

# Concierge Medicine and Halacha

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A physician who does not charge for his services is worthless.

—Talmud Bava Kama 85a

A physician who refuses to treat the indigent is worthy of going to hell.

—Rashi, explaining Talmud Kiddushin 82a

## PRESENTATION OF CONCEPT

Over the past few decades, physician frustration has grown over decreased reimbursements, increased malpractice costs, greater onerous administrative paperwork, and additional burdens on the physician.<sup>1</sup>

This has especially affected primary-care physicians, leading to a reduction in the number of students pursuing a career in primary care. In response, the last few years have seen an upsurge of concierge medicine practices. Concierge, or boutique, medicine charges a fee in exchange for enhanced services and increased access.<sup>2</sup> The patient agrees to pay an annual fee, or retainer, to a physician (which is not a substitute for insurance), while the physician in return agrees to provide additional services beyond typical care. This is provided based on the increased availability of the primary-care physician resulting from capping the number of patients that the physician allows in his

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practice (typically from 3,000–4,000 down to 100–600). Organized and centralized concierge medicine has recently developed into a franchised market in which organizations, such as MD and MDVIP, have led to the increased prevalence of this so-called boutique medicine.<sup>2</sup> Fees for such services range from \$60 to \$20,000 annually, with an average between \$1,500 and \$2,000 (MDVIP charges \$1,800; MD charges \$20,000).<sup>3</sup> Proponents of the program argue that it improves quality care and increases the attention and time allotted to a patient's appointment. For example, in MDVIP a patient is guaranteed a comprehensive physical examination and a follow-up wellness plan as well as medical records in CD-ROM format, personalized Web sites for each patient, same- or next-day appointments that start on time, as well as unhurried visits.<sup>4</sup> Furthermore, concierge medicine gives the physician financial security, allowing him to focus primarily on medicine, with less emphasis on financial burdens. This would diminish physician burnout from overwork.<sup>5</sup> However, detractors worry that concierge medicine will lead to elitism, discrimination, patient abandonment, restricted access to medicine, and reduced quality care for the general population. Eighty-five percent of physicians' current patients would be dropped from their current physician. If a majority of primary-care physicians become boutique doctors, it will exacerbate an already tiered healthcare system, leaving quality care in the hands of the wealthy, while overburdening the

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<sup>2</sup> Portman, *J Health Life Sci Law*. 2008 Apr;1 (3):1, 3–4 fn. 1, 35.

<sup>3</sup> Government Accountability Office (GAO). "Report to Congressional Committees, Physician Services: Concierge Care Characteristics and Considerations for Medicine," GAO-05-929 (August, 2005). Available at [www.gao.gov/new.items/d05929.pdf](http://www.gao.gov/new.items/d05929.pdf).

<sup>4</sup> Carnahan, "Law, Medicine and Wealth: Does Concierge Medicine Promote Health Care Choice or Is It a Barrier to Access?" *Stan L & Pol Review*. 121, 123–129 & 155–163 (2006). Also Portman, *J Health Life Sci Law*. 2008 Apr 1 (3): 27.

<sup>5</sup> "Boutique Medicine: When Wealth Buys Health," CNN.com, October 19, 2006, "Doctors' New Practices Offer Deluxe Services for Deluxe Fees," *New York Times*. January 15, 2002, and "For a Retainer, Lavish Care by Boutique Doctors," *New York Times*, October 30, 2005.

remaining patient population, who will then receive sub-par care. Moreover, concierge medicine may allow a physician to selectively choose patients who are healthier and require less maintenance. This will leave sicker patients to a more drained and less accessible health care system.<sup>3,4</sup> Furthermore, treating only those who can afford the retainer, according to the New York Attorney General's Office, might violate non-discrimination laws.<sup>6</sup>

## HALACHIC ANALYSIS

The goal of this paper is to explore the halachic issues that may occur for a physician looking to become a boutique physician. This article will analyze the power of the physician to charge for health-care services rendered. Specifically, what is a physician allowed to charge, and is there a concept of overcharging regarding patient fees? Furthermore, is a physician allowed to deny care to a patient, especially for monetary reasons?

### Physician Fees

The Talmud explains that if a person takes a vow to avoid giving benefit to someone, he can still administer medical treatment to him.<sup>7</sup> *Rishonim* explain that healing a person is a positive Biblical commandment, something that a person cannot take a vow against.<sup>8</sup> Exactly what commandment is being fulfilled by healing a sick person? The Talmud<sup>9</sup> and *Sifre*<sup>10</sup> explain the verse *vehashevota lo*,<sup>11</sup>

<sup>6</sup> Joseph Baker, Chief of Health Care Bureau of New York Attorney General's Office, April 2004: "If you are treating patients differently based on ability to pay, that may run afoul of New York State [non-discrimination] laws" quoted in "Patients with Perks: Advocates Say 'Concierge Medicine Is Like Having the Neighborhood Doctor Back; Critics Call it Elitist,'" *Newsday*, Jan 1, 2005, B06.

<sup>7</sup> Nedarim 38b.

<sup>8</sup> Ran and Rosh, *ibid.*

<sup>9</sup> Sanhedrin 73a.

<sup>10</sup> Deuteronomy 22:2.

<sup>11</sup> *Ibid.*

“you shall return it to him,” as applying not merely to inanimate objects but also to the obligation on a person to return the health of a person who is sick. Although a literal interpretation of the verse would seem to be focusing on returning property, the Talmud expands the scope of the verse’s application by explaining that there is no greater act of returning than to restore someone’s health.<sup>12</sup> It is this verse that Maimonides<sup>13</sup> and the Ran<sup>14</sup> quote as the source for the Biblical obligation to heal a sick person. Even those *rishonim* who disagree with Maimonides and the Ran do so over a minute detail, regarding exactly which verse is the source of the commandment. However, they all agree that a Biblical obligation exists. For example, Nachmanides cites the verse *vichei achicha emach*,<sup>15</sup> “let your brother live with you,” while others<sup>16</sup> quote the verse *lo ta’amod al dam re’echah*,<sup>17</sup> “you shall not stand aside while your fellow’s blood is shed.” Assuming the commandment of healing the sick is on a Biblical level, irrespective of the exact source,<sup>18</sup> many *rishonim* wonder how it is possible that a physician can charge for his services, since the Talmud<sup>19</sup> explains, based on the verse *re’ey lemaditi chukim u’ mishpatim*,<sup>20</sup> “see I have taught you the laws,” that just as Moses was taught laws from God without payment, so too teachers should educate without receiving payment.<sup>21</sup> The concept of not receiving payment is not localized to the positive commandment to teach the Torah but applies to all positive command-

<sup>12</sup> Bava Kama 81b.

