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Edut Nashim K'Edut Anashim: The Testimony of Women is as the Testimony of Men: A Concurring Opinion

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This paper was submitted in November, 2004 (Kislev 5765) as a concurring opinion to “Edut Nashim K'Edut Anashim: The Testimony of Women is as the Testimony of Men” by Rabbi Susan Grossman. Dissenting and concurring opinions are not official positions of the Committee on Jewish Law and Standards.

I concur with Rabbi Susan Grossman’s judgment that women may serve as witnesses in Jewish law. I believe that in principle, the acceptance of women’s witnessing applies in all realms and to all documents. In practice, however, special concerns arise from the rejection of women’s witnessing by some Conservative and virtually all Orthodox rabbis. For marriage (*ketubbot* and *kiddushin*) and conversion (*giyur*), women should only serve as witnesses with the informed consent of the individual(s) directly affected, and following a prudential judgment by the rabbi that the involvement of women witnesses would not impose undue risks in the particular case. Because of practical concerns for the well-being of individuals and of *klal Yisrael*, women should not at the present time serve as witnesses for *gittin*.

The scope of women’s testimony has varied over time according to the needs, social conditions, and perceptions of decisors and their communities.¹ For example, the reliance on women’s testimony to assess monetary damages (from a man) was a matter of dispute; it was rejected by Moses Maimonides,² but was accepted as legitimate by other leading authorities. Among *rishonim*, *Sefer Kol Bo* (n. 116) rules that women’s testimony may be relied upon to assess monetary damages when there are no male witnesses to an assault. Rabbi Joseph Colon (*Resp. Maharik*, n. 179) rules that, in the absence of male witnesses, women’s testimony could be relied upon not only to assess monetary damages, but also to inflict punishment on an individual who had slandered a sage.³ While in the *Shulhan Arukh*, Joseph Karo states that

¹ This formulation draws on one proposed by Rabbi Avram Reisner. See generally Haim Hermann Cohen, “Witness: In Jewish Law,” *Encyclopaedia Judaica* 16:585; *Entziklopedia Talmudit* 2:252-53; Rabbi Moses Isserles, *Darkhei Moshe*, H.M. 35, n.3; Rabbi Mordecai ben Hillel, *Mordecai Yevamot*, n. 117. Fully accounting for variations in acceptance of women as witnesses is beyond the scope of this concurrence. There seems to be some tendency for women’s witnessing to be more widely accepted by authorities living in Christian nations, where the status of women and acceptance of their public activities were generally greater than in Islamic nations. (On the status of women in Christian and Islamic lands, see, e.g., Bernard Lewis, *What Went Wrong: Western Impact and Middle Eastern Response* [New York: Oxford University Press, 2002], 65-76, 83-84). It is noteworthy that an expansive acceptance of women’s testimony was offered by one of the few *rishonim* who lived in a culture that could be considered modern, Rabbi Joseph Colon who lived in Renaissance Italy.

² Maimonides, M.T. *Nezikei Mamon* 8:13,

³ Colon uses the precedent of a midwife testifying regarding which twin was the firstborn to argue that women’s testimony is acceptable in monetary matters, and then argues that this acceptance serves as a basis for the legitimacy of the court relying on a woman’s testimony to fine and punish the slanderer. Colon not only provides a precedent

women are ineligible to serve as witnesses, this general assertion does not prevent him, in *Beit Yoseif*, from accepting women's witnessing in areas rejected by Maimonides and others. As noted by Rabbi Grossman, Moses Isserles in the *Mappah* notes areas in which women's testimony is acceptable. His discussion in *Darkhei Moshe* even more strongly endorses the legitimacy of broadened reliance on women's testimony.⁴

There is significant halakhic precedent for a position of accepting women's testimony when this would not be perceived as impugning the honor of a man, and in areas with which women are familiar. In our day, with *shinui ittim* (changed social conditions), this supports general acceptance of women serving as witnesses.⁵ Such a development would in some ways represent a leniency (*kula*) with regard to traditional requirements for witnesses. At the same time, it would represent a stringency (*humra*) with regard to the Jewish value of respect for persons (*kevod habriyot*), and with regard to the traditional injunction to pursue the good and the right (*hatov vehayashar*).

