RELATIONSHIPS BETWEEN THE PARTIES, THE JUDGES AND THE LAWYERS IN THE ISRAELI LITIGATION SYSTEM

Stephen GOLDSTEIN

SUMMARY: I. *General Characteristics of the Israeli Litigation System*. II. *The Relationships among Parties, Lawyers and Judges*. III. *Rules of Proper Behavior and Methods of Controlling Improper Conduct by Parties, Lawyers and Judges*.

I. GENERAL CHARACTERISTICS OF THE ISRAELI LITIGATION SYSTEM

The Israeli litigation system is based on the English adversary system that leaves the conduct of the litigation primarily in the hands of the parties and their lawyers. Yet in Israel the judge has long been allowed a more active role in the process than that of the traditional common law judge in England or the United States. Thus, for example, the Israeli Rules of Civil Procedure have long contained a number of instances where the judge is empowered expressly to act on his own initiative without the need of a request by a party. These provisions include dismissing the action as to parties who were not properly joined and adding necessary parties who were not joined, ordering separate trials where claims or parties have been joined, dismissing a complaint for failure to state a cause of action, ordering the consolidation of separate complaints involving the same or similar questions that are pending before the same court, and dismissing complaints for failure of prosecution.

A most important procedure device for judicial management of the trial is that of the pre-trial conference which precedes the trial of the case. At this pre-trial conference the judge may decide on almost all issues concerned with the pleadings, the discovery process and with preliminary relief. Additionally, the pre-trial conference rules expressly empower the

judge to determine what are the issues that are really in dispute between the parties; to order that a witness proposed by a party first present his evidence by affidavit or that a fact in issue be proven by affidavit (as distinguished from oral testimony which is the traditional method of proof in Israeli law); "to determine the stages of the trial process and the order by which factual and legal issues will be determined, as well as the matters which will be determined separately"; and "to issue any [other] procedural order which will simplify the trial process".

Finally, and most importantly, pre-trial conferences are frequently used by judges as occasions to induce the parties to settle the case. This has been a major function of the pre-trial conference since its incorporation into Israeli law in 1966. Yet it was not until 1996 that the pre-trial conference rules were amended to state expressly that reaching settlements is a purpose of the conference. As we will discuss later in this Report, the reaching of settlements is facilitated by the fact that the judge can order that the parties themselves, in addition to their attorneys, be present at the conference While the pre-trial conference is a major forum for the inducement of settlements, Israeli judges have long been active in trying to induce settlements at all stages of the process: hearings on preliminary motions, the pre-trial conference, at the trial itself and even on appeal. Indeed, active judicial involvement in promoting settlements is a major characteristic of Israeli litigation.

At the trial itself, in accordance with common law procedure, the attorneys for the parties call and question the witnesses, both ordinary and expert. However, the judge may exert a considerable restraining influence on the questioning of witnesses by the attorneys. Moreover, the Rules of Civil Procedure expressly authorize the judge himself to put questions to witnesses at any stage of their examination. The court is also expressly empowered to appoint expert witnesses at its own initiative. In addition, despite the lack of express authority in the Rules of Civil Procedure, the case law holds that a judge has inherent authority to receive evidence and call ordinary witnesses, at his initiative, which neither party has called.

As noted above, the traditional methods of proof in Israel have been based on English type rules of evidence that emphasized oral first-hand testimony. However, in recent years, as in other common law jurisdictions, Israel has been moving away from this approach.

In 1988, the advisory Committee on the Rules of Civil Procedure circulated a draft of proposed amendments to the Rules of Civil Procedure,

1984, the essence of which was the requirement that the pleadings be supported by detailed affidavits, which affidavits, *inter alia*, might then be used at trial in lieu of the direct examination of the affiant. These proposals provoked a great deal of opposition, primarily from the Bar Association, and, therefore, were never promulgated as such.

On the other hand, parts of these proposals were promulgated by the Minister of Justice in 1991. These included a general prohibition of pleading contrary factual allegations against the same party, as well as strengthening the authority of the judge, at both the pre-trial conference and the trial itself, to order that a potential witness first submit an affidavit or that a given fact be proved by affidavits. These provisions did not break completely with common law process, however, as the affiants are still subject to cross-examination.