<sup>13</sup> Pirkei Avot 4:5.

<sup>14</sup> Nedarim 41b.

<sup>15</sup> Leviticus 25:36.

<sup>16</sup> *Tosafot HaRosh* and *Tosafot Rid* commenting on Brachot 60a.

<sup>17</sup> Leviticus 19:16.

<sup>18</sup> Some practical differences do exist regarding exactly which verse to deduce the obligation from. See *Bracha L’Avraham*, p. 216 fn. 24.

<sup>19</sup> Nedarim 37a; see also Meiri there.

<sup>20</sup> Deuteronomy 4:5.

<sup>21</sup> Some *rishonim* (Ran and Maharsha commenting on Nedarim loc. cit.) interpret the Talmudic passage as follows: Just like Moses taught the Jewish people the *Torah* for free, so too you should teach it without charging.

ments.<sup>22</sup> Thus, just as a teacher is forbidden to receive money for practicing his profession, so too a physician cannot be allowed to receive payment for his services.

However, the Talmud takes it for granted in many places that a physician does in fact get paid for his services. For example, the Talmud mentions: “A person with eye pain should pay the doctor [to treat him].”<sup>23</sup> Similarly, in a different tractate, the Talmud comments on a person who is successful, “You will be considered a crafted physician and will get a large salary.”<sup>24</sup> Interestingly, the Talmud’s example of a vocation that receives a large salary is a physician. Finally, and most strikingly, the Talmud comments on physician salaries, “A physician who practices for free is worthless.”<sup>25</sup> Many *rishonim* explain this passage as follows: if a physician were to work for free, he would not be able to fully concentrate on the patient’s care and needs.<sup>26</sup> Having a salaried physician is important in ensuring the proper quality of care and attention to the patient. Thus, a seeming contradiction exists as to whether physicians are allowed to receive fees for their service according to Jewish law.

Although many *rishonim* provide answers to this question, it is important to first elucidate two observations as to where this question would apply. First, the contradiction may only exist where the verse *vehashevota lo* would apply—to a patient who has already been diagnosed and is being treated for a known ailment.<sup>27</sup> However, well visits, checkups, physical examinations, or preventive procedures may not fall under the rubric of returning a person’s health and would thus pose no problem in charging money according to Jewish law. Only if the patient has lost his health and the physician is actively returning it to him would there be a fulfillment of

<sup>22</sup> *Beit Hillel* commenting on *Shulchan Aruch*, Yoreh Deah 336:6.

<sup>23</sup> Ketubot 105a.

<sup>24</sup> Sanhedrin 91a.

<sup>25</sup> Bava Kama 85a.

<sup>26</sup> Rosh commenting in Bava Kama 8:1, *Shitah Mikubetzet*, *ibid.*

<sup>27</sup> For example, according to Maimonides (see n. 13).

a positive Biblical commandment.<sup>28</sup> It is also a possibility that preventive medicine, although not falling under the category of returning lost property, may be Biblically obligatory according to many *Rishonim*,<sup>29</sup> based on a separate obligation of *heshamer lechah ushemor nafshechah*,<sup>30</sup> “protect yourself and guard your soul.” If this were the case, charging a fee for preventive medicine would remain problematic. Second, it should be noted that some explain the positive commandment of healing a person as being contingent on the success of the treatment.<sup>31</sup> If a person recovers, then the physician has done a positive commandment, but if the treatment fails and the person remains ill, then no commandment has been fulfilled. This would seem to fit well with those who use the verse *vehashevota lo* as the source for healing the sick. Just as a person fulfills the obligation of returning a lost article when the owner is again in possession of his object, so too a physician should fulfill his obligation when the patient has reacquired his health. Thus, according to the *Yad Avraham*, as long as the physician charges for his services rather than for the outcome of the treatment, there would appear to be no contradiction as cited above.<sup>32</sup>

To answer the seeming contradiction, the following question is posed by many *rishonim*. If the Biblical obligation to heal a sick person is derived from the verse *vehashevota lo*,<sup>11</sup> then why does the Torah have a more explicit reference for healing a person: *verapo yerapey*,<sup>32</sup> “you shall surely heal him”? While this seemingly extra-

<sup>28</sup>See *Halacha U'Refuah*, vol. 2 p. 142, *Responsa Maharam Shik*, Yoreh Deah 343, *Encyclopedia Talmudit*, vol. 10 p. 345.

<sup>29</sup> Maimonides *Yad Chazakah Rotzeach* 11:4 and *Shulchan Aruch*, Choshen Mishpat 427:8. (The *Minchat Chinuch*, no.546, questions whether Chazal referred to this verse only as pertaining to avoiding forgetting God or also to protecting one's physical body.) For further discussion, see Buchbinder, “Preventive Medicine,” *Journal of Halacha and Contemporary Society*, vol. 42, pp. 70–101.

<sup>30</sup> Deuteronomy 4:15.

<sup>31</sup> *Yad Avraham*, Yoreh Deah 336:1, also see Rabbi Lamm in *Journal of Halacha and Contemporary Society*, vol. 8 pp. 7–10.

