

# The Bais Din Process: Part II

## CHOOSING A BAIS DIN

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A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY SHIUR VIDEO

### CHOOSING A BAIS DIN:

Several years ago, there once was an interesting shailoh that arose regarding a Din Torah. It seems that a group of Sephardic Jews who lived in Mexico had their own shechitah. One day, a group of Chasidic Jews arrived and began performing shechitah there as well. The Sephardic shochtim felt that the newcomers were infringing on their territory, and were guilty of hasagas gevul. They called them to come to their Sephardic Bais din but the Chasidim insisted on having the case heard at their Chasidishe Bais din in Williamsburg.

This story highlights the question of how a Bais din is chosen and who has the right to demand which Bais din is used. While this case is somewhat atypical, a more common case is when two litigants from the same area disagree over which of the local Batei din should adjudicate their case. Who gets to choose which Bais din to go to?

The Shulchan Aruch rules that any three people, even three "hedyotos", inexperienced Dayanim, can form a Bais din and call people to appear before them. It is apparent from the Poskim that although the dayanim can be hedyotos, there is a minimum qualification they must have, as they cannot be "yoshvei keranos", idle people who hang out on street corners.

Although a Bais din of such Dayanim can force people to come to them, they can only do so if the person refuses to go to any Bais din whatsoever. If he says that he is willing to submit to a din Torah but does not want to use this particular Bais din, they cannot force him to come specifically to them.

Although the Shulchan Aruch says that if there is an established Bais din that is in a position of authority over an entire city, anyone who is summoned to a din Torah by that Bais din must appear before them, in our times, this concept does not seem to apply in any large city in America. Therefore, another type of Bais din could be used that both parties would submit to.

The Mishnah says that the most preferable type of Bais din is known as "zeh borer echad v'zeh borer echad." In this arrangement, each party chooses one of the dayanim, and the two chosen dayanim choose a third person to complete the Bais din. The Gemara explains that this is the best arrangement because each party feels that his case is understood by at least one of the dayanim. Both parties are confident that they are being properly represented and that justice is being

served.

Rashi seems to go a step further and implies that each of the two dayanim will lean towards the side that chooses them, with the third Dayan providing the balance. This leads us to ask how this is acceptable. We know that a dayan is not allowed to be biased towards one party. How could a system wherein two of the dayanim are working for the benefit of their "client" be considered the best system?

The Rosh explains that this was not Rashi's intent. He explains that Rashi is saying that the two parties think the dayan they chose is on their side. Thinking this makes them feel that the dayan is looking out for their interests, and gives them confidence in the outcome. This is the benefit of the arrangement. In truth, however, each dayan has to look at all aspects of the case and only issue an opinion if he firmly believes that it is impartial and fair.

The Rosh adds that even though both parties are allowed to choose one dayan, they cannot choose any random person they want. They have to choose someone who is "hagun", upright and trustworthy, as only such a person can be trusted to issue an impartial ruling.

### ZABLA TODAY

While the Shulchan Aruch and Rema rule that this form of a Bais din is the most preferable, the Pishei Teshuvos quotes the Panim Me'iros that speaks very strongly against the way it is done in today's times. He notes that there is a clear halacha that a dayan may not hear one party's version of events without the other side being present; therefore, it should be forbidden for either side to choose a dayan who is already familiar with their version of the story. While the intention of Zabla was for both sides to choose one dayan; however, that dayan has to abide by all the rules of Bais din. Unfortunately, he says, this was not properly upheld in later generations, and the system had become corrupted.

The Aruch Hashulchan excuses the current system by saying that because this has become the common custom, both sides implicitly agree to have one borer representing each of them, with the one impartial dayan casting the deciding vote. Thus, the system cannot be considered unjust.

Although the Aruch Hashulchan's logic may deem the system fair

enough to be used, it remains to be seen if it can still be considered the most preferable arrangement, as it is clearly not the same system as the one described in the Mishnah. The Shevet Halevi does, in fact, say that although the current system can be used, but if one party is not inclined to use it, he cannot be forced to do so because it is not the most ideal type of Bais din.

The Beer Moshe wrote a powerful teshuva in which he denounced the current form of Zabla and relates numerous horror stories of borerim twisting and distorting the truth to corrupt the p'sak. He writes that the system deteriorated to the point where borerim were being paid for their services and representing litigants as a career, and this led to many undesirable outcomes. The fact remains that the minhag is to follow the Aruch Hashulchan and permit such an arrangement to be used. Still and all, it is probably not the best-case scenario and it would seemingly be preferable to go to a Bais din of three impartial dayanim.

## TWO BATEI DIN IN ONE CITY

This takes us back to our original question of what to do when two batei din exist and the parties disagree about which one to go to.

The Semag, quoted by the Shulchan Aruch (14:3) rules that if two talmidei chochomim have batei din in the same city, even if one is a bigger talmid chochom than the other, the defendant who is being summoned to a din Torah can demand to go to the smaller talmid chochom's Bais din and refuse to go to the bigger one, if that is his preference. The Tur disagrees and says that he can be forced to go to the greater talmid chochom's Bais din in his city. The Vilna Gaon comments that, practically speaking, the one being summoned has the upper hand, and he usually will be able to choose which Bais din he is willing to appear before. The halacha is, however, that when the litigants are both in the same city, and the city has a local Bais din, the defendant cannot demand to go to a Bais din in another city, even if he prefers that one.

## LITIGANTS FROM DIFFERENT CITIES

The Rema speaks about a case where the claimant lives in one city and the defendant lives in another and rules that the defendant would usually be able to demand that the din Torah be held in his city. However, there are some exceptions to this rule. For example, if a businessman has a dispute with a customer and then moves to another city, the customer can demand that he come to a din Torah in the city where the incident took place. Even though the defendant now lives in another city, he can be forced to come to a din Torah in the city where the source of the dispute actually occurred. Similarly, if someone damages something in one city, even if he lives in another city, he can be forced to come to a din Torah in the place where the damage happened.

Furthermore, if someone has assets in one city, even if he does not live there, it is possible that he may be forced to appear at a din Torah in that city. This is because there are times when Bais din can seize assets by placing an ikul, an injunction on them until after a dispute is settled. (The times when this type of injunction can be used are limited and the exact circumstances when it is permitted to do so are beyond the scope of this article.) In such cases, it is possible that the defendant could be forced to appear before a Bais din in the city where his assets are being held.

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