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The Role of the Witness in Athenian Law

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8: THE ROLE OF THE WITNESS IN ATHENIAN LAW

Gerhard Thür

I

The authority of the great philosopher Aristotle and the suggestive power of his systematic mind misled the compilers of older handbooks on the law in Athens and clouded their view of Athenian legal procedure. In their chapters on evidentiary procedure, they accept the five "nonartistic proofs" (*atechnoi pisteis*) canonized by Aristotle in his *Rhetoric* (1375a24): *nomoi, martyres, synthēkai, basanoi,* and *horkos* (laws, witnesses, contracts, confessions under torture, and oath).[1] More recent studies have recognized that only one form of evidence, witnesses, had legal significance in the practice of the Athenian jury courts.[2] Aside from a few regulations governing witness testimony, Athenian law had no legally specified rules of evidence. We cannot take the various methods of finding truth in modern law as a natural given, nor can we uncritically apply those standards to the large Athenian courts (*dikastēria*). In Athenian law, the principle of determining the truth is not primary, but rather the principle of equal opportunity:[3] both prosecutors and defendants should have a fair opportunity to present their positions to a body of fellow citizens selected objectively and not influenced by bribery or pressure. This assembly of jurors decides the case immediately after the speeches, rendering their first and final decision without deliberating or giving reasons. Their verdict is a simple yes or

[1] Lipsius (1905–1915: 866–900), Harrison (1971: 133–54), MacDowell (1978: 242–7). Following the modern legal categories more closely, Bonner (1905), Bonner and Smith (1938, 117–44).

[2] Thür (1977: 316–9), Todd (1990: 33) and (1996: 96f.).

[3] Thür (2000: 49).

no (guilty or not guilty). In Athens, legal conflict was a part of direct democracy. The Athenians thought that if the democratic principles of fairness were obeyed in court, then the broader goals of legal procedure, such as truth and justice, would best be assured.

The democratic regulations include: the most equitable allotment possible of jurors from all ten tribes (*phylai*) of the citizens on the day of the trial and their distribution among the *dikastēria*; allotting each juror's seat within the courtroom he already had been allotted to; and the double allotment that assigns the available court magistrates to preside over of the *dikastēria* in session that day. Before the moment of the hearing neither the litigants nor the court official know which citizens will be deciding the case. By mixing up the jurors (*dikastai*) from all ten tribes and then further mixing up their placement, supporters of the prosecutor or defendant are prevented from forming groups within the juries (that numbered from 201 to 1501) and disturbing the delivery of the speeches. Through this procedure and through a perfectly organized system of voting by secret ballot, an objective decision – at least as seen from an external perspective – is best guaranteed. The entire process is described in the *Athenaion Politeia* (Chapters 63–69; composed sometime after 335) with great attention to detail and has been confirmed by archaeological evidence.[4] A further, very simple mechanism also contributed to the principle of equal opportunity: exactly the same amount of time for speaking was measured out for the prosecutor and defendant by a waterclock (*klepsydra*). The times ranged from approximately fifteen minutes (five *choes* of water) for the simplest private case to exactly one-third of the day for the most important political cases. The length of the day was calculated according to the daylight of the shortest day in December (*Ath. Pol.* 67.2–5, unfortunately only fragmentarily preserved; cf. Harpokration *diametrēmenē hēmera*).

The list of nonartistic proofs I mentioned at the beginning is also related to the time allowed for speaking and the litigants' method of pleading. In contrast to the speech, which was composed by a logographer according to the art (*technē*) of rhetoric and delivered by the litigant himself and his supporting speakers (*sunēgoroi*), these nonartistic proofs were written documents[5] that the court secretary (*grammateus*) read aloud at the request of the speaker. In court, no speaker ever held a document in his hand and read it aloud to the jurors. While the secretary read, the waterclock stopped, unless the time allotted to the speaker was

[4] Rhodes (1981: 697–735), Boegehold (1995).

[5] Gagarin (1990: 24), "Evidentiary material."

calculated according to the length of the day, because the day cannot be lengthened. Among the examples of the written documents that the secretary read aloud outside of the allotted speech time, *Ath. Pol.* (67.3) names law (*nomos*) and witness testimony (*martyria*), but two other types of documents, which may have been located in the gaps that precede and follow in the text, can perhaps be added.[6] The documents used by the litigants in the main trial before the jurors are collected during arbitration and then placed in two containers called *echinoi* (we now know that these were clay jars),[7] which were then sealed and brought into court so that the documents could be read aloud. In a well-preserved section of the *Ath. Pol.* (53.2) discussing the preliminary hearing before the official arbitrators (*diaitētai*), three types of documents are listed (again as examples): witness testimonies (*martyriai*), formal challenges (*proklēseis*), and laws (*nomoi*). Neither in practice within or outside of Athens[8] nor in rhetorical theory[9] was there agreement on a firm number or typology of documents that were read out before the court; a litigant was free to decide what he wished to have read aloud. By interrupting the coherence of his speech he did run the risk that the jurors would lose interest or become impatient and begin to protest. But according to the court speeches and the more general sources cited above, witness testimonies in moderate numbers[10] were a standard part of the trial process in the Athenian courts as well as in similarly organized court procedures elsewhere.

The litigants' and their supporters' entire performance in court basically served to provide proof (*pistis*) of their own side of the case. The litigants' presentations became credible and convincing both through the narration of the facts, strengthened by additional arguments from probability (that is by "artistic proofs," *entechnoi pisteis*), and also by reading aloud written documents ("nonartistic proofs," *atechnoi pisteis*) whose precise wording was objectively determined ahead of time, thus removing them from the art of rhetoric. But the rhetorical handbooks naturally show how to include these documents in the argument. Seen

[6] The text probably enumerates: [*psēphisma*], *nomos, mar*[*tyria, symbolon*]; see Rhodes (1981: 722).

[7] Boegehold (1995: 79–81), E 1 (T 305), fourth to third centuries B.C.; Wallace (2001).

[8] *Ath. Pol.* 53.2: *martyriai, proklēseis, nomoi* (also 53.3); 67.3: see above, note 6; *IPArk* 17.42–6 (Stymphalos, 303–300 B.C.): *martyriai, syngraphai*; *IvKnidos*, I (*IK* 41) 221 (*Syll.*[3] 953) 43–5 (Kalymna, circa 300 B.C.): *psēphismata, proklēseis, grapha tas dikas, allo eg damosiou, martyria.*

[9] Aristot. *Rhet.* 1.2 (1355b36): *martyres, basanoi, syngraphai;* 1.15 (1375a24): *nomoi, martyres, synthēkai, basanoi, horkos*; Anaxim. *Rhet.* 7.2: *martyres, basanoi, horkos*. See Mirhady (1991a), Carey (1994).

