

**How close is "too close": Unethical interactions
between judges and repeat players in legal proceedings**

Justice Yosef Elron

As the saying attributed to Socrates goes, "Four things belong to a judge. To hear courteously, to answer wisely, to consider soberly and to decide impartially".

I would like to focus on the fourth virtue – that of impartiality.

As we all know, judges and attorneys who specialize in specific fields of law meet in the courtroom on a regular basis – and at times even in professional conferences.

This could naturally lead to a close acquaintanceship. While professional acquaintance is inevitable in certain situations, friendly and informal behaviors between judges and attorneys could undermine the appearance of impartiality.

I would like to examine when should the close interactions between these "repeat players" be categorized as "unethical" – and therefore forbidden?

The widely publicized case, discussed earlier by Justice Barak-Erez, of a judge and a member of the investigation authorities who communicated privately, via text messaging shortly before the hearings concerning a detention request of one of the suspects, is an extreme and hopefully unrepeatable event.

Nevertheless, it raised several broader acute issues that require close attention, namely, what is the nature of the interactions between judges and attorneys who meet daily in the courtroom? Do these "repeat players" develop a friendly relationship that could undermine judges' impartiality? Do they adopt an informal figure of speech that could impede the appearance of impartiality?

In light of these important issues, the Chief Justice Hayut sought to formulate Rules of Conduct that would facilitate ethical judicial behaviors, enhance a proper legal process and ensure equality among litigants in court.

To this end, she appointed a Committee which examined the interactions between judges and attorneys in legal proceedings that take place while conducting criminal investigations, before indicting a suspect.

I had the honor to sit as Chair of this Committee, which was also comprised of two other Chief Justices of the District and Magistrates' Courts.

As part of our work in the Committee, we received both oral and written submissions from judges, attorneys, and various state officials, including members of the investigation authorities. They all added important input and examples as to how the daily work at Court could raise troubling interactions between judges and attorneys – some of which I would like to share with you here.

The first example I would like to share is that of an attorney who wished to impress his client with his "close relationship" with a judge, and during the hearings mentioned shared experiences he had with the judge in previous cases, made improper remarks and even jokes.

The close interactions among judges and attorneys is at times the result of prior relationships, developed before the judge was appointed. For example, one of the judges who appeared before the Committee previously worked at the State Prosecutor's Office. A former co-worker who now presented his case before him still had his cellphone number – and contacted him personally to ask whether it was possible to come and discuss an urgent motion submitted to the Court.

Finally, Police investigators naturally appear frequently before the court – and are well acquainted with its judges. This could lead to an informal (and somewhat bizarre) relationship between them. For example, in one case brought to us a police investigator met with a judge at his home, after work hours, to discuss an urgent order he requested.

While these examples might be within a legal "gray area", most of the public would seemingly agree that such behaviors are improper. Indeed, the distinction between forbidden and permitted interactions is often difficult to make. Nevertheless, all three examples describe interactions that could undermine public trust in the judiciary. Ordinary citizens, or worse – the opposing party, might conclude that such behaviors imply a close relationship that could adversely affect the judge's impartiality. Such concerns warrant condemning the aforementioned behaviors – even though judges might believe they are capable of drawing a line between personal and professional issues.

My professional experience as a criminal attorney and as a judge in a Magistrates' Court, District Court and now, in the Supreme Court, as well as a Chief Justice of the Haifa

District Court, taught me that these phenomena tend to occur more frequently in the lower courts.

This could be explained by the respect attorneys have towards experienced judges – or perhaps out of fear that such behavior would be perceived negatively by them.

A rather technical consideration that also contributes to the informal interactions between attorneys and judges is the mere fact that many courts, in the past, were situated in old and crowded buildings. This caused inevitable and frequent informal interactions between judges and attorneys passing through the corridors of the court – and even using shared restrooms.

In certain circumstances, the lack of adequate space in these courts also brought judges to carry hearings in their own chambers. This too contributed to an informal atmosphere during hearings which could cause inappropriate comments.