<sup>32</sup> Exodus 21:19.

neous verse has many interpretations,<sup>33</sup> many explain that this verse gives the physician legal permission to collect a fee for his work despite the general concept of abstaining from collecting money when performing a Biblical obligation.<sup>34</sup> Thus, the “permission” that the Talmud explains based on the verse *verapo yerapey* is the permission to accept a fee for medical services. However, although this Biblical exegesis is documented and supported by many *rishonim*, it does not appear in the codified Jewish law. What does appear in the magnum opus of Jewish law is a prohibition regarding physicians receiving payment for services rendered.<sup>35</sup> However, a physician may be compensated for having refrained from his other employment that he could have been involved in while delivering services to the patient (*s’char batalah*)<sup>36</sup> and for time and effort (*s’char tirchah*).

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<sup>33</sup> Tosafot, Rashba, and *Tosafot HaRosh* commenting on Brachot 60a—includes healing for diseases that are not directly caused by man; Rav Kook, *Daat Cohen* 140—The verse gives permission to treat when it is uncertain; *Shach*, Yoreh Deah 336:1—a warning to treat people lest a person avoid treating someone for fear of killing them; *Torah Temimah*, Exodus 15:27 and Deuteronomy 22:2—since the main source for healing is only an exegesis by the rabbis, another verse is necessary to unequivocally mention the obligation. Alternatively, *verapo yerapey* only gives permission for the physician to heal, but *vehashevota lo* elevates healing the sick to a Biblical obligation; Ibn Ezra, Exodus 21:19—The Torah only gives a physician the power to heal external visible injuries (*Krayti U’Playti* 188:5—since only in external injuries can a physician make an accurate diagnosis; however, regarding internal injuries where the physician cannot see the injury, it is the speculation and imagination of the physician and not pure scientific knowledge that makes the diagnosis) (author: one wonders what category modern imaging would fall into). Author: the simple context of the verse *verapo yerapey* refers to an assailant’s obligation to reimburse the individual attacked for the money he has spent for medical care. This may thus not be a compelling source for an obligation to heal a sick person, but rather a source for specific monetary obligations in a case of tort (see also *Gur Aryeh*, Exodus 21:19).

<sup>34</sup> Rashi, Onkolus, and *Targum Yonatan* on verse *verapo yerapey*, Exodus 21:19; also Tosafot and *Tosafot HaRosh* on Brachot 60a.

<sup>35</sup> *Shulchan Aruch*, Yoreh Deah 336:2.

<sup>36</sup> For exactly how to pay a person for *s’char batalah*, see *Encyclopedia Talmudit*, vol. 11 p. 82–83.

The logical explanation given as to why some payments are acceptable and not others is as follows: *S'char batalah* and *tircha* are permitted by the *Shulchan Aruch* because they are not directly a part of the Biblical obligation, while payment for knowledge and teaching a patient is prohibited because they are the essence of the Biblical obligation to heal the sick.<sup>37</sup> Based on this differentiation, Rav Gedalyah Rabinovitz points out that *s'char tirchah* should be prohibited just like payment for knowledge because there is a Biblical obligation to invest time and effort to save a person's life.<sup>38</sup> He thus explains that *s'char tirchah* is only permissible if the sick person is not in danger, in which case there is no obligation to seek out the sick person immediately. Thus, even charging for time and effort (*tirchah*) is prohibited in many cases. Furthermore, defining in contemporary times exactly what is considered time and effort and what is considered knowledge and teaching can at times be ambiguous. For example, some hold that writing a prescription is considered teaching a patient,<sup>39</sup> while others understand it as a function of the physician's time and effort.<sup>40</sup> Thus, although the *Shulchan Aruch* delineates what a physician can charge, it would appear to be difficult to extrapolate into a contemporary medical practice.

The source of paying for *s'char batalah* appears in the Talmud in a discussion of a witness (who by bearing witness to an event is avoiding a Biblical negative commandment) who may be paid for missed employment.<sup>41</sup> The cases in this talmudic passage appear to revolve around individuals who are partaking in a Biblical commandment but have another source of employment. Thus, it would appear that payment of only *s'char batalah* would be limited to an individual who is not fully employed in a field that involves a Biblical obligation. However, if such an individual is engaged full-time in

<sup>37</sup> *Halacha U'Refuah*, vol. 2 p. 141, based on Nachmanides, *Torat Haadam* and *Kiddushin* 58b.

<sup>38</sup> *Halacha U'Refuah*, vol. 2 p. 142, explaining Nachmanides.

<sup>39</sup> *Tzitz Eliezer* 5 (*Ramat Rachel*) no. 24.

<sup>40</sup> *Aruch Hashulchan*, *Yoreh Deah* 336:3, *Aseh Lechah Rav*, vol. 3 no.31.

<sup>41</sup> *Bechorot* 29b.



a Biblical obligation, such as modern-day physicians, it would be impossible to pay them for their missed wages since they do not have an alternative occupation.<sup>42</sup> Using the same logic, Rav Moshe Feinstein<sup>43</sup> and Rav Shlomo Zalman Auerbach<sup>44</sup> rhetorically ask that even if a physician was only able to charge for *s'char batalah*, how would it be calculated in a person who is not dually employed? Should one assume that if they were not physicians they could have entered into a high-reimbursement profession? This is unknown, based on pure speculation, and not computable. Additionally, the *Tashbetz* and *Tosafot Yom Tov* purport that the prohibition of a physician collecting for more than *s'char batalah* (i.e., knowledge and time) does not apply if the two parties agreed to the fee in advance.<sup>45</sup> Thus, many modern-day halachic authorities have determined it to be halachically permissible for a physician to collect a fee even for his knowledge and time.<sup>46</sup>

It is important to note that it is codified in Jewish law by the Ramo that if a person is wealthy it is forbidden to earn money from teaching Torah.<sup>47</sup> If this Ramo is applied to the case of a physician, one must question how the Ramo would approach the talmudic passage mentioned above stating that any physician who works for free is worthless.<sup>26</sup> To help understand whether the Ramo would apply this talmudic passage to a physician, a deeper analysis is necessary of the reasons behind the above-mentioned passage. The context of the passage deals with a person who injures another and is obligated

<sup>42</sup> Ketubot 105a according to *Nishmat Avraham*, Yoreh Deah 336; Rosh, Bechorot, loc. cit.; *Tosafot Ketubot 105a*, *Tosafot Yom Tov* commenting on Bechorot 4:6, Responsa of Radbaz, vol. 2, 622, *Iggerot Moshe*, Yoreh Deah, vol.4 no.52.

