden. Advice designed to bring unhappiness or financial loss is clearly forbidden. Hence, according to *Mishneh le-Melekh,* failure to provide information and advice for the purpose of averting such unfortunate results is also a form of "placing a stumbling block before the blind." Accordingly, concludes Rabbi Breish, a physician is not at all justified in maintaining his own counsel in circumstances which would result in grief or financial loss to others.

Rabbi Waldenberg notes that Jewish law also provides that the *Bet Din* may compel testimony which would otherwise involve a breach of personal or professional confidence. The obligation borne of the commandment ". . . he who is a witness . . . if he does not inform, he should bear his iniquity" (Leviticus 5:1) supercedes the obligation to respect the privacy of others. It would seem that in such cases Jewish law would require that testimony of this nature be heard *in camera* in order that matters of a personal nature not be overheard by persons who have no "need to know." This was indeed the ruling of the Israeli Supreme Rabbinical Court, *Piskei Din Rabbaniyim,* IX, 331, in a related case.

The halakhic problem with regard to disclosure of confidential information by a physician is complicated by the fact that the Hippocratic oath contains the statement, "And whatsoever I shall see or hear in the course of my profession, as well as outside my profession in my intercourse with men, if it be what should not be published abroad, I will never divulge, holding such things to be holy secrets." Thus, the physician is bound by a solemn oath not to divulge confidential information. Rabbi Waldenberg states that the physician may nevertheless be compelled by the *Bet Din* to testify. The Mishnah, *Shevu'ot* 29a, declares that an oath not to testify in a given matter is an oath taken in vain. All Jews are bound by the oath taken at Mount Sinai to obey the commandments of the Torah. Hence a person cannot swear a binding oath not to testify since he is bound by a prior oath which compels his testimony when demanded by a *Bet Din*. This would also appear to be the case even with regard to divulging information in order to avoid anguish or financial loss according to the opinion of Rabbi Breish who maintains that failure to do so constitutes a transgression.

Rabbi Waldenberg, however, points out that this provision of Jewish law applies only to an oath pertaining specifically to testimony. The physician does not swear an oath not to testify, but rather swears a general oath not to divulge confidential information. Rabbi Waldenberg cites authorities who maintain that a general oath applying to situations not involving infractions of Jewish law is a binding oath and hence acquires validity in all situations including those which involve a transgression of Halakhah. Nevertheless, Rabbi Waldenberg asserts that the oath is not binding in such situations because it may be assumed that the physician "and specifically the observant physican" had no intention of including in his oath situations in which failure to divulge such information would constitute a transgression. Despite his conviction with regard to this point Rabbi Waldenberg adds that the oath may be nullified under such circumstances by a court of three. This would be necessary, according to some authorities, in situations in which the physician is the sole witness since, according to those authorities, the obligation to testify devolves upon witnesses only when they are at least two in number.

It would appear to this writer that this entire problem dissipates upon a close reading of the Hippocratic oath. The physican swears not to divulge whatsoever he shall see or hear in the course of his profession only "if it be what should not be published abroad." Judaism clearly establishes standards of what should and should not be published abroad. The observant physican certainly understands the words of the oath in that manner. Accordingly, the physician is bound by the Hippicratic oath to refrain from divulging only such information which Jewish law deems

"should not be published abroad."

Elective Surgery Prior to Shabbat

The Tammuz 5738 issue of *Ha-Pardes* features a transcript of an address by Rabbi Menachem Mendel Schneersohn, the *Lubavitcher Rebbe,* in which he advises that elective surgery should not be performed during the three days immediately prior to *Shabbat,* i.e., Wednesday, Thursday or Friday, if it is anticipated that the patient will be hospitalized over *Shabbat.* The following issue, dated Tishri 5739, contains a statement by the Union of Orthodox Rabbis of the United States and Canada announcing that its President, Rabbi Moshe Feinstein, has similarly ruled that in matters involving no danger to life it is forbidden to schedule surgery on those days "in situations where it is possible to delay."

This position is based upon a number of considerations:

1) *Shulchan Arukh, Orach Chaim* 248:2, rules that one must not embark upon a sea voyage during this three-day period because the voyage will disrupt "Sabbath delight" *(oneg Shabbat).* There is no objection to embarcation earlier in the week because subsequent to three days of travel one becomes acclimatized to the motion of the vessel. Rabbi Schneersohn argues that routine hospital procedures, not to speak of the pain and discomfort of surgery and post-operative therapy, cause at least as much disruption and discomfort as does a sea voyage and thereby disturbs the Sabbath repose of both the patient and his family.

