

## Must you testify as a witness?

### Background

Torah: A witness is responsible for providing testimony:

If someone sins because he did not testify, after being required to testify regarding what he has seen or learned, he will be held responsible. [Lev. 5:1]

Talmud: Punishment is from God only:

Rabbi Yehoshua said: These are... acts for which the offender is exempt from the judgments of Man but liable to the judgments of Heaven...: hiring false witnesses to give evidence; and knowing evidence in favor of another and not testifying on his behalf. [Bava Kamma 55b]

### Questions

Can you be compelled to testify?

Why wouldn't you testify?

- Afraid of consequences (threats of harm, ostracism from community, loss of livelihood)
- Not wanting to get involved
- Not wanting to take the time (loss of income?)
- Not wanting cross-examination (having your past probed, your private life dragged in the open)

Promise of immunity may not be enough to overcome reluctance.

### Story from Talmud

A man came from Be-Hozai and went to Mari ben Isak... claiming to be his brother, and said to him: Give me a share in the property of our father.

[Mari] answered him: I do not know you.

[The claimant then] came to Rabbi Hisda, who said to him: [Mari] answered you well, for it is written [in the Torah]:

And Joseph recognized his brothers, but they did not recognize him.  
[Gen. 42:8]

[So it is possible for brothers not to recognize each other.]...

[Then Rabbi Hisda] said to [the claimant]: Go and bring witnesses that you are his brother.

He answered him: I have witnesses, but they are afraid of [Mari] because he is a powerful man.

[Rabbi Hisda then] said to [Mari]: Go and bring witnesses that [the claimant] is not your brother.

[Mari] answered him: Is this [really] the law? [Surely] it is the claimant who must produce evidence!

[Rabbi Hisda] said to [Mari]: This is my ruling for you, and for all those who are as powerful as you! [I apply the rules according to circumstances.]

But, [it was argued, these witnesses] may lie?

[The rabbi replied:] They will not commit TWO wrongs. [They may refuse to testify because they are afraid, which is wrong, but they will not LIE.]

[Ketubot 27b; also Baba Metzia 39b]

So it is the intimidating party who must bring the witnesses to argue his side! (How far does that ruling go?)

Implication: Witnesses may not be compelled to testify.

## **Torah on witnesses**

-Two witnesses are required [Num. 35:30; Deut. 17:6; 19:15; cf. 1Kings 21:10, 13].

-Talmud reports case of a witness who was punished for testifying, because he was the only witness:

It once happened that Tuvia sinned and Zigud alone came and testified against him before Rav Papa.

Whereupon, [Rav Papa] had Zigud punished.

[Zigud] exclaimed: Tuvia sinned and Zigud is punished!

[Rav Papa] said to him: It is written:

One witness shall not rise up against a man. [Deut. 19:15].

When you testified against him alone, you merely brought him into disrepute.' [Pes. 113b]

-The witness must be the one to begin an execution:

[The witness's] hand shall be first upon him to put him to death, and afterwards the hand of all the people. [Deut. 13:7-12].

-No false testimony [Ex. 20:13, 23:1; Deut. 5:17; Prov. 6:19, 14:25].

-False witness incurs the penalty that would have been inflicted upon the accused [Deut. 19:16-21]

-Israel is a witness to God. [Isa. 43:9-10; 44:6-9].

## Halachic additions on witnesses

-In criminal cases, witness must testify of his own accord; in civil cases, he is obligated only when summoned [Yad, Edut 1:1; Sh. Ar., hM 28:1].

-Kings are exempt [Sanh. 2:2] but high priests must testify for the king [Yad, Edut 1:3].

-The witness must have seen himself, or heard from a party to the action; he may not testify to things he does not personally know [Rema hM 28:1], or to what he has heard others say. [Yad, Edut 17:1,5]

-Spy planted to hear or see wrongdoing is not valid witness [Yad, Edut 17:3], except in cases of incitement to idolatry [Sanh. 7:10; Sanh. 29a, 67a].

-Witness is allowed to look at notes he wrote at the time [Ket. 20b; Yad, Edut 8:2; Sh. Ar., hM 28:14; Beit Yosef hM 28, n. 13–14]

-May not testify: Women, slaves and non-Jews, minors, the mentally deficient, the deaf or mute, the blind, the wicked, the contemptible, relatives, and interested parties. [Yad, Edut 9:1]

(1) Women. Talmud: A woman belongs at home, not in court. [Shev. 30a; cf. Git. 46a]

However, women can testify if there are no male witnesses.

[Resp. Maharam of Rothenburg, ed. Prague, no. 920; Resp. Maharik no. 179]

In Israel, women can testify since 1951.

(2) Slaves and non-Jews. Witnesses must be free Jewish citizens [Bava Kamma 15a; Yad, Edut 9:4; Sh. Ar., hM 34:19].

Non-Jews OK only if secular law requires it. [Maggid Mishneh, Malveh 27:1]

(3) Minors. Not if under 13; allowed between 13 and 20 only if have understanding and experience. [Bava Batra 155b; Yad, Edut. 9:8; Sh. Ar., hM 35:3].

(4) The mentally deficient. [Yad, Edut 9:9-10; Sh. Ar., hM 35:8-10]

(5) The deaf or mute. Witnesses must testify by speaking and must hear the warnings of the court. [Yad, Edut 9:11; Sh. Ar., hM 35:11]

(6) The blind. Torah says: “What he has seen” [Lev. 5:1], so blind can't testify. [Yad, Edut 9:12; Sh. Ar., hM 35:12]

(7) The wicked. Torah:

Do not put your hand with the wicked to be an unrighteous witness.  
[Ex. 23:1]

Includes:

Broadly: Criminals, swindlers, perjurers, illiterates, informers.  
Specifically: Thieves, usurers, tricksters, gamblers, gamesters, idlers, vagabonds; tax collectors who receive a portion of the money they collect; those who are ignorant of Tanach and Mishnah, or of standards of conduct (unless their conduct is irreproachable); and agnostics, heretics, and Torah-transgressors, whether through conviction or malice.

(8) The contemptible. Who do not conform to conventions (e.g., by walking around naked while working). [Bava Kamma 86b]

(9) Relatives

-Father, brother, uncle, brother-in-law, stepfather, father-in-law, and their sons and sons-in-law [Sanh. 3:4]; nephews and first cousins [Yad, Edut 13:3; Sh. Ar., hM 33:2].

-If relative is a woman, her husband may not testify [Yad, Edut 13:6; Sh. Ar., hM 33:3].

-Witnesses must not be related to one another [Mak. 6a];  
or related to one of the judges [Sh. Ar., hM 33:17].

-Defendant may not testify for or against himself, for “a man is related to himself” [San. 9b–10a; Yev. 25b].

(10) Interested Parties. Witness cannot testify if he gets any benefit from his testimony [Bava Batra 43a; Yad, Edut 15:1; Sh. Ar., hM 37:1; Yad, Edut 15:4].

-Payment for testifying invalidates witness [Bek. 4:6]. (Except to attest.)

-Witnesses can be cross-examined. [Sanh. 32b; Yad, Edut 1:4]

-If two sets of witnesses contradict each other, all are ignored.

## Civil law on witnesses

Court can force you to testify (subpoena), except if:

-You would incriminate yourself

-You are the defendant

- You are the spouse, attorney, therapist, or clergyman of someone involved
- You are not competent

Penalty: jail for contempt of court