In addition, a number of special procedures adopted since 1991, base their proceedings on affidavits which the parties are required to file. The most important of these are the procedures in the Family Courts and the recently adopted (2002) special expedited process (fast track) adopted for civil actions the value of which does not exceed $ 50,000 (c. $10,000).

III. The Relationships among Parties, Lawyers and Judges

1. *Attorneys and Clients*

Traditionally, Israeli lawyers have been relatively conservative in relation to soliciting clients in order to promote litigation. Thus, when Israel began adopting American style class actions it was not expected that the system would work as in the United States, *i.e.*, entrepreneurial attorneys would instigate and finance such actions on a contingent fee basis in the expectation of receiving a large fee for their services if the class action is successful. As this writer wrote in 1990:

> in Israel... contingent fees are permitted. However, their use is not so widespread as in the United States. Moreover, the Israeli rules of legal ethics frown upon soliciting by lawyers. For these and other reasons the legal culture in Israel has not produced the type of entrepreneurial-initiator lawyer on which the successful use of American class actions is based. The Israeli system requires, Therefore, incentives for brining class actions that are not thought To be necessary in the United States.

And, indeed, such incentives are contained in the Israeli class action legislation. Yet, how wrong I was as to how Israel would respond to the introduction of class actions in Israel! Class actions are now filed in Israel in great numbers. Moreover, the vast majority of them are instigated and organized by Israeli lawyers in the same way as their American counterparts. How can this be explained? It is, of course, possible, that I was simply wrong as to the Israeli legal culture as described above. However, this does not seem to be a satisfactory explanation. In 1990, I was expressing what was the general consensus of scholars and lawyers at that time. Moreover, this view was supported by the lack of shareholder derivative actions that had been filed in Israel despite the fact that Israeli law had long recognized them.

A better explanation would seem to be that the Israeli legal culture, at least as to class actions, has changed in this regard since 1990. I would suggest a number of possible explanations for this change. First, we should remember that cultures, including legal cultures, are not static but dynamic. Aspects of legal culture may change as a result of changes in the law, including procedural law. This is true as to every society, but it is particularly true as to Israel, a young society with a relatively young legal system which is constantly developing and changing.

Secondly, there is the phenomenon of "Americanization", which affects many aspects of Israeli life. Like many other countries, Israel is influenced, for better or worse, by the United States and its culture. If Israel is influenced by America as to clothing, food, music, etc., why should we be surprised if also the American legal culture influences that of Israel? This phenomenon is especially understandable when it involves the use of a device, class actions, which itself has been imported into Israel from the United States.

Yet this is not the full story. There is, perhaps, an even more significant reason for this change in Israeli legal culture, a reason that is uniquely Israeli. In recent years the number of lawyers in Israel has increased dramatically and is still increasing. In fact in the last 15 years the number of lawyers in Israel has more than doubled, from about 12,000 to over 27,500 at the end of 2002.

This great and rapid increase in the number of attorneys challenges the hegemony of the veteran attorneys who have long determined the conservative Israeli legal culture concerning, inter alia, solicitation of clients. There is no doubt that this large bloc of hard-to-assimilate young attorneys

will affect the future of the Israeli legal culture in many ways. In addition the existence of such a large number of attorneys does not allow the luxury of waiting passively for clients. Rather it encourages attorney initiative in finding sources of income, one of which is class action litigation.

Finally, class action litigation is particularly attractive to young attorneys because of its public nature. In bringing such class actions the attorneys seek compensation for damage that has been caused to a large part of the public and, at times, expose grave faults in the economic system. Thus they receive extensive coverage in the media. This is most important to young attorneys who are restricted in their ability to advertise by rules of professional ethics. Moreover, the attorneys who bring these class actions get very good publicity; they appear as fighters for the public good against the entrenched economic powers.

To what extent this change in the role of the attorney-client relationship in regard to class actions will affect other area of the legal culture, only time will tell.

In terms of the general litigation process, with only one exception, in all civil proceedings all parties have an unqualified right to be represented by counsel of their choice provided such counsel is a registered attorney under Israeli law.