2) According to many early authorities, sea voyages may not be commenced during this period because of the possibility that desecration of the Sabbath may subsequently become a necessity by virtue of danger to life which may arise. This consideration is germane even if the vessel is manned by non-Jews since a Jew may not normally permit a non-Jew to perform actions on *Shabbat* on his behalf which the Jew may not perform himself. Concern with regard to creating conditions of danger requiring subsequent suspension of *Shabbat* restrictions is mandated during the three days preceding *Shabbat,* but not earlier. This consideration is also cited by *Shulchan Arukh.* As explained by *Ba'al ha-Ma'or, Shabbat* 19a, this prohibition is rooted in the consideration that a person undertaking such a journey appears to the onlooker as being unconcerned with the observance of *Shabbat;* such lack of concern is not apparent to the onlooker when the journey is undertaken during the early part of the week. This concern applies to surgery performed during this three-day period since post-operative care frequently entails acts ordinarily forbidden on *Shabbat.*

3) In the course of normal post-surgical care, many procedures are routinely carried out which have no bearing upon alleviation of danger to the patient. Patients frequently find themselves unable to insist that such procedures be post-

poned until after *Shabbat.*

In a footnote appended to this statement, Rabbi Schneersohn takes cognizance of the ruling of *Shulchan Arukh, Orach Chaim* 248:1, to the effect that voyages for purposes of fulfilling a *mitzvah* may be commenced even on Friday. According to Rabbenu Tam, cited by Rema, *Orach Chaim* 249:4, all voyages other than purely pleasure trips are deemed to be undertaken "for purposes of a *mitzvah,*" and certainly preservation of health would be considered a *mitzvah. Shulchan Arukh* adds, however, that when such a permitted voyage begins within the three-day period it must nevertheless be stipulated in advance with the captain of the vessel that travel will be interrupted for the duration of the Sabbath. Rabbi Schneersohn, citing *Magen Avraham* 248:1, argues that in the absence of such stipulation or in event that the captain refuses to accept such a stipulation, the trip may not be undertaken. By the very nature of the situation "stipulation," is, of course, impossible with regard to medical treatment on *Shabbat.* It should be noted, however, that many authorities, among them *Mishneh Berurah* 248:3, indicate that while such stipulation is to be preferred its absence does not prohibit a Jew from undertaking a voyage "for purposes of a *mitzvah.*" Rabbi Schneersohn, however, maintains that even according to these authorities such stipulation is not mandatory only when an opportunity to fulfill the *mitzvah* presents itself for the first time during the three-day period, but did not exist earlier. When, however, the opportunity existed earlier the requirement concerning stipulation cannot be waived. Writing in the same issue of *Ha-Pardes,* Rabbi Yisrael Pikarski cites authorities who rule that permission to undertake a voyage for fulfillment of a *mitzvah* during this three-day period is limited to situations in which the *mitzvah* cannot be fulfilled at a later date.

Rabbi Gedaliah Felder, writing in the Cheshvan 5739 issue of the same journal, cites an example of such an elective procedure which is the source of some controversy. A child dare not be circumcised so long as he is afflicted with any malady, but must be circumcised without delay as soon as he is medically and halakhically deemed to be out of danger. Jewish law provides that circumcision delayed beyond the eighth day may not be performed on *Shabbat.* But may a child deemed to be fully cured on Thursday be circumcised on that day in light of the fact that the third day, considered to be a day of pain as well as danger for the person ciscumcised, will fall on the Sabbath and hence it may be necessary to violate *Shabbat* restrictions on his behalf? *Taz, Yoreh De'ah* 262:3 cites the opinion of *Tashbatz,* I, no. 21, and rules that circumcision on Thursday is forbidden under such circumstances; *Shakh, Yoreh De'ah* 266:18 and *Nekudat ha-Kesef* 262, disagrees and permits the procedure even on a Thursday. However, even *Shakh's* permissive ruling is based upon the

presence of an immediate, compelling *mitzvah;* he would not have permitted circumcision if not for the halakhic requirement of avoiding delay.