[10] See the statistics by Todd (1990: 29) and Rubinstein (2004) (appendices).

in this way, it is only logical that rhetorical theory includes "laws" among the nonartistic proofs as objectively preexisting texts that are read aloud by the secretary, even though legal statutes, now just as then, have a status completely different from facts that are affirmed but (in the modern sense) remain to be proved.

Like laws, all other nonartistic proofs except witness testimony should also be excluded from the law of evidence as we understand it today. To prove the authenticity of a contract or other document read aloud by the secretary, the speaker relied entirely on witnesses. In the short time of the trial, the popular courts had no chance to examine the authenticity of a document. Certainly litigants could settle the matter ahead of time in a preliminary hearing – in the *anakrisis* before the court magistrate or in the official arbitration (*diaita*, see below) – or also in a private meeting. If someone wished to refer to a document such as a will during the trial in front of the jurors (Dem. 36.7; 46.8), he summoned witnesses and challenged his opponent beforehand either to concede that the copy was true or to open the sealed original that was deposited with a third party for safekeeping. If the opponent granted that the copy was true and the original document was authentic, then "proof" of the document was unnecessary. If he refused the formal challenge (*proklēsis*), however, those present as witnesses at the time would confirm this in the trial, and following the rules of rhetorical art, the speaker would draw his own more or less detailed conclusion about the accuracy of the copy and the authenticity of the original.

The challenge (*proklēsis*) issued before witnesses also is important for the rhetorical argument about the two remaining nonartistic proofs, slave testimony under torture (*basanos*) and oath (*horkos*). Both of these could be described as evidence in today's sense, but Athens was peculiar in that these types of evidence took place outside of court, not before the jurors. These procedures, interrogation under torture and oath, became relevant to the trial only if both parties agreed. Because slaves were not normally allowed in court as witnesses, a litigant could interrogate his opponent's slaves under torture about a particular topic only if his opponent agreed.[11] In the same way, the parties could agree that one would accept an oath sworn by the other on a particular subject. In such challenges it is often suggested that the decision for the entire case should depend on the outcome of these procedures taking place outside of court.[12] But in most cases it remains merely the suggestion of one

[11] Thür (1977).

[12] Thür (1977: 214–32), cf. Mirhady (1996) and Thür (1996b).

party, because the opponent does not, as a rule, accept the challenge. But even in these cases, the speaker can have the written text of the challenge read to the jurors and confirmed by the witnesses present at the time, and can draw his own conclusions, as Aristotle recommends (*Rhetoric* 1.15). Then, the nonartistic proof as a document is not the exact text of a testimony under torture or a sworn oath, but rather the text of the challenge, where the contents of the interrogation or of the oath to be sworn are recorded precisely. Thus only the fact that the challenge happened is proven, not the contents of the challenge that was proposed to no effect.[13] For Athenian procedure, then, more precise than Aristotle's textbook on rhetoric is *Ath. Pol.* 53.2, where he gives the documents typically sent by the public arbitrator to be read aloud to the jury courts as "laws, witness testimonies, and challenges," without worrying about the broader application of the challenge.

When describing the law of evidence in classical Athens, necessarily in the terminology of modern law, we should not make the mistake of seeing the list of nonartistic proofs, which merely groups together a few types of documents coming from outside the court speech, as a systematic account of evidence in our sense. Evidence (*pistis*) in the rhetorical sense is a general means of persuasion, not of legal proof.

II

From the considerations put forth thus far, one can conclude that – contrary to rhetorical theory and against the expectations of a modern observer – only one type of evidence, witnesses, was used directly in the procedure before the jury courts. The narrow time frame alone in which the trial took place suggests that the process of presenting witnesses' testimony in Athens was essentially different from modern evidentiary procedures. In the following sections the few rules governing the testimony of witnesses will be discussed: (1) witness qualifications, (2) witness formulas and types of testimony, (3) arbitration and witness obligation, (4) the witness in the main trial, and (5) the false witness. In Section III, we will consider the function of witnesses in the overall structure of litigation at Athens.

(1) The first question, who is allowed to be a witness in the *dikastēria*, already shows that Athenian law was far from exhausting all possibilities of determining material truth. Only free adult males were

[13] Thür (1996b: 132) against Mirhady (1996).

allowed to be witnesses. Slaves of either gender, as previously mentioned, were normally subjected to interrogation under torture carried out jointly by both parties outside of court. In the court speeches, the parties often mention having challenged each other, but no evidence of this kind is ever used in a trial, or even mentioned as being used. Likewise, the knowledge women held, which was often decisive in inheritance speeches, could be introduced only indirectly. Either the woman affirmed her knowledge outside of the court through an oath – in Dem. 29.33, and 55.27, for example, the speakers challenge their opponents to agree to it but no oaths are sworn – or the woman's male authority (*kyrios*) testified for her (Dem. 57.67) with her consent (Isai. 12.5). A woman did not appear in court on her own behalf, either as a litigant or witness, nor could she be held legally responsible for perjury or for the false testimony of her *kyrios*. Foreigners, however, could be witnesses, perhaps by special regulations or agreements between states.

Whether slaves and women could testify in private homicide cases is disputed.[14] Anyhow, the sacred foundations of homicide law resulted in several peculiarities, above all solemn oaths. Aside from homicide cases, slaves managing their businesses independently could apparently litigate and testify about their own affairs.[15] From these regulations we see that the ability to testify did not depend on a person's mental capacity but was seen as the privilege of appearing in public on one's own, before citizens assembled as jurors in court.

Litigants and their *sunēgoroi* undoubtedly had the right to speak in court, but were they also authorized or obligated to appear as witnesses? A litigant could not be a witness in court in his own case in order to increase the credibility of his plea (Dem. 46.9). Only in a *diamartyria* could someone be a witness in his own case (Dem. 44.42; Isai. 7.3), but such cases did not involve a witness testifying in court but rather a formal deposition before the archon that he must not hand out the inheritance to more distant relatives because legitimate sons exist.[16] After a *diamartyria*, the archon's hands are tied unless formally effective, extrajudicial testimony is eliminated by a successful suit for false witness (see Section II.5).

Just as a litigant cannot force his own testimony on the court, he also cannot force his opponent to be a witness: "The two litigants must

[14] Harrison (1971: 136).

[15] E. Cohen (1992: 96–8).