The one exception to this rule concerns Small Claims Courts, where the representation of a party is allowed only by permission of the court for very special reasons. In practice this permission is almost never requested or given.

This exception was adopted at the instance of consumer advocates who believed that preventing the appearance of attorneys in the Small Claims Courts would aid in reducing the costs of litigation in those courts, would help to prevent them from becoming vehicles for commercial creditors against consumers and would encourage the informality and simplicity desired in those courts.

While representation by an attorney is not required, *i. e.*, a party may always represent himself, in practice, except for Small Claims Courts, almost every party is represented by an attorney. As will be discussed shortly this is a function of the fact that in Israel litigation is conceived of as a highly professional matter conducted by professionals, *i. e.*, lawyers and judges.

In general, in Israel pleadings are signed and filed by the attorney, not the party himself. Moreover, while the parties have a right to be, and may

wish to be, present in the courtroom during preliminary hearings or the trial they need not be. Rather the only requirement is that the party's attorney be a present at such times. With only one exception, a party need only be present physically at a hearing, if he is going to testify.

The one exception to the rule that a party need not be present physically at court hearings concerns pre-trial conferences as to which judges are authorized to, and generally do, order that the parties be present in person along with their attorneys. This is done in order to strengthen the hand of the judge in inducing settlements. With the parties present in the room, an attorney cannot avoid responding to settlement recommendations with the excuse that he must consult with his client who is conveniently "unavailable" at the moment.

In theory the party is in charge of the litigation and the attorney is the agent of the party whose function is to carry out the wishes of his client. Indeed, common Hebrew terminology for the relationship of party-attorney is that of "principal-agent". However, in practice the matter is often quite difference with the attorney really being in charge.

All the pleadings are drafted, signed and filed by the lawyers. This is also true as to the other documents filed. Of course an affidavit of a party is like testimony and thus must be signed by the party personally. However, even in such cases the attorney generally drafts the affidavit for the signature of the party. Equally so, he prepares the party before the latter's testimony at trial. Needless to say it is the attorney, not the party, who conducts the proceedings in court as well as those for settlement.

This attorney control of litigation is the result of the fact that litigation in Israel is seen as a professional operation, to be conducted by professionals, lawyers and judges, with laymen, *i. e.*, the parties only playing a very minor role.

In general, Israeli culture puts great trust in professionals and professionalism and litigation is no exception to this rule. The litigation professionals are the lawyers and the judges. They have special forms of address for each other. Judges are generally addressed as "your honor the judge"; while attorneys insist in using the title "advocate" both in and out of the courtroom. Judges and lawyers also speak with each other in a special legal jargon that the lay-person has great difficulty understanding. In the higher courts, they also share special dress, *i. e.*, robes.

It is no wonder that the party feels like he is an outsider in this closed professional company of judges and attorneys and thus relies on his attorney almost completely.

2. *Attorneys and Attorneys*

In the courtroom Israeli attorneys tend to be quite aggressive and combative with each other. This is, of course, in keeping with the common law system which Israel inherited from the British. However, in this regard Israeli attorneys seem to be even more combative than their English counterparts. As I have written elsewhere:

> This difference ...probably reflects a difference in cultures... Israelis are not Englishmen; they are Middle Easterners, primarily of eastern European, Middle Eastern and North African descent.

This then is a clear example of an affect general culture on the legal culture. Moreover, the aggressiveness and combativeness of Israeli attorneys in the courtroom seems to be related also to what they think that their clients, who are generally present in the courtroom, expect from them. Attorneys believe, probably correctly, that their clients perceive aggressiveness by them as a sign of loyalty to their cause for which the attorney is "battling". Clients, and perhaps even some attorneys, also tend to believe that aggressive behavior, in contrast to subtlety, in cross-examining hostile witnesses, for example, is the mark of a good trial attorney.