Of interest is the position of *Magen Avraham, Orach Chaim* 331:9. *Magen Avraham* permits a delayed circumcision to be performed on Thursday "in our day" since under contemporary conditions it is extremely unlikely that violation of *Shabbat* regulations will be necessary. *Magen Avraham* appears to be unconcerned with regard to the pain which will ensue on *Shabbat.*

Rabbi Felder assumes that the circumcision of a proselyte on Thursday is forbidden even according to *Shakh* because of the absence of an immediately compelling *mitzvah* and this, indeed, is the opinion of *She'elat Ya'avetz,* II, no. 95. However, *Chakham Tzvi,* addenda, no. 14, permits even the circumcision of a convert on Thursday. The implication of *Chakham Tzvi's* position is that such procedures are permitted during the three day period prior to *Shabbat* for the sake of any *mitzvah* including, of course, treatment of the sick and preservation of health.

Rabbi Eliezer Waldenberg, *Tzitz Eli'ezer,* XII, no. 43, also discusses the propriety of undertaking such procedures during the three-day period prior to *Shabbat* but limits his discussion to the question of surgical procedures for patients who are not presently in danger but whose lives will become endangered at some future time if the operation is not performed. Procedures that are entirely elective are not specifically discussed by Rabbi Waldenberg. Rabbi Waldenberg not only permits the procedures under discussion but urges that they not be delayed both because of possible unforseen dangers to the patient and because of possible need of the hospital bed for other patients. Rabbi Waldenberg argues that the majority of latter day halakhic authorities have declined to rule according to the opinion of *Tashbatz* and that most authorities including *Shulchan Arukh ha-Rav* 248:1, *Chayyei Adam, Hilkhot Shabbat* 4:1 and *Mishneh Berurah* 248:33 rule that the "stipulation" discussed earlier is preferable but not mandatory. Although he does not state so explicitly, Rabbi Waldenberg implies that if no element of danger at all is present the opinion of *Tashbatz* should be heeded since in the past his opinion was followed in many locales and delayed circumcisions were not performed on a Thursday.

The argument advanced by Rabbi Schneersohn serves to establish that elective surgery which can be planned in advance should be scheduled during the first three days of the week and even postponed in order to schedule surgery for a date early in the following week only "when it is possible to delay," as is carefully stated in Rabbi Feinstein's statement. However, this reasoning does not apply to a situation in which the surgeon regarded as the most competent available or in whom the patient has the greatest confidence is unable or unwilling to operate early

in the week. The argument certainly does not apply to a situation in which delay may cause danger to the patient.

Dating the *Ketubah*

Quite frequently, particularly during the months of spring and early summer during which a disproportionate number of weddings are celebrated, the wedding ceremony is scheduled for an hour which coincides with the twilight period, i.e., *bein ha-shmashot,* a period which is neither clearly day nor clearly night. Performance of the wedding ceremony between sunset and nightfall poses a question with regard to the dating of the *ketubah.* The *ketubah* is customarily prepared and signed prior to the celebration of the marriage. The *ketubah* would ordinarily bear the date of execution, i.e., the date on which it is written and signed, as indeed would be the case with regard to any commercial instrument. Hence, if the *ketubah* is prepared before sunset and the wedding is delayed until nightfall, the *ketubah* would bear a date one day prior to that of the actual marriage. The halakhic propriety of such a procedure has been questioned by many. The *ketubah,* in its essence, is a financial contract which imposes a monetary obligation upon the husband. Although the stipulated sum is due and collectable only upon dissolution of the marriage by virtue of the death of the husband or divorce, execution of the *ketubah* generates a lien upon all property held by the husband at the time of, or acquired subsequent to, the marriage. Accordingly, the bride's claim, since it is prior in time, takes precedence over any other obligation assumed by, or imposed upon, the husband subsequent to marriage. The *ketubah,* although collectible only at a later date, constitutes a prior claim which must be paid before other creditors are satisfied. A predated *ketubah* is a defective instrument because it falsely testifies to the existence of a lien against property as of the date it bears, while, in fact, no valid lien exists prior to the actual time of execution of the *ketubah.* Other claims upon the husband's property which might arise prior to the marriage would have precedence over the wife's claim to her *ketubah.* Thus a falsely dated instrument might have the effect of illicitly infringing upon the rights of other claimants and hence is invalid. This consideration has led some rabbis to insist that the marriage ceremony be performed either prior to sunset or that it be delayed until after dark so that the *ketubah* may bear a date which is unquestionably that on which the marriage is celebrated.