[16] Wolff (1966: 122), Harrison (1971: 124–31); for other forms of *diamartyria*, see Wallace (2001).

answer each other's questions, but are not obligated to be witnesses" (law cited in Dem. 46.10). This rule refers primarily to pretrial procedure. In the *anakrisis* (preliminary examination) before the magistrate or in the public arbitration, each litigant prepares step by step the case he will present in a continuous speech at the trial in court. We can call this the "dialectical" stage of procedure, in contrast to the "rhetorical" stage, when his timed pleading is cohesively presented in court.[17] In pretrial proceedings a litigant questioned and challenged his opponent before witnesses, and, as we will see, the litigant had to show to his opponent all the documents that would be read aloud in court, which could provoke more questions and challenges. At every step, either litigant must cooperate to ensure a fair preparation for the main trial. This obligation, however, does not extend to compelling one party to testify for the other.

What is forbidden for the litigants for obvious reasons, however, is permitted for their supporting speakers (*sunēgoroi*), who argue alongside them in court. As a result, a paradigmatic trial strategy developed of presenting the *sunēgoros* as a witness immediately before he gave his supporting speech (Isai. 12.1, 4; Aisch. 2.170, 184), thus emphasizing that, like a witness, the *sunēgoros* himself risks a suit for false testimony.[18] The extant speeches from witness trials show that their testimonies were in fact attacked under every conceivable pretext, whereas the only risk that the *sunēgoros* faced – that he would be prosecuted for "paid legal assistance" – was negligible: the acceptance of money was difficult to prove, but it was quite easy to twist the wording of a deposition and present it as false. It is easy to delineate the boundaries between *sunēgoria* and witness testimony, when a witness said nothing but merely confirmed a written document that was read aloud in court, but the difference may seem problematic during the period when testimony was presented orally – ostensibly in one's own words.[19] This problem is only apparent. As I will soon show, even oral testimony in fact adhered to a fixed formula that clearly distinguished it from the unconstrained speech of the *sunēgoros*.

(2) Particularly informative are the witness formulas, which, unlike the issue of oral versus written testimony, have received too little attention until now. The witness accepts responsibility that a statement, carefully formulated ahead of time, corresponds to the truth. Beyond

[17] Thür (1977: 156).

[18] Rubinstein (2000: 71).

[19] Rubinstein (2000: 72–5).

that, he gives no further information of any kind to the court. In the fourth century this statement was commonly prepared before the preliminary hearing by the litigant who wanted to present the testimony in court and was written on a whitened wooden tablet (Dem. 47.11). Almost throughout, the wording adheres to a set formula. After the name of the witness or witnesses come, for example, the words "testifies to knowing that Neaira was a slave of Nikarete and . . ." (Dem. 59.23) or "testify to knowing that Phylomache, Euboulides' mother, was considered the sister of Polemon . . ." (Dem. 43.35). The formulaic verb "know" (*eidenai*) introduces a subordinate clause that precisely expresses the fact to be proven. The same formula, "to know" something, is used to specify the subject about which a slave will be interrogated under torture in a private *basanos* procedure: "I requested from him [Onetor] three slaves who knew that the woman lived with him in marriage . . ." (Dem. 30.35; reporting a challenge).[20]

In witness testimonies, the verb "be present" (*pareinai, paragenesthai*), is also used in a similar way as "know": ". . . testify to having been present before the arbitrator when Philomache defeated all other claimants to the estate" (Dem. 43.31). "Having been present" is normally included in the testimony of witnesses who were summoned to business transactions or important procedural transactions. By contrast, most persons who testify that they "know" are accidental witnesses to an event. A third formulaic verb for expressing the subject of witness testimony is "hear" (*akouein*): ". . . testify to having heard from their father that Polemon had no brother but a sister, Philomache" (Dem. 43.36). Such hearsay evidence was only allowed if the informant, the bearer of "knowledge," was already dead. Sometimes the witness's relationship to the litigant is recorded in the deposition just before the subject of the testimony, particularly to point out kinship and therefore the competence of the witness (". . . testifies to being a relative and to having heard . . ." Dem. 43.42; cf. 35–46). The three different formulaic words that introduce the subject of the testimony are also found in the legal regulations underlying the speaker's argument in Dem. 46.6–7: "The laws prescribe that a person should testify to what he knows or to events at which he was present, and that this should be recorded in a document so that no one could delete something from, or add something to, the written text. They do not allow testimony from hearsay while someone is still alive, but only after his death."

[20] Thür (1977: 128f.).

This passage could give the impression that a fixed formula was only introduced with the written form of testimony. Scholars dispute not only the date when the Athenians changed from oral to written testimony but also the reason for this change.[21] The innovation is probably connected with the reform of pretrial procedure, when the circle of those responsible was expanded to include all sixty-year-old citizens who, as "arbitrators by lot," performed a similar function to the archons in the *anakrisis*, preparatory to trial.[22] In fact, the clay jars (*echinoi*) in which documents for trial are stored (*Ath. Pol.* 53.2, see above, Section II.1) are mentioned in connection with public arbitration.[23] Presumably public arbitration, which was established soon after the restoration of the democracy in 403/2, needed more stringent public control than the preliminary hearing before the archons. When witness testimony was submitted in written form, a litigant could be confident that in the main trial his opponent would not change the wording of the testimonies announced at the arbitration. For trials in which the same archon presided over both the preliminary hearing and the main trial, this risk was minimal. These conclusions, however, are not directly provable from the sources. The only certainty is that from the 370s, at the latest, speakers in court asked the clerk to read out the witness testimonies, whereas in the fifth century, they asked the witnesses "to speak."[24]

Giving oral testimony is typically understood as if the witness described relevant facts to the court in his own words,[25] whereas a fixed formula was only introduced along with written testimony. Two passages in particular are cited as evidence that witnesses recounted events in their own words: Andok. 1.69, "They will mount the speaker's platform and speak to you as long as you want to listen ..."; and Lys. 17.2, "... they will recount to you ... and testify."[26] Upon closer examination, however, both speeches contain clear hints that oral testimony was already couched in the above-stated formula. For instance, Andokides (1.69) asserts that the relatives he saved from the death penalty "knew" the information best; we can therefore assume that as witnesses, they described their rescue with similar statements using *eidenai*

[21] Rubinstein (2000: 72–4), with references to earlier works.

[22] See Scafuro (1997: 126f. and 383–92) (opposed in part by Thür 2002: 408f.).

[23] However, the only known example of an *echinos* (above, n. 7) comes from an *anakrisis*.

[24] Leisi (1908: 85f.), Rubinstein (2000: 72, n. 143).