<sup>43</sup> Responsa. Yoreh Deah. vol. 4 no. 52, see also Responsa of Rosh 56:5, who points out that *s'char batalah* exists only if a person has a job that he has taken a break from.

<sup>44</sup> See *Nishmat Avraham*, Yoreh Deah 336.

<sup>45</sup> *Responsa Tashbetz* 1:145, *Tosafot Yom Tov*, *ibid.*; see further discussion below.

<sup>46</sup> See *Encyclopedia of Jewish Medical Ethics*, p. 801, also see further discussion.

<sup>47</sup> *Shulchan Aruch*, loc. cit. Also see *Kesef Mishneh*, *Talmud Torah* 3:10, *Tosafot Ketubot 105a*, *gozrei gezeirot*.

to pay his medical bills. The Talmud explains that the injurer may not force the injured to get free medical care, since the attention and care of the physician would be called into question if he was not receiving any money. Thus, the talmudic passage may be limited to a case of attempted coercion of the injured party into a free physician over another, more expensive option. The passage might not reflect halachic reality and may rather be only a justified claim that the injured party may use when choosing a physician. Alternatively, some interpret this talmudic passage as reflecting the obligation of the patient and not addressing a physician's responsibility.<sup>48</sup> If a physician would like to treat pro bono, he may.

It is also important to note that Maimonides, himself a physician, disparages teachers of Torah who receive any payment whatsoever from teaching.<sup>49</sup> Many *rishonim* argue with Maimonides point by point on his numerous proofs.<sup>50</sup> One such dissenter, the *Tashbetz*, argues forcefully that Maimonides was a unique figure in his time—respected as a superb physician and Torah scholar.<sup>51</sup> It would be easy for him to not have to collect fees for his work due to his stature. However, most other people, who are not of such stature, need to actively seek a livelihood. If they did not collect a payment for their services, they would starve to death! If this position of Maimonides was applied to all Biblical obligations, as most halachic authorities hold,<sup>52</sup> it would be prohibited for a physician to charge any money, including *s'char batalah*. It is possible to argue that Maimonides' position may only apply to teaching Torah, because the many passionate reasons he gives for not taking a wage are specific to Torah learning<sup>53</sup> and would not necessarily apply to

<sup>48</sup> *Shoshanat Ha'amakim, verapo yerapey*, no. 71, see later discussion regarding refusal to treat.

<sup>49</sup> *Peirush Hameshnayot*, Avot 4:5, *Yad Chazakah*, Talmud Torah 3:10; position elucidated by *Tosafot Yom Tov* commenting on Mishnah Bechorot 4:6.

<sup>50</sup> *Kesef Mishneh*, *ibid.*

<sup>51</sup> Responsa 147.

<sup>52</sup> *Beit Hillel*, *ibid.*, Nachmanides, *Torat Haadam*.

<sup>53</sup> *Talmud Torah* *ibid.*

other positive commandments.<sup>54</sup> Just as the rabbis instituted a payment for someone who returns a lost object and fulfills a positive Biblical commandment,<sup>55</sup> so too the rabbis can institute the payment of fees to physicians.<sup>56</sup>

Prima facie it would appear that Nachmanides, also a physician, disagrees with almost everything that has been presented thus far, arguing that the practice of medicine is incongruent with a God-fearing existence.<sup>57</sup> In his discussion regarding the ultimate blessings, he writes that the Jewish people will be above the rules governing nature. No disease will exist, for God is the ultimate physician. “Those who seek out the prophets cannot seek out a physician. There is no place for a physician in the house of a God-fearing person.” Nachmanides explains that the purpose of the verse *verapo yerapey* is to give a physician the ability to treat a person who inappropriately sought out medical help. It would seem, according to Nachmanides, that there is no Biblical obligation for a physician to treat a patient and thus no legal impediment to the collection of fees. However, if this is in fact his opinion, many questions surface. First, how does Nachmanides explain the talmudic passage in Bava Kama 81a which specifically states that healing the sick is a Biblical commandment. Furthermore, the *Tzitz Eliezer* poses another question,<sup>58</sup> based on a different talmudic passage which rejects sanctioning a prayer for a sick patient that focused on not seeking human help in disease.<sup>59</sup> The rejection of this prayer by the Talmud is upheld after

<sup>54</sup> See also *Even Haezel Gezeylah* 3:12 and *Encyclopedia Talmudit*, vol. 11 pp. 80–81.

<sup>55</sup> Using the precept of *hefker bayit din hefker*; see Maimonides, *Peirush Hamishnayot*, Nedarim 4:2; *Tiferet Yisrael*, Nedarim 4:2; Rosh, Bava Metziah 2:28; and *Encyclopedia Talmudit*, vol. 11 pp. 80–81.

<sup>56</sup> See *Halacha U'Refuah*, vol. 2 p. 140; *Machaneh Efraim* 17 differentiates between returning lost objects where there is no obligation to seek out a lost object and a seriously ill person where the Torah requires a physician to seek out such a person.

<sup>57</sup> Leviticus 26:11.

<sup>58</sup> *Tzitz Eliezer*, vol. 5:20 (*Ramat Rachel*).

<sup>59</sup> Brachot 60a.

citing the verse *verapo yerapey*. Thus, permission is also given to the *patient* to seek medical attention, and he is not obligated to rely solely on a miracle. Moreover, Nachmanides himself cites the verse *verapo yerapey* and *vechai achichah imach* as a positive commandment.<sup>60</sup> The *Nishmat Avraham* suggests that Nachmanides may be referring only to a patient seeking medical attention as a preventive measure where there is no hint of a disease.<sup>61</sup> However, the *Nishmat Avraham* points out that such a stance is against the view of contemporary halachic authorities like Rav Shlomo Zalman Auerbach and Rav Moshe Feinstein.<sup>62</sup> With these points in mind, many contemporary halachic authorities explain Nachmanides' opinion, rejecting human intervention in curing disease, as referring to a precise time and specific circumstances during the rule of the prophets of early Jewish history.<sup>63</sup> However, he never intended to apply this to the circumstances of the Diaspora, when prophetic times have ceased.