In principle, the acceptability of women's testimony applies in all realms and to all documents. In practice, the witnessing of conversion and especially divorce present special issues. The same formal warrants, and the same value of women's equality, apply to *gittin* as to other forms of witnessing. However, I believe that halakhah involves more than formalism or the simple invocation of one valued principle. A complex process requires attention to textual sources, tradition, ethical values, contemporary circumstances, and the needs of individuals and the Jewish community.⁶ The vast majority of Orthodox rabbis, and some Conservative rabbis, do not accept the legitimacy of women serving as witnesses. For women to serve as witnesses for documents regarding personal status (especially divorce) would present problems for the unity of the Conservative movement and the Jewish people (*klal Yisrael*). It also would entail risks for those individuals who rely on such documents, and for their children.

The risks and benefits of women serving as witnesses will vary in different particular cases, and generally for differing types of documents. The greatest risks would be entailed by the involvement of women as witnesses for divorce. An individual whose *get* is witnessed by a woman will find that some Conservative rabbis, and virtually all Orthodox rabbis, will not recognize the validity of the document and so would refuse to officiate at a remarriage. If an individual who converted with a woman witness changes his or her views or affiliation, and wishes to undergo a new ceremony, the matter poses difficulties but remains within that individual's control. If an individual's *get* is witnessed by a woman, and he or she wishes to undergo a new ceremony, the matter is far more complex. In the best of circumstances, the active cooperation of the former spouse would be required. In many cases, the issuance of a *get*

for the acceptance of women as witnesses, but offers a model for expansively reading existing precedents regarding women's witnessing when this serves important values.

⁴ *S.A., H.M.* 35:14; *Beit Yoseif, H.M.* 35, n. 15; *Darkhei Moshe, H.M.* 35, n. 3. In *Beit Yoseif*, Karo reports the restrictive position held by Maimonides and Rashba (Rabbi Solomon ben Abraham Adret), but rejects it, citing the views of *Maharik* and *Terumat Hadeshen* (n. 353).

⁵ Even if the acceptance of women as witnesses did impugn the honor of some men, a strong argument could be made that this would not be a sufficient basis to exclude women from witnessing. Given the strength of precedent supporting women's witnessing, and contemporary social realities, such an argument is not necessary.

⁶ See Aaron L. Mackler, ed., *Life and Death Responsibilities in Jewish Biomedical Ethics* (New York: Finkelstein Institute and Jewish Theological Seminary of America, 2000), 8.

following civil divorce entails great difficulties. The issuance of a second *get* would be all the more problematic.

Most importantly, if divorce is viewed as ineffective, then children of subsequent marriages (or other sexual relations) will have the status of *mamzer*, an “illegitimate” individual who traditionally is not able to marry most other Jews.⁷ An individual who had a woman witness his or her *get*, and then changed views or affiliation, would then consider a child from a subsequent marriage to be a *mamzer*. The individual also would face significant halakhic objections to his or her remaining married to the new spouse. Furthermore, children of a subsequent marriage who came to view women’s witnessing as unacceptable, or who wished to marry someone with such views, would have no remedy. On a broader level, the involvement of women as witnesses in divorce would have harmful effects on the unity of *klal Yisrael*, effects much more severe than those of women serving as witnesses for marriage or even for conversion.⁸

Rabbi Grossman appropriately calls for the informed consent of congregants before women serve as witnesses for their documents of personal status; the congregant is to be advised of the risks involved, and then choose how to proceed. While such a requirement is important, the medical model of informed consent would have additional implications. The medical process of informed consent involves the physician’s recommendation to the patient.⁹ These risks would have to be taken into account by a rabbi in formulating a recommendation on this matter to those who are marrying, converting, or divorcing. In health care, even advocates of informed consent

⁷ There is a long tradition of reluctance to formally label an individual as a *mamzer*. The Conservative movement has approved a responsum that de facto renders the issue of *mamzerut* inoperative by ruling that evidence regarding *mamzerut* is not to be accepted (Rabbi Elie Spitz, “*Mamzerut*,” 2000). This position is not universally accepted in the Conservative movement, though, and certainly not by all in the Jewish community.