[25] Bonner (1905: 46f.), Leisi (1908: 86f.), Rubinstein (2000: 72), Gagarin (2002: 138), *contra* Thür (1995: 329).

[26] Rubinstein (2000: 73).

("know"). And the restriction that follows – "as long as you (the judges) want to listen" – refers grammatically not to the content of the witnesses' statements or their speaking, but rather to the number of witnesses who, pronouncing identical formulas, would be coming up to the speaker's platform (*bēma*). For good reason (cf. 1.47) Andokides has not called all eleven relatives mentioned in 1.68 but already stopped the process earlier. The alleged desire of the jurors to listen (or not) is a rhetorical trope, like the challenge to the jurors in 1.70 to request the completion of an argument that just ended. In the second passage (Lys. 17.2) both verbs known from the formula are in fact used: "those who 'know' more than I and 'were present' when that man concluded the deal will recount to you and testify." Here too, obviously, the witnesses' narratives consist in the recital of formally introduced statements that were agreed on with the litigant ahead of time.

From these passages, one can conclude that in the change from oral to written testimony only the medium, not the formula, changed; what was previously stored only in memory was now documented. Further evidence that oral testimony follows a fixed formula is the *diōmosia*, the statement that a witness in a homicide case must give under oath, which is also introduced with the verb "know" before the introduction of written testimony (Ant. 1.8, 28). In the same way the subjects about which slaves are to be tortured, in the fifth and into the fourth centuries, are formulated consistently as what the slave "knows."[27]

We may conclude that the boundary between witnesses and *sunēgoroi* was always clear. The witness used formulaic words and was responsible for each and every word of his formulaic statement under *dikē pseudomartyriōn* (suit for false testimony – Section II.5). In the period of oral testimony, the memory of the participants was obviously sufficient to ensure the wording, but in accordance with the bureaucratic regulations of the restored democracy, testimony proceeded from the pretrial stage to the main hearing and, if necessary, to the suit for false testimony in the form of an unalterable document.

(3) If we follow the course of a trial, the witness testimony (that, as we have seen, in each case was prepared and formulated by the parties in private) first appears publicly during the pretrial proceedings. In the scholarship, both the purpose of the different types of pretrial proceedings and the function of the witnesses in the whole trial are disputed. The first issue can be considered only briefly here, the second will be

[27] Thür (1977: 128, n. 155; 131).

treated more fully later (III), after the overall legal framework of the evidence from witness testimony is clarified.

During pretrial proceedings, the witness first had to state his view of the prepared testimony. If he refused to appear, he exposed himself to compliance by force. Cases that fell under the jurisdiction of one of the nine archons went through a preliminary hearing called the *anakrisis*.[28] Presumably, at this time the archon would have checked on his authority to administer the case and any other formal requirements before conducting the trial in a court session under his control. It is thought that the other trials, which fell under the jurisdiction of the Forty (*Ath. Pol.* 53.1–3), would have been prepared totally differently: these trials would have to go through arbitration before a public arbitrator (*diaitētēs*), a sixty-year-old citizen chosen by lot; but each party could "appeal" the arbitrator's decision, and a "higher court" presided over by one of the Forty made the decision.

Steinwenter[29] has already shown that the arbitrator's verdict was at most the basis for a free and amicable agreement between parties, but otherwise was not legally binding. If the parties did not come to an amicable agreement, the trial took its normal path toward the sole binding decision of the court. As mentioned above, the legal consequence of public arbitration rested only in the fact that the parties "could use no documents other than those placed in the *echinos* before the arbitrator" (*Ath. Pol.* 53.3). We can thus see the procedural purpose of public arbitration as (in addition to attempting to end the conflict amicably) fairly preparing for the main trial. Following dialectical rules, the parties were supposed to clarify their opposing positions. As its name ("examination") suggests, the *anakrisis* before the archons also had this dialectic nature, though the archon did not question the litigants (at least not about formal requirements) but rather the litigants examined each other.[30] Because *echinoi* are never mentioned in the literary sources in connection with the *anakrisis*, Lämmli[31] concluded that the rule of fairness was not in force there and new documents, even witness testimonies, could be introduced until the beginning of the main trial. The discovery of a lid with an inscription showing that the *echinos* held documents from an *anakrisis*[32] proved the opposite. Accordingly, the litigants had to let each other see all their evidence

[28] For details, see Harrison (1971: 94–105).

[29] Steinwenter (1925: 68–73), Lämmli (1938: 92).

[30] Thür (1977: 76).

[31] Lämmli (1938: 117) still generally followed, see Wallace (2001: 98).

[32] See above, n. 7. The literary sources examined by Lämmli (1938) need further discussion.

in every procedure before the main trial.[33] This does not mean, however, that witnesses gave testimonies in the *anakrisis* or in the public arbitration.

Because the witness did not give testimony in either pretrial proceeding, he was not liable under *dikē pseudomartyriōn* for his appearance there. However, he was responsible for appearing at the pretrial proceedings before either the archon or the arbitrator chosen by lot. Each litigant had the opportunity to summon (*kalein, proskalein*) privately a person he would present as a witness. In pretrial proceedings, the witness had to declare if he would confirm the formulaic testimony presented to him in court, or would at once "swear himself exempt" by an oath called *exōmosia* (Pollux 8.37): "He must either confirm or swear himself exempt that he does not know or was not present." From the words used by the lexicographer, clearly taken from the formula for witness testimony, it is easy to see that in the *exōmosia* the witness does not excuse himself by "not knowing"; rather, he takes an oath that the statement devised by the litigant and formulated as the witness's knowledge is not true. A witness swears "not to have been present" if he denies that he was summoned for an act of legal significance. Denial under oath, however, has no legal consequences; a witness can be prosecuted under *dikē pseudomartyriōn* only if he confirms a stated fact during the trial before the jurors. From Dem. 45.58, we learn that the *exōmosia* normally took place before the trial, in this case at the public arbitration, and that the oath ceremony claimed a considerable amount of time. Moreover, *Ath. Pol.* mentions (55.5; cf. 7.1) that, as a particularly celebrated oath, the *exōmosia* was sworn on the stone before the Stoa of the archon basileus.[34]

Instead of swearing oneself exempt, an unwilling witness could also decide to stay away from the proceeding altogether; however, he thereby exposed himself to legal force by the litigant who summoned him. One source (Dem. 49.19–21) gives information about this, during arbitration, but much of this account remains unclear.[35] The witness Antiphanes did not appear at the last session of the public arbitration in which his testimony should have been placed in the *echinos*. The passage states clearly that testifying before the public arbitrator meant nothing more than introducing the formulaic testimony in the presence

[33] *IPArk* 17.43–46 (Stymphalos, 303–300 B.C.) has the same regulation; cf. the commentary on p. 236.