### Determination of Fee

From the preceding discussion, halachic authorities have determined that it is legal according to Jewish law for a physician to charge money (since a physician does not have a different full-time job from which he receives compensation)<sup>43</sup> for services rendered. However, it is important to understand exactly how a physician can determine his fees and whether he may charge a high fee. The *Shulchan Aruch*, in discussing the fee that witnesses to a divorce document receive, points out that a clause exists stipulating that if due to them a problem arises, they would have to pay for another divorce document.<sup>64</sup> Therefore, due to their monetarily high-risk activity, these witnesses are allowed to charge a high fee. The *Nishmat*

<sup>60</sup> *Torat Haadam* "Inyan Hasakanah," Leviticus 25:36.

<sup>61</sup> Yoreh Deah 336, p. 274.

<sup>62</sup> See *Nishmat Avraham*, Yoreh Deah 336, p. 275.

<sup>63</sup> *Tzitz Eliezer*, loc cit.; *Yechaveh Daat* 1:81.

<sup>64</sup> Even Haezer 130:21.

*Avraham* feels that this case would apply to physicians as well.<sup>65</sup> Furthermore, the *Tashbetz* mentions that as long as the fee was discussed before the administration of treatment, there is no legal hindrance for the physician to charge a high fee.<sup>66</sup>

Furthermore, it is essential to understand whether a physician who charges a high fee would be allowed to collect the fee. Would he be violating a Jewish prohibition of overcharging?<sup>67</sup> Can the physician legally collect from the patient who has not paid, and is the patient allowed to claim a reimbursement if he does pay the high fee? The *Shulchan Aruch* rules in a case where someone is fleeing from jail and employs a sailor to assist him in crossing a river for a very large fee:<sup>68</sup> the person is only obligated to pay what a normal fee for crossing a river would be.<sup>69</sup> If this ruling were extrapolated to a physician, it would appear that although a physician may have the ability to charge a high fee, the patient may not have an obligation to pay the full fee, and thus the physician would not have the right to collect the full unpaid fee. Some *rishonim* and *acharonim* do apply this ruling to the case of a physician.<sup>70</sup> However, most commentaries on the *Shulchan Aruch* do not apply this ruling to the case of a physician.<sup>71</sup> They write that once the patient agrees to the physician's

<sup>65</sup> Yoreh Deah 336:M.

<sup>66</sup> Responsa 1:145.

<sup>67</sup> See Bava Metseyah 49b for further details.

<sup>68</sup> Choshen Mishpat 264:7.

<sup>69</sup> *Yam Shel Shlomo Shlomo*, Bava Kama 10:38, gives two reasons: First, there is a set fee that sailors usually get for the trip. Alternatively, he already has a Biblical obligation to save this person; see also *Shitah Mekubetzet* in the name of Ramo—the employer can claim that he was joking with the employee in regard to the extra amount.

<sup>70</sup> *Mordechai*, Bava Kama 172; Responsa of Radvaz 3:556; Ritva, Yevomot 106a—since he only agreed to the payment due to the stress of his sickness. See also Rashi and Tosafot, Bava Kama 116b.

Author: It would appear that according to the second explanation of the *Yam Shel Shlomo* (n. 70), a physician who makes a high fee would not be able to collect the entire fee since he too is involved in a Biblical obligation.

<sup>71</sup> Ramo, *Taz*, and *Shach*, Yoreh Deah 336; also *Yam Shel Shlomo*, Bava Kama 10:38, and *Mordechai* 174; see also Nachmanides, *Torat Haadam*, Shaar Hasakanah.

terms, it is incumbent on the patient to pay the agreed-upon amount. Furthermore, even according to the opinion that a physician may only charge for *s'char batalah*, if they agreed upon a payment for the physician's knowledge and expertise, the patient is still obligated to pay in full, irrespective of how large.<sup>72</sup> Moreover, if the patient has already paid the fee, he has no legal standing to request that it be returned in part or in full. The above case of the runaway, according to these halachic authorities, is unique in that the employment of the sailor is temporary and fixed, unlike a physician's job, which is not bound by time. It is thus the normative halachic opinion that a patient must pay the physician the entire agreed-upon fee, no matter how large.<sup>73</sup> A psychological explanation is given by some *acharonim* as to why this is the case:<sup>74</sup> It will prevent people from avoiding choosing a career as a physician, and it will prevent physicians from refusing treatment unless they are paid in full from the beginning.<sup>75</sup>

An argument does exist among halachic sources as to whether this rule applies if there is only one physician in a city. Many feel that if only one physician is located in the city, then there is no obligation for the patient to pay the entire high fee.<sup>76</sup> Others,<sup>77</sup> including

<sup>72</sup> Ramo, Choshen Mishpat 264:7—since it is a normative practice to pay physicians a high fee. See also Rosh, Bava Metziah 2:28 and *Lechem Mishneh Gezeylah* 12:7 (explaining the opinion of Maimonides), who understands that the person must pay whatever the agreed-upon amount was, without any limits. See also *Ketzot Hachoshen* 264:2. *Chidushei R. Shimon Shkup*, Bava Kama 19, who argues that even though the Rosh permitted large fees, he did have a maximum amount based on the maximum salary that the person could have made in his other profession. How the Rosh, according to the interpretation of Rav Shkup, would apply this maximum amount is unclear, since modern physicians do not have alternative occupations. See nn. 43–45 above.

<sup>73</sup> Similar to *Shulchan Aruch* and Ramo, Choshen Mishpat 264.