However, outside of the presence of their clients, in general, and that of the courtroom, in particular, lawyers generally act much more cooperatively with each other. After all they are part of the same guild and the lawyer who today is asked to agree to a request by his opposing counsel for an extension of time for the filing of pleadings, may tomorrow be the requester of a similar request. Thus, even in the context of litigation, many matters are settled routinely by agreement of the lawyers without the need for judicial intervention. A clear example of this is the discovery process which generally is conducted cooperatively between the lawyers. Most importantly, in this regard is the fact that the overwhelming number of the actions filed are settled by compromise. While some of these compromises are reached through judicial pressure and others by special mediation processes, a large number are settled by the attorneys themselves without outside intervention.

Thus between themselves Israeli lawyers exhibit both public aggressiveness and private cooperation.

3. *Attorneys and Judges*

Israeli judges are appointed to all the regular courts —the Magistrates' Courts, the District Courts and the Supreme Court— by a Judicial Appointments Committee composed of nine members: The Minister of Justice (Chairman) and one other government minister; three judges of the Supreme Court, including the President of the Supreme Court, two members of the Parliament specifically chosen for that purpose, and two representatives of the Chamber of Advocates. The judges are appointed for life subject to a mandatory retirement age of 70.

In the courtroom, for reasons similar to those described above concerning the relationship between the lawyers, Israeli lawyers often act aggressively and combatively also vis-à-vis the trial judge, despite, of course, the very polite forms of address, also described above. This may lead to friction between lawyer and judge.

The possibility of such friction is exacerbated by the lack of clear demarcation of the respective roles of the lawyers and the judge in conducting the trial. As discussed above in Section A, the Israeli litigation system has been traditionally a modified English common law adversary system. Thus, the conduct of the trial has been primarily in the hands of the attorneys; however, the Israeli judge has had greater powers of intervention and control than has had his traditional English counterpart.

As mentioned above, these traditional powers of the Israeli judge include a number of pre-trial instances when he can act on his own motion, his extensive powers at the pre-trial conference, his authority to ask supplementary questions of witnesses at trial as well as even calling witnesses on his own, as well as his extensive intervention throughout the process in order to induce the parties to settle. We should add to this also his authority at trial to halt the questioning of witnesses when he feels that such questioning has become repetitive.

It should be noted that none of these powers of the judge are clearly defined. They all involve judicial discretion and most are matters of degree. Thus, it is natural that when the judge uses some of these powers the attorneys involved may feel that he has overstepped his bounds and infringed on their "right" to conduct the litigation as they see fit. The judge, on his part, sees these powers as requiring him to assure that the litigation is conducted efficiently in an attempt to reach a correct result. Clearly, we have here a formula for friction between the attorneys and the judge.

We should also note specifically the resentment felt by lawyers who feel that the judge has gone too far in pressuring them to accept a settlement. The judge, on his part, wants very much to produce settlements, primarily because of the felt pressures of the court's case-load, but also because he may feel that a settlement is generally a better resolution of the conflict than a zero-sum judicial decision.

Moreover, this situation has worsened in recent years as the judges have been given increased discretionary powers in an attempt to increase the efficiency of the process. A primary example of this is the judge's power to order the use of affidavits in lieu of oral testimony, a matter which attorneys object to greatly as both infringing on their right to conduct the trial as they see fit and as depriving them of the chance to demonstrate their forensic abilities in questioning witnesses.

Another recent increase in judicial power vis-vis the attorneys is contained in a 1992 amendment to the Courts Law (Integrated Version), 1984, which authorizes the court, with consent of the parties, to transfer pending matters to arbitration or to a new mediation process set up by this amendment and consequent regulations. Transferring a matter to arbitration has rarely been used. However, in the ten years since the adoption of the mediation process, this process has become very popular, particular with judges and mediators. Many people have been trained as mediators, mediation centers have been established and judges routinely suggest to attorneys that their cases be transferred to mediation.

On their face these mediation provisions should not be a further force of friction between judges and attorneys since, as we have emphasized above, the judges have only the authority to suggest the transfer to mediation with the final decision to do so resting with the attorneys and their clients who must agree before any such transfer can take effect. However, in practice it may be quite difficult for attorneys to refuse to agree, particularly since the entire judicial structure supports the mediation process and judges routinely "suggest" its use. These may be, in reality, "suggestions that cannot be refused". Indeed, in some courts cases are "assigned" to mediation without waiting for the agreement of the attorneys. Thus, as with the efforts of judges to induce settlements discussed above and for similar reasons, also mediation has become a cause of friction between judges and attorneys.