[34] The *lithos* has been excavated in front of the Stoa, Rhodes 1981, 136; 620. *Ath. Pol.* 55.5 is speaking about the *exōmosia* generally (*contra* Carey 1995b: 115); cf. Lyk. 1.20 (see below, Section II.4 and Appendix).

[35] Harrison (1971: 141f.).

of the witness. Out of fairness, the identity of the witness and the wording of his testimony had to be revealed to the opposing litigant. The arbitrator could only accept a deposition in the presence of those who would confirm them in court. Because Antiphanes did not appear, Apollodoros, who had summoned the witness in vain, paid "a drachma for the refusal of a witness to appear" before the close of the arbitration (49.19).

Apollodoros then brought a suit for avoiding testimony (*dikē lipomartyriou*) against Antiphanes to prosecute him for the damage (*blabē*) he had caused (49.20). Of course, Apollodorus incurred damages only if he were to lose the main trial.[36] Nevertheless, if he mentioned in court that the arbitrator did not consider the defendant, Timotheus, guilty after he waited until night for the witness to appear, but instead ruled in his favor, he is still not making an argument for damages but is rather accusing the absent witness. Oddly enough, in the main trial Apollodoros still tries to get Antiphanes to confirm two statements under oath (49.20). From this passage, we can conclude that Antiphanes was actually present in court, but most likely as a witness for the opponent. Apollodoros' irrelevant challenge to Antiphanes to swear an oath on the spot is meant to disguise his failure at the arbitration to get Antiphanes to show up as witness for his side. Dem. 49.19 has been wrongly understood to mean that a witness can be sentenced to pay the amount of damage caused by a "broken promise" to appear.[37] By comparison with a parallel regulation from Stymphalos, however, it is clear that to avoid becoming liable to a penalty the witness had to comply with a private summons, even without consenting.[38]

In the remaining sources from Athens, it is not from arbitration that the witness is absent, but rather from the main trial. This topic will be discussed in the next section. There are no sources dealing with the absence of a witness from the *anakrisis*, but at least for political trials we can speculate (Section II.4). Naturally, no force could be used against individuals who had already been convicted twice for false testimony, because a third conviction threatened them with disenfranchisement (*atimia*) (Hyp. 2.12). As a consequence, they were also exempted from swearing an *exōmosia*. This regulation explicitly protected

[36] If Apollodoros won his case against Timotheus, the same problem would have arisen as in a *dikē pseudomartyriōn* by a winning party (see below, Section II.5); in both instances, the loss is not financial, but rather one of reputation.

[37] Lipsius (1905–1915: 659); *contra* Harrison (1971: 142f.).

[38] *IPArk* 17.10–14 (303–300 B.C.): "to not be present" after being summoned could result in being penalized for the entire amount of the claim.

even those witnesses who "had been present," when summoned at business transactions – a stipulation that could have caused trouble for some parties involved in a contract case. Nevertheless, these individuals could still appear as witnesses of their own free will.

(4) At the conclusion of the arbitration process, which could extend over several sessions, the *thesmothetēs* determined a time for the trial (*Ath. Pol.* 59.1). A court had to be available with adequate capacity for the size of the jury. For private suits, 201 or 401 jurors were needed (*Ath. Pol.* 53.3), and 501 for most public cases. The trial had to be conducted according to a strict schedule because of the costs associated with jury payment. A court could decide several cases on the same day. Because of the pressure of time and the large number of jurors, only rudimentary means were developed for presenting one's evidence. The most important tool for persuading the court were the speeches of the two litigants, each forming a cohesive unit. The length of their speeches was determined exactly by the time measured out by the waterclock (*klepsydra*). The trial was the domain of rhetoric. A litigant could lengthen the time of his presentation as much as he wanted by having documents read aloud because then the waterclock was stopped, but this tactic ran into psychological limitations; the audience, fellow citizens serving one day as jurors, preferred to hear exciting stories rather than dry accounts of deeds.

Evidence from witnesses also had to fit into these limits. The most important features have already been mentioned: at the trial the witness had to appear before the court in person and had to go up to, or onto, the speaker's platform (*bēma*). There, he had to either recite the formulaic testimony himself or, later, confirm it silently by nodding after the secretary read the text aloud. He never had to answer any questions.[39] Only the fact that he was there in person, that he was either praised or insulted by the litigants in their speeches, and that by testifying he risked a suit for false witness gave the jurors an idea whether he was telling the truth in the testimony created for him by the litigant. The jurors had an important criterion for assessing the testimony in the rule that before the jurors voted, the litigants had to announce by *episkēpsis* if they wished to bring a *dikē pseudomartyriōn* against a witness (*Ath. Pol.* 68.4). No further measures for evaluating the truth of a testimony were available to the court. Because the verdict in the *dikastērion* occurred simply by

[39] The unique "questioning" of a witness in Andok. 1.14 is nothing other than the deposition pronounced by the party himself and the witness answering "I know." An *anakrisis* of a witness is mentioned only in *IvKnidos* 221.67–72 (see above, n. 8).

a vote without deliberation (*Ath. Pol.* 69.1) and no reasons were given, no one could know what influence a particular witness had exerted on the outcome of a trial.

Under these circumstances, it is evident that the litigants were given the means to compel a witness to appear for the main trial too. At the trial in court, unlike the preliminary proceedings, the witness took personal responsibility for the truth of the facts asserted by the litigant. Forcing a witness to appear was not conceivable in Athens. Compulsion could only be applied indirectly through fines or penalties. We must keep in mind that by swearing the *exōmosia* a witness could avoid all responsibility for the content of the statement. For practical reasons, the *exōmosia* was already sworn during arbitration.[40]

One simple means of indirectly forcing a witness to appear before the court was to have him officially summoned (*klēteuein*) by the court secretary (Aisch. 2.68). In view of the harsh sanctions that accompany this official summons, we must assume that *klēteuein* is allowed only against absent witnesses (*mē elthein*, Lyk. 1.20) who had already been summoned by the litigant and appeared during the preliminary hearing. Only someone who is prepared for his appearance before the court, or who is present but not willing to go to the speaker's platform, can fairly be put under pressure by being officially summoned.