<sup>74</sup> *Mateh Moshe Gemilut Chasadim* 4:3 and *Tzedah Laderech* 5, no. 2:2, elaborated in *Encyclopedia of Jewish Medical Ethics*, p. 801.

<sup>75</sup> See below if this is allowed.

<sup>76</sup> *Levush*, Yoreh Deah 336; Radvaz, Choshen Mishpat 264:7; Responsa Radvaz 3:556; *Tzitz Eliezer* 5:25 (*Ramat Rachel*).

<sup>77</sup> *Yam Shel Shlomo*, Bava Kama 10:38.

the Ramo,<sup>78</sup> disagree and hold that even when there is only one physician in the city, if the patient and physician agree upon a certain price, no matter how high it may be, the patient is obligated to pay it in full. However, this ruling would not hold true if the patient indicated at the time of agreeing to the high payment that he was doing so due to extenuating circumstances.

Many contemporary halachic authorities have determined, using the above principles, that it is legal for physicians to charge a high fee. Rav Moshe Feinstein explains that people would not dedicate themselves to the study of medicine were they not assured an acceptable fee (and it is as if the patient had agreed in advance—see above).<sup>79</sup> In a similar vein, some cite the high cost of medical education and the large debt that most students accrue.<sup>80</sup> If a physician were not allowed to charge a high fee to pay back these large debts, it would be another factor steering people away from becoming physicians, especially primary-care physicians.<sup>81</sup> Additionally, since modern physicians do not have other employment, it is permitted for them to charge for their time and knowledge,<sup>43, 44, 45</sup> something that is truly priceless.<sup>82</sup> In the same responsum as mentioned above, Rav Moshe Feinstein gives an additional explanation. Many patients prefer a high fee if it means greater availability and better quality of care. This further benefits the patient by preventing the physician from needing to seek alternative sources of livelihood and allows him to focus solely on the practice of medicine. Thus, charging of a fee, even a high one, is something that is beneficial to the com-

<sup>78</sup> Choshen Mishpat 264:7; see also *Encyclopedia of Jewish Medical Ethics*, vol. 3 p. 801.

<sup>79</sup> *Iggerot Moshe*, Yoreh Deah 4:52.

<sup>80</sup> Since studying medicine is not Biblically mandated; *Barkai 5745*, vol. 2 pp. 32–33, *Halacha U' Refuah*, vol. 2 p. 141, *Responso Teshuvot Vehanhagot*, vol. 1 no. 887.

<sup>81</sup> For these and many other contemporary concerns of primary-care physicians, see “The Physicians’ Perspective: Medical Practice in 2008” by the Physicians Foundation ([www.physiciansfoundations.org/usr\\_doc/PF\\_Report\\_Final.pdf](http://www.physiciansfoundations.org/usr_doc/PF_Report_Final.pdf)).

<sup>82</sup> Nachmanides, *Torat Haadam* end of Shaar Hamichush; Nachmanides and Rashba, Yevamot 106a; *Yam Shel Shlomo*, Bava Kama 10:38.

munity. However, this permutation would not exist if the fee was overly exorbitant, in which case it would be prohibited,<sup>83</sup> and those who charge such a fee would not reap the reward for the Biblical obligation of healing the sick.<sup>84</sup> Although not specifically discussing physicians,<sup>85</sup> the Talmud, commenting on Biblical verses, discusses and condemns a person who works for the community conducting a Biblical obligation while receiving an exorbitant salary.<sup>86</sup> Likewise, R. Ovadya MeBartenurah, comments on a Mishnah stating that the judgment of judges who accept a salary are void: “There are rabbis who charge ten gold coins for half an hour to write a divorce document. . . . Such a rabbi, in my eyes, is a thief and a rapist . . . and I would be concerned that the divorce document is worthless.”<sup>87</sup>

Exactly how should a fee be considered typical and how should it be considered excessive? Dr. Aviad Hacoen elucidates the difficulty in a precise determination.<sup>88</sup> He comments that pricing in medicine is dependent on many factors, such as time and degree of expertise necessary for a procedure. Furthermore, the need, as expressed by the patient and/or a third party, is imperative in establishing proper pricing. For example, the psychological effect on the patient, the potential loss of function, and potential cosmetic implications may also be included in determining a suitable fee.

## Refusing Patients

The Torah proclaims that there is an obligation to not stand idly by your friend’s blood, *lo ta’amod al dam re’echah*.<sup>89</sup> The Talmud and *Shulchan Aruch* associate this verse with abstaining from as-

<sup>83</sup> *Halacha U’Refuah*, vol. 2 p. 141; *Brachah L’Avraham*, pp. 237–238.

<sup>84</sup> *Responsa Teshuvot Vehanhagot*, vol. 1 no.887.

<sup>85</sup> Based on discussions presented above, a physician may also be considered as practicing a communal profession that fulfills a Biblical obligation.

<sup>86</sup> Shabbat 56b and 139a, commenting on the sons of Samuel.

<sup>87</sup> Bechorot 4:6 (Author’s translation).

<sup>88</sup> *Brachah L’Avraham*, pp. 230–231.

<sup>89</sup> Leviticus 19:16.



sisting a person who needs health care.<sup>90</sup> Furthermore, as discussed above, there is a positive commandment to heal those who are sick.<sup>8</sup> Additionally, the Maharsham<sup>91</sup> cites the verse discussing the prohibition against making an orphan suffer, “If you inflict suffering on him [orphan or widow] . . . I will kill you,” as applying to all types of suffering that one person causes to another, whether passive or active.<sup>92</sup> Thus, it would appear that if a physician denied a patient treatment, he would be violating a positive and (possibly) two negative Biblical precepts.<sup>93</sup> It is therefore understandable that Rashi explains the statement in the Talmud “The best physicians go to hell”<sup>94</sup> as pertaining to a physician who has the ability to treat a destitute individual but refuses to help the patient. This raises a number of significant questions: Can a physician take a vacation, can he retire? Must a physician answer all calls at night and while resting? How would a patient who has the funds but refuses to pay a fee be characterized? Although the physician should be treating patients as much as possible, it should not come at the expense of the quality of care that a patient receives. The more patients a physician has, the busier he will be and the less time will be available for each patient. Moreover, a physician who is overworked may lack the same focus that he would have if he worked fewer hours with fewer patients. The psychological needs of the physician should also be considered, because taking breaks and avoiding burnout may be necessary to ensure the best quality of care. Moreover, the busier a physician is, the increased chance that a mistake can occur. Even inadvertent

<sup>90</sup> Sanhedrin 73a, Yoreh Deah 336:1.