This friction leads to oral criticism by judges of the conduct of hearings by lawyers and even, at times, written criticism of such conduct in their judicial opinions. In terms of the lawyers this friction leads to a large num-

ber of applications that the judges involved disqualify themselves from continuing to conduct the case. Under Israeli rules these applications are first made to the judge involved himself and if he refuses to disqualify himself there can be an appeal directly to the President of the Supreme Court. These applications are only vary rarely granted by the judges themselves and their decision are generally upheld on appeal. Yet the large number of such applications, even though they are not sustained, is a clear indication of the friction between judges and lawyers in the context of litigation.

On the other hand, on the social level, there are often strong friendships between judges and lawyers in Israel. Following common law tradition, judges in Israeli are generally appointed from the ranks of practicing lawyers. Thus judges and lawyers have studied law together and, indeed, practiced together. Friendships formed at these times remain even after judges are appointed and serve in that capacity.

Do such friendships present a problem in terms of impartial justice, or at least the appearance of impartial justice? In England, of course, traditionally judges and barristers have maintained quite close collegial relations as evidenced by their membership in the Inns of Court and, as far as I know, no one has ever suggested that this raises any problems. On the other hand, in 1993, the then President of the Israeli Supreme Court, Justice Meir Shamgar, expressly and publicly warned judges about maintaining close personal contacts with lawyers who may appear before them.

Moreover, in the same year, President Shamgar promulgated a Code of Judicial Ethics which, *inter alia*, required a judge to disqualify himself if he has a particularly close personal relationship with an attorney appearing before him. The provision of the Code provided as follows:

> A judge should not sit in a case in which he has a relationship of family or friendship with a party, an attorney appearing in the case, or a principal witness ...which would create the impression of a danger of undue favoritism.

The issue of the binding effect of this provision arose in 2000 when Supreme Court Justice Orr refused to disqualify himself from sitting in a case in which he had a very strong personal friendship with one of the attorneys, Pinchas Rubin, which, under the above quoted provision of the Shamgar Code of Judicial Ethics should have required him to disqualify himself. Nevertheless Justice Orr refused to disqualify on the grounds that

this part of the provision was contrary to long-standing practice in Israel and that President Shamgar did not have the authority to promulgate a Code of Ethics binding ion judges.

Justice Orr acknowledged that a close family relationship with a party, attorney or principal witness was, indeed, under Israeli practice grounds for disqualifying a judge. Moreover, a close friendship between a judge and a party or principal witness should also result in such qualification. However, he maintained that under long standing Israeli practice this was not true as to a close friendship with an attorney appearing in the case.

In the words of Justice Orr:

> The principle that has always been followed in practice is that friendship between a judge and an attorney, as distinguished from a family relationship between them, is not a ground to disqualify the judge from sitting in a case in which such attorney appears. This principle is not only the norm in our legal culture, but also in the English, American, Canadian and other legal cultures. This practice is based on the assumption and the experience pursuant to which there is not a significant danger that such a friendship will affect adversely the independence and neutrality of the judge. My judicial colleagues so act and thus I, myself, have acted in the past, including cases in which Pinchas Rubin himself has represented one of the parties. I see no reason to diverge from this practice in this case.

President Shamgar, who by that time had retired from the Supreme Court due to the mandatory retirement at age 70, responded in the press that, in his view, the Code was, indeed, binding on the judges. Thus, at this writing, both the binding nature of the Shamgar Code of Judicial Ethics and the question of the effect of close social relationships between judges and lawyers on the impartiality of the judicial process, or at least the appearance of impartiality of the process, remain unresolved in Israel.

III. Rules of Proper Behavior and Methods of Controlling Improper Conduct by Parties, Lawyers and Judges

1. *Parties*

If a party is a witness at trial he is obligated to tell the truth, as is every witness. Likewise an affidavit filed by a party is treated the same way as

evidence, *i. e*. the party is obligated to tell the truth. In both cases the sanction for not telling the truth may be a criminal prosecution for perjury. In practice such prosecutions are extremely rare, yet the threat of such a possibility along with the general sense that statements under oath should be truthful do inhibit parties from not telling the truth in their testimony or affidavits.