Klēteuein has different consequences in private and public cases.[41] Although we do not know what means of compulsion could be used against a witness who failed to appear for the *anakrisis* in a public trial, we are well-informed about the next stage and the compulsion used to get witnesses to appear in court and approach the speaker's platform. It is certain that a reluctant witness in political trials had to pay a fine of a thousand drachmas (Aisch. 1.46). According to the general view, the witness had to pay this fine only if he did not approach the speaker's platform when summoned. The thousand drachma fine is exactly the same penalty a prosecutor had to pay if he abandoned his case or received less than one-fifth of the votes (Dem. 21.47). Just like the prosecutor, the witness in political trials should not yield to threats or bribery, after he has already taken a position during the preliminary hearing. For the most part, a witness in a public trial could not be held accountable for material damages (*blabē*) as a witness in a private suit could. Therefore, a fixed fine, paid to the state, seems appropriate.[42]

[40] See Appendix and above, n. 34.

[41] First seen by Rubinstein (2004).

[42] Rubinstein (2004: 109–11).

Only in the *anakrisis* of a public trial was someone who summoned a witness uncertain whether he would confirm the testimony in the main trial or take the *exōmosia* at once. This situation is best suited for the almost formulaic expression used in connection with *klēteuein*, "the witness may (in the future) confirm the testimony or (immediately) swear the *exōmosia*." Perhaps one can conclude from this that *klēteuein* was also permissible in preliminary hearings along with the fine of one thousand drachmas, of course only against witnesses privately summoned according to the rules.

In private cases the expression "*klēteuein*" is used only once in a comparable sense (Dem. 32.30). Because a witness who has already failed to appear at the public arbitration – as shown above – is prosecuted with *dikē lipomartyriou* for *blabē* (Dem. 49.20), it is unlikely that the penalty of 1,000 drachmas would also be imposed on him for failing to appear in court. Perhaps *klēteuein* in private cases was a procedure like *episkēpsis*, undertaken before the vote as a condition for bringing a *dikē lipomartyriou*,[43] to take revenge for sustained damages or an injured reputation. Dem. 32.30 deals with none of these questions. Failure to appear as a witness in court was clearly not a common problem in private suits.

In sum, we can assume that a litigant was able to compel witnesses to appear both in preliminary hearings and in the main trial. Although the *exōmosia* was sworn only in preliminary trials, the witnesses who exempted themselves under oath still had to go before the jurors in the main trial and stand by their oath in person. This is indicated by those passages we have thus far examined – and refuted – as arguments that an *exōmosia* could also still be sworn before the court. These passages, however, can best be explained by the rhetorical device of feigned uncertainty.

The texts cited thus far deal with reluctant witnesses, but Athenian law also solved the problem of witnesses who were unable to appear at the main trial because of illness or travel. Before the trial, these individuals, in the presence of other witnesses, confirmed the testimony formulated by the litigant in a procedure called the *ekmartyria* (Dem. 46.7).[44] The original testimony of the absent witnesses and the testimony of the present witnesses that they were properly transmitting the original

[43] Rubinstein (2004: n. 22) understands *klēteuein* here as the "formal summons to a legal action"; but the international political affair in Dem. 18.150 is not comparable to the private one of the poor metic Protos in Dem. 32.

[44] Harrison (1971: 146f.); similarly, IvKnidos 221.47–65 (above, n. 8); Pap. Hal. 1.70–73.

testimony were combined into a single document, in which the testimonies of the witnesses who were present in court were added at the end of the original deposition that the absent witness had given before the trial (Dem. 35.20, 34). An *ekmartyria* could be attacked at the end of the trial in a single *episkēpsis* for false content as well as for false transmission.

(5) Only after the verdict was it possible to test the truth of testimony taken during the trial. If a party had promptly protested through *episkēpsis* against one of his opponent's witnesses,[45] he could bring a suit for false testimony (*dikē pseudomartyriōn*). We do not know what happened if the litigant did not bring suit after his *episkēpsis*; perhaps the simple attack was considered *hybris*. Deposition suits were mostly directed against false statements, but in the case of *diamartyria*, they were also brought against false legal claims (e.g., one's status as the legitimate son of the deceased was disputed in the deposition suit). Finally, suit could be brought against filing an inadmissible deposition, one based on hearsay from a person still alive. It is generally accepted that the prosecutor's goal in this type of suit is to receive payment of a fine in the amount of the damage (*blabē*) that resulted from the testimony.[46] This sanction is meaningless, however, if the winner in the main trial brings a deposition suit (Lys. 10.22; Isokr. 18.54–56) or if a witness who testified in a public trial is prosecuted. In these cases, it is not a matter of material damage, but only of one's injured reputation, which to be sure always played a role along with *blabē*. Because a witness who had been convicted three times lost his civil rights, it might have been enough for the prosecutor to bring the witness one step closer to *atimia*. It is unclear if, and under what conditions, the trial could be reopened after the conviction of a witness (*anadikia*).[47] We can assume that, as a rule, the conviction of the witness did not set aside the verdict of the main trial.

III

The present study tries to understand witness testimony strictly from the procedural rules in effect in Athenian jury courts. Here at the end, I will first summarize the most significant conclusions, which deviate

[45] *IG* II² 1258 (324/2 B.C.), honoring the prosecutors for entering an *episkēpsis* in time.

[46] Harrison (1971: 144), Thür (1987: 406–12), as against Bonner (1905: 92), Berneker (1959: 1370).

[47] Harrison (1971: 192–7), Behrend (1975).

in part from the general opinion. Then finally, I will give my view of the purpose of witness testimony in the overall concept of litigation in Athens.

The fact that the five "nonartistic proofs" are given from a rhetorical, not a judicial, perspective yields the important conclusion that in the legal process witness testimony is the only enforceable means of discovering the truth in court – and even this only to a modest extent. It is undisputed that restricting the capacity to bear witness to free males restricted the search for truth. There is also agreement that written testimony – a statement formulated by the litigant that the witness only silently confirmed – did not promote the discovery of truth in court. It is a new realization that a fixed formula was also used in the period of oral testimony; in my opinion, the witness never recounted events in his own words – thus, he was always clearly distinct from a *sunēgoros* – and was never questioned or cross-examined in court.