This question is analyzed in detail in two separate contributions to *Ha-Emek,* a publication of the *Kollel Yirei ha-Shem* in Jerusalem. Rabbis Chaim Yosef Dinkeles, writing in the Nisan 5731 issue, and Shmuel Roth, writing in the Tammuz 5731 issue, both find grounds for sanctioning execution of the *ketubah* on a date prior to

that of the wedding.

Marriage consists of two separate acts, viz. *eirusin* and *nisu'in*. *Eirusin* is commonly effected through presentation of a ring by the groom to the bride and creates a marital bond which can be dissolved only by death or divorce. Although the *arusah* cannot contract a marriage with another man, cohabitation between bride and groom is prohibited until solemnization of *nisu'in*, i.e., until the bride is conducted to the domain of the groom symbolized by the nuptial canopy or, according to some authorities, actual seclusion of the bride and the groom in the presence of witnesses for this specific purpose. Marital rights and duties which exist between husband and wife come into being only upon *nisu'in*. Accordingly, there exists no statutory obligation with regard to the *ketubah* until *nisu'in* has taken place. Citing *Kesef Mishneh, Hilkhot Ishut* 10:11, Rabbi Dinkeles argues that, despite the absence of statutory obligation, the groom, if he so desires, may voluntarily assume such obligation even prior to *eirusin*. According to *Kesef Mishneh*, the obligations of the *ketubah* are contingent, in whole or in part, upon subsequent solemnization of the marriage. Nevertheless, the lien established by writing and signing the *ketubah* at an earlier date is retroactive to the time of execution of the *ketubah*.

Rabbi Roth draws attention to a reference in *Kiddushin* 50b to "places in which they write [the *Ketubah*] and subsequently perform *kiddushin*." In a locale in which this is the usual practice possession of a *ketubah* does not in itself constitute proof of the existence of a matrimonial relationship. It is nevertheless clear that even when the *ketubah* is not evidence that a marriage has taken place because it may have been prepared in advance the *ketubah* is not deemed to be a defective instrument by virtue of improper dating. Consequent to presentation of other evidence demonstrating the existence of a marital state, the *ketubah* may be used as evidence of non-satisfaction of the husband's financial obligations. Accordingly, both writers conclude that the writing of the *ketubah* need not be delayed and that the document may indeed bear a date prior to that of the actual ceremony.

Neither of these scholars discusses the propriety of drawing up the *ketubah* prior to sunset but postdating it to bear the date of the following day. Although a valid instrument may be executed in this manner, Rema, *Choshen Mishpat* 43:12-13, rules that one should avoid post-dating a promissory note because of "the appearance of falsity." Yet, the very text of the *ketubah* incorporates the declaration of the groom "Be thou my wife according to the law of Moses and Israel" and records that the bride "consented and became his wife," events which are anticipated but which, in fact, have as yet not occurred. Presumably, this practice is not deemed to be tainted with "the appearance of falsity" since it is commonly understood that such clauses are included in

anticipation of the event and that, halakhically, assumption of the obligations of the *ketubah* is contingent upon those events actually taking place. By the same token, since the events are recorded in the past tense, it would appear that there is no "appearance of falsity" in utilizing the date on which these events will actually occur. It would be immediately understood that a later date was utilized since the events described have as yet not occurred but will indeed have occurred, and hence be accurately described as past events, as of the date recorded in the document.

Utilization of a post-dated *ketubah* poses the additional question of whether bride and groom may be secluded together during the period between sunset and night. Cohabitation is forbidden by Halakhah unless a valid *ketubah* has been executed. Although *Shulchan Arukh, Even ha-Ezer* 66:1, also forbids seclusion of the bride and groo min the absence of a valid *ketubah,* Rema prohibits only cohabitation but permits seclusion. Since the *ketubah* is designed to impose a financial burden upon the husband in the event of divorce and thus to serve as an impediment to impulsive divorce, it may be argued that prior execution of a post-dated *ketubah* would serve to render seclusion permissible even according to the opinion of *Shulchan Arukh.* Possession of such a document means that it may be validly used by the bride as a cause of action immediately subsequent to nightfall, an event which will occur in a matter of minutes. The certain knowledge of the automatic validation of such a document but a few minutes hence surely constitutes a deterrent to impulsive divorce.