On the other hand, Israel follows general common law practice that distinguishes between pleadings and evidence. Under this distinction pleadings that are not verified by affidavits need not be as truthful as evidence. Common law pleadings traditionally may contain conjectures of fact the truth of which is not known. Moreover, they may contain even contradictory factual allegations.

A party may be prevented from introducing evidence as to a factual matter which is not contained in his pleadings. However, there is no sanction for pleading factual allegations which the party does not prove. The result is an inclination to plead every possible factual allegation whether or not the party knows them to be true.

As discussed above in Section A, in recent years this situation has changed somewhat in Israel due to the requirement in some special forms of actions, such as those in family court and the expedited process that the pleadings be verified by affidavits. Moreover, also as discussed above, a general prohibition against pleading contradictory factual allegations against the same party has been adopted.

On the other hand the suggestion that all pleadings be verified by affidavits was rejected. Thus, in general, pleadings in Israel need not be verified, a situation which lessens greatly both the legal and the felt need by parties and their attorneys that such pleadings be truthful.

This situation is true both as to plaintiffs and defendants. Indeed, it may even be more true as to defendants. In this regard we should note that it is acceptable practice for a defendant to deny unequivocally an allegation of a plaintiff even if he knows it is true in order to compel the plaintiff to prove the allegation.

In terms of sanctions for improper conduct by litigating parties, the Israeli Rules of Civil Procedure provide sanctions for such improper party conduct, including entering judgment against the offending party. However, both the rules themselves and their enforcement in practice reflect the Israeli view that improper conduct by a party is generally that of the party's attorney rather than that of the party himself, and thus entering

judgment against an offending party is rarely employed as a sanction. Rather, the usual sanction is the assessment of costs against the offending party in favor of the other party.

In extreme cases the court may impose what is in effect a fine on an offending party, *i. e.*, assessing "costs" in favor of the State, despite the fact that the State is not a party to the proceedings. In extreme cases also the costs against an offending party, whether in favor of the other party or of the State, may be imposed directly on the attorney as distinguished from the party.

Finally, in this regard we should note that in assessing costs at the end of the litigation the costs awarded to the winning party may be reduced if that party, despite his victory, has acted improperly in the proceedings.

2. *Attorneys*

As noted above, in the course of the litigation process attorneys may be rebuked by judges for improper behavior, both orally and in written opinions. In addition, in extreme cases they may be held in contempt of court or have "costs" imposed upon them.

Also while such instances are quite rare in Israel, attorneys may be held liable for malpractice in tort actions brought against them by clients they represented in litigation.

Rules regarding professional ethics of attorneys are laid down in the Chamber of Advocates Law, 1961, and in the Regulations enacted in accordance with that Law. The law and Regulations provide that an attorney must preserve the honor of his profession and refrain from doing any act liable to affect it adversely.

The main provisions concerning the conduct of litigation include the general rule that in the performance of his duties an attorney is enjoined both to act faithfully for the good of his client and to assist the court in achieving justice. Attorney-client communications are privileged and an attorney must not reveal any such communication unless required to do so by law. While an attorney may meet with witnesses he is calling on behalf of his client and, indeed, usually does so, he may not meet with witnesses about to give evidence for the opposing party, except with the prior approval of that party or his attorney.

Where a party is represented by an attorney another attorney must always approach the party's attorney and not the party himself. An attorney

may not deal with a matter which he knows has been in the care of another lawyer without that other lawyer's written consent; on the other hand the latter may not refuse to give such consent unless the client is in his debt and has not fulfilled the conditions laid down in the Regulations.

These Rules of professional ethics may at times be quite problematic. Thus, for example, it may be difficult to reconcile an attorney's duties to act faithfully on behalf of his client with his duty to assist the court in achieving justice. Faced with such conflicting loyalties Israeli attorneys tend to choose loyalty to the client over assisting the court to achieve justice.