Both types of preliminary hearings, the *anakrisis* and the public arbitration, serve as preparations for the main trial. The most important tool in this "dialectic stage" of the procedure is question and answer between the litigants. The witness is obliged to appear there and must decide if he will at once swear an oath that the statement prepared by the litigant is false (*exōmosia*) or if he will confirm it in the main trial. The *exōmosia* should not be understood as an excuse of not knowing, but rather as a negative assertion, denying the content of the testimony. If the witness did not appear at the preliminary hearing, then in a private suit, after receiving a private summons, he had to pay a penalty to the litigant for damages, and it is possible that in a public trial, after being officially summoned (*klēteuein*), he had to pay a fine of one thousand drachmas to the state. Because public arbitration, as we have known for a long time, did not end with a definitive verdict, but rather with the arbitrator's decision that was not binding at all, we cannot speak of giving evidence at this stage. In both types of preliminary hearings, the wording of the entire deposition and the identity of the witness or witnesses were to be made known to the opposing litigant on the principle of fairness (though this is disputed for the *anakrisis*).

The main trial can be characterized as a battle of speeches – the "rhetorical stage" of the judicial process. Speaking or reading aloud the short, formulaic testimony, even one denied by *exōmosia*, carried little weight, at best, in the overall speech. Contrary to the claims of previous scholarship, an *exōmosia* sworn before the jurors in the main trial is not attested. It is also a new finding that in each case the witness, whether he confirmed the testimony or already swore the *exōmosia* in

the preliminary hearing, must approach the speaker's platform and show himself in person to the jurors. In public trials, a witness who did not go before the jurors after being summoned both by the litigant and officially was fined 1,000 drachmas. In private cases, he was perhaps penalized with a fine in the amount of the damage or simply with a guilty verdict. A perjured *exōmosia* thus had the serious social consequence of public stigma, but only the testimony positively affirmed by a witness (*martyria*) had legal consequences. The witness exposed himself to a suit for false testimony (*dikē pseudomartyriōn*) and could be convicted and fined the amount of the damage; in each case, he risked the loss of civic rights (*atimia*), which occurred after a third conviction. The extant speeches from these trials show that attacks on witnesses consist of hair-splitting quibbles (see, e.g., Thür 1997: 252–5 on Dem. 47); the main weapons are the emotions aroused in the previous trial where the deposition originally was given.

Thus far I have attempted to reconstruct the legal principles of witness testimony in the Athenian jury courts. Now we can finally turn to the identity of the witness. Who were the people who approached the speaker's platform alongside the litigants and their *sunēgoroi*? What function did they have in the interaction between the litigants and their fellow citizens selected as judges? In the past twenty years this issue has prompted profound and continually refined analyses of the entire corpus of court speeches. The results must be placed in the legal framework of witness evidence. Humphreys (1985: 322 and 353) very rightly denies the thesis – which, in any case, was never proposed in this form – that witnesses in classical Athens acted as oath-helpers. The institutional prerequisites for this, in fact, are entirely lacking. In the time of the orators, the verdict in an Athenian trial never depended on an oath that, as in Gortyn, a court magistrate could impose on one of the litigants or his supporters. Nevertheless, Humphreys understood witnesses as supporters and followers of the litigants and grouped these into types of inner and more distant circles. She explained this as resulting from a court system that presumed the rural mentality of a face-to-face society that, however, found itself becoming an urbanized society by the end of the fifth century. The primitive system of the Athenian *dikastēria* has conserved that mentality. Comparing Athenian law suits with those of other Mediterranean agonistic societies D. Cohen (1995: 107–12), without going into legal details, holds that giving testimony, also a false one, was a noble act of family and kinship solidarity.

Todd (1990: 31f.) created distinctions based on the statistical frequency of witness testimony in the speeches; witnesses are much more

often found in private cases than public ones, where the *sunēgoroi* more often appear.[48] Rubinstein (2004) combines the statistically supported difference between private and public trials with the substantive criterion of how close in every single case the personal connections were between the witness and the litigant. In this way, she reveals the different means of compelling testimony; she assigns the fine of 1,000 drachmas after an official summons (*klēteuein*) only to public trials. In these she also finds the long overlooked figure of the neutral witness.

As already emphasized, the legal structure excludes the possibility of oath-helpers in classical Athens. Already in Draco's law (621/0) the verdict in a homicide case occurs not by an exculpatory oath but by the vote of a panel of judges, the Ephetai (*IG* I³ 104.13). Nevertheless, the formulaic language of classical witnesses is reminiscent of the formulas of oaths. Witnesses in a homicide case, like oath-helpers, had to swear an oath that was formulated in terms of "knowing" either the guilt or innocence of the defendant (Ant. 5.12; 1.8, 28), and "know" is one of the words that introduce the content of the testimony, that is, the assertion in the formula of the deposition that requires confirmation. Because the formula, which is similarly used in oral and written testimony, was too little noticed until now, the archaic character of witness testimony at Athens was also unrecognized. Here we cannot investigate the origins of archaic witnesses in the practice of oath-helpers. But the fact that the fourth-century formula reaches back to earlier times allows the conclusion that the view of the witness as primarily a helper and friend of the litigant did not originate in the fourth century. Along with the formula, the peculiarity of Athenian witness testimony, that the witness, without being questioned, merely confirmed a statement formulated by one of the two litigants, can also be dated to the time of oral testimony. Therefore, the strict polarization of witnesses between one party and the other also cannot be an innovation of the fourth century. All this confirms the assumption that the witness in an Athenian trial was – from a legal perspective – a helper of one of the litigants more than an instrument for judicial truth finding.

Not to be overlooked, however, are the tendencies in the opposite direction.[49] The risk of being prosecuted by the opponent for false witness after the trial bound even the closest supporter to the truth. By

[48] For reservations about the use of statistical methods see Mirhady (2002: 262–4), who stresses the function of witnesses as a means for finding the truth.

[49] These are stressed by Mirhady (2002) and especially for citizenship and inheritance trials by Scafuro (1994: 157, 182), who calls witnesses in these cases a "living communal archive."

analyzing the court speeches, however, we see that testimony was very often employed that is legally irrelevant or slightly beyond the truth. On the other hand, even testimony that was by all appearances completely truthful was attacked with flimsy arguments by a *dikē pseudomartyriōn*. Statistics about the extant testimonies cannot take all these imponderables into consideration. In view of the residual risk that even truthful testimony before the Athenian *dikastēria* brought, the conjecture seems justified that neutral witnesses too were asked for their support by the litigants ahead of time. To sum up, each trial had its own individual agenda depending on the subject of the conflict and the litigants' strategies of argumentation, and this determined the witnesses to be selected and the formulation of appropriate statements to be confirmed by them.