The Israeli Code of Ethics for Judges provides a partial solution for these issues. The Code expresses fundamental social and moral perceptions regarding these matters which could be found, *inter alia*, in ancient Jewish sources.

For example, article 12(a) of the Code dictates that "A judge should conduct the proceedings before him professionally, concentrating on the issue at hand, while ensuring that he treats the parties and attorneys appearing before him equally and refrains from any statement or act that harms his appearance as objective and professional."

This article is based on the well-known command in The Book of D'varim (Deuteronomy): "judge righteously [...] Ye shall not respect persons in judgment".

This could be achieved ideally when the judge is not acquainted with the parties and their attorneys.

However, this ideal situation is not always possible. In certain contexts, attorneys are in fact "repeat actors" in the courtroom – and are doubtlessly acquainted with the judge. For example, only several judges are designated to discuss detention requests filed before indicting a suspect.

Naturally, these judges meet the attorneys who submit detention requests almost on a daily bases, and are clearly familiar with them.

The conclusions of the Committee I mentioned earlier, which were submitted to the Chief Justice Hayut, later

contributed to the formulation of new Rules of Conduct, which came into force this last September, and wished to provide comprehensive guidelines as to the proper nature of the interactions between judges and attorneys. These Rules aim to create clear boundaries between judges and investigative officials, in order to enhance the transparency of criminal proceedings. Some of the guidelines included in the Rules of Conduct relate to situations similar to those I described earlier:

- 1) All interactions between the judges and the attorneys are to take place during hearings. Judges are to refrain from any other direct or informal interaction with attorneys that appear before them.
- 2) Detention requests and other motions are to be submitted to the Secretary of the Court at regular work hours – and may not be submitted directly to a certain judge or his staff.
- 3) Investigation materials are to be presented during hearings in the courtroom only. When necessary, the judge may adjourn the hearings and examine the investigation materials in his chambers without the presence of either of the Parties.
- 4) In exceptional circumstances of which the investigation materials must be submitted before the hearing, they shall not be submitted directly to the judge or his staff.

The Rules of Conduct are based on the presumption that the judge must not only be honest and impartial, and avoid any irrelevant influences on his legal judgment; but also must avoid any comment or interaction that could undermine the appearance of impartiality. Maintaining the appearance of impartiality is crucial for enhancing public trust both in the judicial system and the legal process as a whole. I believe this is especially important in the context of the Israeli society.

One can only hope that the rules of conduct will indeed fulfil both purposes – facilitating rules that ensure the existence of a proper legal process, and at the same time, enhancing transparency and increasing public trust in judges and the judicial system as a whole.

On a personal note, I would like to add that I believe that the Chief Justices of the District and Magistrates' Courts can greatly contribute to ensure the transparency of relationships between judges and attorneys.

For example, during my service as the Chief Justice of the Haifa District Court, I required that all requests made by the Bar Association for the participation of judges in its activities, such as requests that judges would participate in legal conferences organized by the Bar Association, will be

done through my office. This allowed my personal supervision over the process, and increased the diversity of judges who appeared before the Israeli regional and state-wide legal community – thus mitigating the risk of facilitating friendships between judges and attorneys through these activities and preventing direct contact between judges and attorneys while inviting the judge personally to participate.

I would like to conclude with the provisions of article 16 of the Israeli Code of Conduct for Judges, which acknowledges the possible friendships that might exist between judges and attorneys – especially those developed before the judge was appointed.

The Article clearly states that "Having been appointed as a judge, a judge has no duty to break off his social ties, including ties with attorneys."

However, the article also underscores that "a judge should be cautious in his social contacts, and consider how people might interpret his company with a certain person or group of people."

In my view, this consciousness and the requirement of judges to be mindful of how people might interpret their actions and interactions with others, is the essence of the

high standard of personal conduct that is expected of judges. This is the substantial requirement necessary to ensure the close relationships between judges and attorneys are not, in fact, "too close".