In addition, some of the Israeli rules of professional ethics are currently undergoing liberalization. This is particularly true as to advertising by lawyers, which was once strictly forbidden. Direct solicitation of individual clients is still, however, officially prohibited, despite the fact, as discussed above in Section B1, that such solicitation is a daily occurrence concerning class actions, thus creating a clear conflict between the rules of professional ethics and the actual practice in the profession.

For violations of the rules of professional ethics as well as other more serious offences as set forth in the Chamber of Advocates Law, 1961, all Israeli attorneys are answerable before a District Disciplinary Tribunal of the Chamber of Advocates. The penalties the Disciplinary Tribunal may impose on an attorney convicted of a disciplinary offence are:

- A warning.
- A reprimand.
- A fine (not exceeding a stated sum).
- Suspension for a period not exceeding ten years.
- Expulsion from the profession.

Where a punishment of suspension or expulsion has been imposed, the decision, including the named of the convicted lawyer, must be published. Otherwise these proceedings are generally secret.

A Disciplinary Tribunal may also impose upon an advocate one of the above penalties if he has been convicted in the ordinary courts of a criminal offence involving moral turpitude.

A National Disciplinary Tribunal acts as an appellate level from the District Disciplinary Tribunals. Both the accused and the accuser may appeal to the National Tribunal, as may also the Attorney General even if he

was not an accuser. A further appeal against a conviction by the National Tribunal may be filed in the Supreme Court of Israel.

From time to time, there has been criticism of this disciplinary process primarily because of its secret nature and the fact that it is lawyers judging lawyers with no outside public participation. On the other hand there has not been any serious movement toward changing the process.

3. *Judges*

As noted above, in 1993, the then President of the Supreme Court promulgated a Code of Judicial Ethics. However, as also noted above there is an unresolved dispute as to the binding effect of this Code and, in practice, it is not generally cited as a source of judicial conduct.

The major source of control of the day-to-day conduct of judges in the litigation process is motions for disqualification filed by attorneys and, as noted above, these are filed rather frequently. Under Israeli procedure a party may move that a judge disqualify himself from sitting in a given proceeding "if there exist circumstances which may create a real fear of bias in the conduct of the proceedings".

A motion to disqualify a judge must be made to the judge involved himself at the outset of the proceedings or immediately upon the discovery of the basis of the motion if such has occurred during the proceedings themselves. The judge involved must decide the disqualification motion before he makes any further decisions in the case.

A party may appeal as of right from the decision of the judge on the disqualification motion directly to the Supreme Court, regardless of in which lower court the case is pending. Such appeals may be decided by the President of the Supreme Court himself or such a judge or panel of judges that the President has chosen for this purpose. In practice, most appeals are decided by the President himself.

It has been held that the test of "a real fear of bias" is an objective one; that is, as would be perceived by an outside observer not what a given party feels subjectively. Moreover, the cases emphasize the assumption that professional judges are able to overcome many influences which, were they not professionals, might be seen as creating such a real fear of bias.

We have already discussed above the situation of the judges with a familial or friendship relationship with a party, key witness, or attorney. In terms of the activities of the judge during the litigation process which might

be seen as creating a "real fear of bias", the above test unusually results in denial of the disqualification motion. Only in the most extreme cases are such motions granted.

In deciding on appeals from a refusal by the judge involved to disqualify himself, the President of the Supreme Court necessarily is influenced by three factors in addition to the gravity of the conduct of the judge. The first is the delay in the process that might be created by having the case transferred to another judge in a relatively late stage of the proceedings. The second is the desire not to overly encourage the filing of disqualification motions as they inevitably disrupt the progress of the case. Finally, particularly in recent years the Presidents of the Supreme Court have desired to support the judges in their desire both to control the litigation process and to induce the parties to settle.

In addition, the decisions on these disqualification motions are inherently sporadic and heavily dependent on the fact of the given case.

For all these reasons they cannot, and do not, serve as a basis for a case-law determined code of judicial ethics.

The various informal ways of objecting to, and trying to influence, judicial conduct include media, legislative and professional criticism of such conduct. Historically, the Israeli view that adjudication is a highly professional activity, removed from politics as far as possible, resulted in the discouragement of criticism of judges by the political legislature as well as by the media. However, that situation has been changing in the last ten years and such criticism is now quite prevalent, even though it is still objected to by the judiciary.