General considerations so far support the conclusion that litigants chose their witnesses according to the subject of the testimony from the circle of their closest supporters or at least from those who were well intentioned toward them. Nevertheless, the legal sanctions that could affect a reluctant witness may tell us something different: the indirect compulsion of a fine for not appearing as a witness in the preliminary hearing or the main trial could – in theory – serve best to determine the truth objectively. But the means of coercion lay in the hands of the litigants who also formulated the testimony. The first stage, summoning a witness to the preliminary hearing, compelled him to take a stand either for or against the litigant who had summoned him. Either the witness agreed to put the previously formulated statement on the record and to have it used in the main trial or he swore at once a solemn oath that the statement was false. With the latter, the *exōmosia*, he declared himself a supporter of the opposing litigant. At a second stage, the litigant could compel a witness who had appeared in the preliminary hearing to go before the jurors in the main trial. The compulsion to testify was, therefore, not so much a tool for finding the truth; rather, it served most of all to align the witness as the supporter of one litigant or the other. Nevertheless, clever logographers succeeded in finding arguments for the truth of a statement denied by the witness even when an *exōmosia* was delivered; they branded witnesses who were present in court and supporting their opponents as perjurers (Aisch. 1.47; Dem. 45.60; similarly, Isai. 9.18).

The identity of the witness and the content of his previously formulated testimony are inseparable. For every single testimony, the legal information in the sources reveals a strict polarization of the witnesses in favor of one party or the other. Through cleverly formulated testimony, litigants – if not their logographers – succeeded time and again

in getting supporters of an opponent, who shied away from obvious perjury, to testify for their side.[50] The superficial impression that the witness was an unconditional supporter of one litigant was qualified by the masterful manipulation of a witness's duty to testify.

APPENDIX: *EXŌMOSIA* AND *KLĒTEUEIN*

Most scholars agree that the *exōmosia* (oath of disclaimer) was sometimes sworn directly before the jurors during the main trial (Rubinstein 2004, n. 15 with further references), but the direct sources, including two passages from private suits connected with compulsory testimony and four from public trials, speak convincingly against an *exōmosia* taking place in court.

In the prosecution of Stephanos for false witness (Dem. 45), Apollodoros accuses Stephanos of stealing a document with witness testimony and adds that people present at the time can testify to this (45.58). He then has the testimony he wishes these witnesses (who are Stephanos' friends) read out (45.60) and directs them either to confirm or deny it under oath. The caption *Exōmosia* follows and directly afterwards Apollodoros tries to convict the witnesses of perjury, implying that they swore the *exōmosia* (45.61). But the charge that Stephanos stole the document is insignificant, and it is out of the question that Apollodoros and the witnesses went to swear this *exōmosia* at the stone by the Stoa of the basileus during the trial, leaving the jurors with nothing to do. Even if the oath ceremony could have taken place in court, it would have interrupted and thereby destroyed the logical progress of the well-constructed story (45.57–62). Thus, Apollodoros's uncertainty (45.58) is fabricated. He presents his evidence for the supposed theft as concisely as possible with two documents and the single word *Exōmosia*, referring in all probability to an *exōmosia* that had already taken place during the public arbitration and was not repeated in court.

The speaker in Isaios 9.18–19 proceeds along the same lines, but is not so creative. He summons Hierocles, who has testified for his opponent, as a witness for his side. This time the *exōmosia* is read aloud. The speaker then attempts to show that Hierocles' *exōmosia* is perjury (9.19). But it is most unlikely that in this rather short speech there is a break in the speaker's description of mutual hostility between the two families just as it is reaching its peak. Here too, then, the document

[50] For examples, see Harrison (1971: 140 n. 1) (add Dem. 29.20).

read aloud was presumably only an *exōmosia* that had taken place in a preliminary stage. We can conclude that in both cases the witnesses appeared during the main hearing even though in all probability they had already sworn the *exōmosia* in the preliminary hearing. There is no mention of any kind of compulsion.

In four public cases, the speakers threaten their witnesses with *klēteuein* (an official summons).[51] In Aisch. 2.68, the speaker successfully ensures the appearance of his witness at the speaker's platform; the possibility of swearing the *exōmosia* is not even mentioned. In Dem. 59.28, the witness is formally given the choice either to confirm the deposition or exempt himself under oath. When he does neither, the speaker threatens him with *klēteuein*. Here too the testimony is obtained. In the same way, only in more words, Lykurgus (1.20) proceeds against three groups of witnesses. Even though the last two passages mention the possibility of witnesses exempting themselves under oath, nothing in the actual depositions indicates that witnesses did or would make use of this possibility. Also in these passages, the speakers only put rhetorical pressure on their witnesses to confirm the prepared statements at the speaker's platform. To encourage the witnesses to confirm their testimony, Lykourgos uses the analogy of military obligation and warns against desertion from the battle lines (*lipotaxia*), which is easily associated with *lipomartyria*, the failure of witnesses to appear. For rhetorical balance, he also explains the possibility of *exōmosia* in detail, although his reference to the solemnity of the oath that (as we know from *Ath. Pol.* 55.5) was sworn at the Stoa of the basileus, must have made it obvious that it was technically impossible to swear the oath during the main trial. But the speaker's actual argument gives no indication of the different time frames. Perhaps the formulaic alternative in the last two passages, "testify or swear oneself exempt," originates from the formula for *klēteuein* that developed for the preliminary hearing (see above, Section II.4).

An entirely different situation presents itself in Aisch. 1.44–50 in the affair of Misgolas. Here too the three possibilities are first described at length: Misgolas could confirm the testimony that he had sexual relations with Timarchos, not appear and pay the 1,000-drachma fine for ignoring the summons, or swear the *exōmosia* as a perjurer (1.46f.). Aischines has already prepared for the last possibility by filing other depositions affirming the acts (1.47), but he presents his evidence in reverse order, first calling other witnesses and only at the end calling

[51] For *klēteuein* in private cases see above Section II.4.

on Misgolas. Thus, he has already expressed doubt that Misgolas will confirm the statement (1.50). The rhetorical tactic is obvious: Aischines first leaves the jury uncertain whether Misgolas had already exempted himself from the testimony during the *anakrisis*. Then, under the threat of *klēteuein* and the penalty of 1,000 drachmas, Aischines forces his witness before the jury to stand by his oath that has already been rhetorically branded as perjury by the depositions previously read aloud. Just as in the case discussed above about the supposed theft of a document in Dem. 45.60, here also the evidence about sexual relations is creatively provided through a deposition that was never confirmed. Because the jurors do not get to see the documents before the trial, the speakers are able to enhance the suspense of their speeches by presenting an already sworn *exōmosia* as if the witness at that moment had not yet decided on it. The stylistic device of feigned uncertainty is particularly suitable for the themes of *martyria, exōmosia*, and *klēteuein*, a fact that must always be considered when interpreting such passages.

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