<sup>91</sup> Responsa 2:210 (second responsum—responding to the Aderet).

<sup>92</sup> Exodus 22:22–23.

<sup>93</sup> *Iggerot Moshe*, Yoreh Deah, vol.2 no.151: These obligations would not pertain to a non-physician, since there is no obligation for a person to learn medicine in order to save someone’s life. Rather the obligation is for a person to do what he can with what he has. (*Responsa Levushai Mordechai*, Orach Chayim 29, and *Responsa Chelkat Yaakov* 1:82 disagree and hold it is an obligation to study medicine.)

<sup>94</sup> Kiddushin 82a.

mistakes are seen by many *rishonim* as having some physician liability and needing reparations.<sup>95</sup> Similarly, many contemporary halachic authorities consider the accidental inappropriate injection of the wrong drug as being similar to an intentional act.<sup>96</sup> Thus, an overload of patients can overburden the physician and compromise patient care, potentially leading to careless mistakes.<sup>97</sup> It is plausible to suggest that setting limits on the number of patients will be beneficial for all parties.

Recent halachic sources highlight that in the modern, developed world, it is uncommon for cities to have a shortage of physicians. If a physician were to refuse, either passively or actively, to respond to a sick patient, there are ample other physicians who can treat that person. Thus, Rav Shalom Elyashiv writes that if a person is not seriously ill and not in need of urgent care, if a physician is eating, sleeping, or resting, he is not obligated to tend to the patient.<sup>98</sup> However, a seriously ill patient falls into a different category. The *Tzitz Eliezer* writes that although a physician who does not aid a seriously ill patient in a time of need may not monetarily be responsible for damages, he nevertheless has an obligation to come to the patient's aid.<sup>99</sup> If he does not, he will be punished by the Heavens. The *Nishmat Avraham* comments that this distinction may not apply if the inactivity occurred after the physician began treating the patient.<sup>100</sup> The Talmud explains that if a person delineates that he is depending on someone, then that person is liable for any loss incurred.<sup>101</sup> The *Shulchan Aruch* applies this law even if the statement

<sup>95</sup> *Tzitz Eliezer* 5:23 (*Ramat Rachel*) explaining the opinions of the Ramban, *Tur*, and *Shulchan Aruch*.

<sup>96</sup> *Ibid.* and *Responsa Minchat Yitzchak* 3:105 unlike *Responsa Chatam Sofer* 1:177 (*Responsa to Orach Chayim*).

<sup>97</sup> Similar to arguments made in the Libby Zion case of 1984; see "Libby Zion," *New York Times*, March 6, 1984.

<sup>98</sup> *Zichron LehaGriv Jolte* 5747; see also *Kobetz Ateret Shlomo*, vol. 7 188:2.

<sup>99</sup> *Responsa* 19:63.

<sup>100</sup> *Yoreh Deah* 336.

<sup>101</sup> *Bava Kama* 100a.

was not specifically stated but was implied and obvious (e.g., the implied relationship between a physician and a patient).<sup>102</sup> Thus, the *Nishmat Avraham* concludes that a physician who denies treatment to an existing patient is also liable monetarily.<sup>103</sup> Consequently, it would appear that a distinction is made in Jewish law regarding refusal to treat a person being dependant on the severity of sickness and where a pre-existing physician-patient relationship has already been established.<sup>104</sup>

An important halachic discussion exists surrounding the case of a physician who refuses to treat a patient due to lack of funds. As quoted above, Rashi explains the statement in the Talmud “The best physicians to Hell”<sup>105</sup> as pertaining to a physician who has the ability to treat a poor person but refuses to help the patient. If a person truly cannot afford the medical treatment, a rabbinic court can force him to treat the patient.<sup>106</sup> However, the courts can only coerce the physician if there are no other physicians in the city. Otherwise, it is not possible to coerce one physician over another, and it is the responsibility of the court to raise money to pay a physician to treat the poor.<sup>107</sup> Although the Talmud comments that “a physician who receives no payment is worthless,”<sup>108</sup> this does not mean that a physician cannot heal pro bono; rather it means to say that a patient is obligated to pay what he can.<sup>109</sup>

<sup>102</sup> Choshen Mishpat 306:6.

<sup>103</sup> In the name of Rav Shalom Elyashiv.

<sup>104</sup> A similar delineation exists in common law: A physician is not obligated to treat every patient unless a physician-patient relationship has been established. See Katz and Marshall, “When a Physician May Refuse to Treat a Patient,” *Physician’s News*. February 2002 (available at [www.physiciansnews.com/law/202.html](http://www.physiciansnews.com/law/202.html)).

<sup>105</sup> Kiddushin 82a.

<sup>106</sup> *Responsa Teshuva Meyahavah*, Yoreh Deah 3:408.

<sup>107</sup> *Tzitz Eliezer* 15:40:7—delineates the possible Biblical prohibitions if such a fund is not established and discusses the Biblical verses that are fulfilled when such a fund is established.

<sup>108</sup> Bava Kama 85a.

<sup>109</sup> *Shoshanat Ha’amakim, verapo yerapey* no. 71; see also Taanit 21b and *Gilyonei Hashas*, Bava Kama 85a.