A major and most controversial form of professional criticism of judges is the newly initiated survey of the judges by the Chamber of Advocates For a number of years the Chamber of Advocates has been strongly critical of the judiciary, particularly as to the long delays on deciding cases and handing down opinions.

A major result of such criticism is the recent initiation by the Chamber of Advocates, over the strong objection of the judges, of an annual survey of lawyers in which all the judges are rated individually on various aspects of their performance. The results of both the original pilot survey and the first comprehensive annual survey were published fully, including the name and rating of each judge on each aspect of performance surveyed. The judges objected most vehemently to this publication, but

to no avail. It is yet to be seen what effect if any, such surveys will have in influencing the behavior of the judges.

In terms of continuing and grievous misbehavior by judges, Israeli law provides for two separate systems of imposing sanctions The first is removal from office by the vote of 7 of the 9 members of the Judicial Appointment Committee that appoints the judges, following a recommendation of removal initiated by the Minister of Justice or the President of the Supreme Court, both of whom are themselves members of this nine person Committee This is a most extreme procedure that, in practice, is seldom, if ever used.

The second, which is used somewhat more frequently, but still rarely, is the disciplinary process. This process may be initiated by the Minister of Justice, either on his own initiative or on the basis of a complaint presented to him. The grounds for the initiation of this disciplinary process are set forth in the Law as follows:

- Improper behavior in the discharge of official duties.
- Conduct unbecoming a judge.
- Conviction of an offence involving moral turpitude.
- A finding by the judicial appointments committee that the judge's appointment was unlawfully obtained.

Upon the filing of such a disciplinary complaint by the minister of Justice, the President of the Supreme Court is to appoint a disciplinary panel of either five judges (of whom three must be either judges or retired judges of the Supreme Court), or of three judges (of whom two are judges or retired judges of the Supreme Court). In the rare occasions in which this process has been invoked the President of the Supreme Court has appointed himself as chairman of the panel. The disciplinary panel may impose any of the following five penalties:

- A comment on the action of the judge involved.
- A warning.
- A rebuke.
- Transfer to another judicial position.
- Termination of the judicial appointment, either with or without pension rights.

As noted above, also this process is rarely used. Yet that does not mean that it is effectively non-existent. This is so, since the threat of its use may be quite effective in inducing the judge involved to request "early retirement" or to "retire for reasons of health", etcetera. Thus, its importance is more in its potential, rather than its actual, use.

Despite, these various mechanisms for controlling judicial behavior, in the last few years there has been a feeling in Israel —in the press and general public as well as in the legislature and Ministry of Justice— that a new mechanisms of control is needed. In particular, a mechanism that is independent of the judiciary.

In response, in 2002 a new law was passed in the Israeli parliament creating a "Commissioner of Public Complaints (Ombudsman) Against Judges". This Ombudsman and his staff are to be independent and autonomous, both as to government ministries and the judiciary.

The Ombudsman is to be chosen by the Judicial Appointments Committee, the composition of which is discussed in Section A above. According to the Law he must be a jurist who has the necessary qualifications to be appointed to the Israeli Supreme Court.

The Ombundsman is to investigate complaints against judges in such matters as delays in delivering opinions, lack of equality or discrimination in the courtroom, lack of "judicial temperament", as well as criminal behavior. He is to deliver an annual report to the Minister of Justice and the President of the Supreme Court. In this report he is authorized, *inter alia*, to recommend to the Minister of Justice and the President of the Supreme Court the imposition of sanctions, including even removal from office, against judges against whom complaints have been found by the Ombudsman to be justified.

The judiciary, led by the President of the Supreme Court, vigorously opposed the appointment of such an outside, independent and autonomous Ombudsman, as opposed to an internal complaint procedure within the judiciary, to investigate complaint against judges. The judges argued that such an outside Ombudsman would jeopardize the essential independence and autonomy of the judiciary.

This Ombudsman Law is new and yet to be implemented. Only time will tell if it achieves the golden mean of providing greater public accountability of the judiciary while not unduly jeopardizing its most necessary autonomy and independence.