⁸ Some have suggested that a practice of women serving as witnesses for *gittin* would have no negative repercussions in practice, since *gittin* prepared under Conservative auspices would not be accepted regardless of the gender of witnesses, and Orthodox rabbis would readily invalidate an initial marriage performed under Conservative auspices. It is important to realize, however, that neither the Conservative nor the Orthodox movement is monolithic. First, some Conservative rabbis do not accept women as witnesses; we should not rely on them to invalidate marriages performed by Conservative colleagues, nor should we encourage them to do so. For some Orthodox rabbis and for some cases, *mamzerut* might not pose a practical problem, even following a *get* with women witnessing; and for some, any Conservative *get* would be rejected, even with male witnesses. There will still be a large number of cases in which a Conservative *get* with male witnesses would be accepted, but one with female witnesses would not. At best, the individuals involved would go through emotional turmoil, as the rabbi deliberates about whether he can find a way to rule that the individual’s parents were never really married to anyone, including each other. It seems likely, though, that there are many Orthodox rabbis who would be honest enough to say that a ceremony that appears to meet all halakhic requirements, followed by years of living together, establishes at least a *safek* (possibility) of *kiddushin*. As well, it is possible that an Orthodox rabbi officiated at the original marriage. Furthermore, our movement would violate traditional norms and weaken the Jewish community if we were to contribute to the splintering of the Jewish community by pushing moderate Orthodox rabbis away, adding to the pressures already on them to invalidate our movement the pressure of needing to do so to save an individual from disaster.

⁹ In a central secular work on informed consent, Ruth R. Faden and Tom L. Beauchamp write: “Professionals should disclose to those from whom they seek consent some core set of facts or propositions . . . including the professional’s recommendation, if there is one, and the reasons why the patient or subject should take the professional’s advice” (*A History and Theory of Informed Consent*, [New York: Oxford University Press, 1986], 308).

acknowledge competing ethical concerns that could prevent a health care professional from going along with a patient's desired course of action. Ruth Faden and Tom Beauchamp write that "the physician is of course enjoined from doing harm if interventions inflict unnecessary pain and suffering on patients." Ethical principles, including those of providing benefit and avoiding harm, "can have sufficient weight under some conditions to override respect for autonomy."¹⁰

In my judgment, the involvement of women as witnesses for purposes of marriage and conversion entails some risks to congregants, but the risks are small enough that, in many cases, a rabbi could in good conscience accept and even recommend such witnessing. At the current time, the risks entailed by women witnessing *gittin* are unacceptable. A woman's witnessing a *get* would render that document ineffective for virtually all Orthodox rabbis, and for some Conservative rabbis. This poses a much higher risk of the divorce being viewed as ineffective, and a child of a subsequent marriage being considered a *mamzer*, than the (existent but much less likely) risk of rejection of a *get* signed by men.¹¹

Rabbi Grossman acknowledges the potential problems of women serving as witnesses for *gittin*. She explicitly reserves for the Joint Bet Din the decision as to whether women should in practice serve as witnesses for *gittin*, and she pointedly omits *gittin* when she argues that "refusal to accept women as witnesses for marriage and conversion documents . . . embarrasses women as a class."¹² She argues that a formal moratorium against women serving as witnesses for these purposes is unnecessary, and might be construed as impugning the prudence of female rabbis. I agree that a formal moratorium is not appropriate (and that female rabbis as a class have equal discretion to that of male rabbis, and wise discretion would lead to rabbis refraining from having women serve as witnesses for *gittin*). At the same time, I believe that in formally endorsing the power of women to serve as a witness, a *poseik* has the responsibility to provide guidance on the proper exercise of this power.

Over time, I hope and expect that the activity of women as witnesses will enjoy overwhelming acceptance among Conservative Jews. Women's witnessing may well gain a degree of acceptance, at least *bediavad* (after the fact), among many in the Orthodox community (at least among those Orthodox who would not automatically reject any document from a Conservative rabbi). At that time, it could be appropriate to further extend support for the practice of women serving as witnesses to *gittin* as well. I hope that that time comes "speedily in our days." But that time has not yet arrived.

¹⁰ Faden and Beauchamp, 12, 18.

¹¹ In the words of Rabbi Miriam Spitzer: "I find it personally difficult to have to seek out men to serve on my *batei din* or sign my documents. Nonetheless, the frustration and unhappiness that I feel is nothing compared to the pain that could be caused a person who suddenly discovers him or herself not to be Jewish or to be a *mamzer*, etc. I can live with my pain, and I urge my colleagues, male and female, not to put personal feelings or the personal need to be a 'real rabbi' or anything like that, above the good of the Jewish people which we have been called to serve." It should be noted that Rabbi Spitzer argues against women serving as witnesses not only for divorce, as I have, but also more broadly, including conversion (Communication March 28, 2001, quoted with the permission of Rabbi Spitzer).

¹² Grossman, n. 97.