Throughout history, practicing Jewish physicians have highlighted the importance of treating the poor. Yitchak Yisraeli highlights this in a statement to physicians: “There is no greater mitzvah than treating the poor.”<sup>110</sup> R. Eliezer Pappa contends that the quality of care offered to the indigent must be comparable to that offered to the wealthy.<sup>111</sup> A physician who is called upon must act quickly, irrespective of time or economic status. Furthermore, from as early as the thirteenth century to the Nazi ghettos, Bikur Cholim societies have been set up to allow those who cannot afford medical care to receive adequate attention.<sup>112</sup> The *Chafetz Chayim* raises the question of whether a community that does not set up a fund to care for the poor would be, in effect, violating the prohibition of *lo ta’amod al dam re’ echah*, “not standing idle by the blood of your friend.”<sup>113</sup>

An interesting contemporary application of a physician’s ability to refuse to care for patients occurred during a physician’s strike in Israel in 1983, which lasted four months.<sup>114</sup> At the time Rav Shlomo Zalman Auerbach permitted the strike on condition that it did not threaten patients’ lives.<sup>115</sup> He specified that physicians might not abandon the hospitals and might not make themselves unavailable by traveling far distances. As the strike progressed, Rav Shlomo Zalman Auerbach and Rav Yaakov Yitzchak Weiss clarified the practical level of staff that physicians must supply during the strike as being the level that would be supplied on Shabbat (which would be the medically determined level needed to ensure saving a life if there were an emergency and to ensure proper care for the hospitalized patients).<sup>116</sup> Thus, halachic authorities throughout Jewish

<sup>110</sup> *Mussar Harofim*, no. 30; see also “Oath of Assaf” (quoted in F. Rosner, *Ann Int Med* 63:317, 1965) and “Oath of Jacob Zahalon” (in *Otzar Hachayim*).

<sup>111</sup> *Peleh Yoetz*, no.510, *rofeh*.

<sup>112</sup> For further details, see *Encyclopedia of Jewish Medical Ethics*, vol. 3 p. 1120, and *Brachah L’Avraham*, pp. 221–223.

<sup>113</sup> *Ahavat Chesed*, vol. 3, Bikur Cholim 48b.

<sup>114</sup> Strikes in Israel also occurred in 1973 (one month) and 1976 (three months).

<sup>115</sup> Cited in *Nishmat Avraham*, Choshen Mishpat 333:1.

<sup>116</sup> Cited in *Encyclopedia of Jewish Medical Ethics*, p. 803.

history have balanced the personal and psychological needs of the physician with the importance of the destitute and severely infirm receiving adequate access to health care.

## CONCLUSION

The surge in the number of primary-care physicians in the United States converting their practices into concierge, or retainer, practices raises many halachic questions, such as: Can a physician charge for direct medical care? Can he charge a large fee for medical access? Can he limit his patient pool while transitioning into a concierge practice?

As highlighted above, although providing medical care is a Biblical obligation, and one may only charge *s'char tirschah* and *s'char bata-lah*, this may not be the case with contemporary physicians, who practice medicine as their sole source of income. Furthermore, it should be noted that to avoid common-law issues, it has been advised that concierge physicians clearly stipulate in their contract with the patient exactly what services the retainer fee covers and that the stipulated services are of a non-medical nature.<sup>117</sup> Accordingly, a concierge physician would not charge a fee for direct medical services. Thus, the payment is not contingent on the performance of a Biblical obligation and would be exempt from the prohibition of charging by a Biblical commandment.

Both Jewish and United States law recognize, except for emergencies, a physician's right to choose where he or she practices and whom they treat.<sup>118</sup> However, once a person is an existing patient, it is imperative, according to both Halacha and common law, that his treatment is continuous and he is not abandoned. According to United States Law and the American Medical Association's ethical code, it

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<sup>117</sup> Portman, *J Health Life Sci Law*. 2008 Apr;1 (3):1, pp. 26, 37.

<sup>118</sup> Assuming that no laws are violated (e.g., discrimination laws). For a more detailed discussion regarding common-law applications, see "Principles of Medical Ethics" ([www.ama-assn.org/ama/pub/category/2512.html](http://www.ama-assn.org/ama/pub/category/2512.html)). For a more detailed discussion regarding Halacha, see the discussion above regarding denial of care.

is forbidden for a physician to abandon a patient.<sup>119</sup> A physician is obligated to transition all of his patients into their new retainer practice, whether they will continue to be patients or not. Those patients who will not be part of the new practice must continue to be cared for until they can be safely incorporated to a new physician. The entrance of a physician into a concierge practice must be tempered with the strong emphasis placed in Halacha and Jewish literature on the necessity for a Jewish physician to treat the indigent. This is a point that the AMA has itself highlighted—the need for concierge physicians to offer charitable medical care.<sup>120</sup> Interestingly, it has been noted by a study that among concierge medical practices, 84 percent provide charity care, and many continuously see patients despite not having paid the retainer fee.<sup>121</sup>

At the present time, it has been determined by the United States government that concierge medicine is too small to reach the level where it limits the access of patients (specifically Medicare patients) to healthcare. Retainer practices have been limited to larger cities with sizable population pools, as opposed to rural areas with few primary-care physicians.<sup>122</sup>

It was recently noted that “as the economic pressure on physicians and their traditional medical groups intensifies . . . more retainer practices are likely to surface around the country.”<sup>123</sup> As time continues and concierge medicine evolves, it is imperative to re-evaluate the halachic and common-law ethical dilemmas that arise.

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<sup>119</sup> “AMA Report to the Council on Medical Services of Special Physician-Patient Contracts,” CEJA Report 9-A-02 (June 2002); and Portman, *J Health Life Sci Law*. 2008 Apr;1 (3):1, p. 30.

<sup>120</sup> AMA “Principles of Medical Ethics”; AMA, “Report of the Council on Ethical and Judicial Affairs: Disrespect and Derogatory Conduct in the Patient-Physician Relationship” (June 2003).

<sup>121</sup> Alexander GC, et al. “Physicians in Retainer Practice: A National Survey of Physician, Patient and Practice Characteristics,” 20 *J Gen Internal Med*. 1079–1082 (Dec. 2005).

<sup>122</sup> GAO report, *supra* n. 2.

<sup>123</sup> Portman, *J Health Life Sci Law*. 2008 Apr;1 (3):1, p. 8.