

May judges judge their friends?

Adapted from the writings of Dayan Yitzhak Grossman

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A coalition of nine progressive groups has released a statement calling on Supreme Court Justice Brett Kavanaugh to recuse himself from an upcoming case involving Facebook due to his close friendship with the company's vice president of public policy, Joel Kaplan. Kaplan had previously said that he had "known Brett and Ashley Kavanaugh for twenty years," and that "they are my and my wife Laura's closest friends in D.C. I was in their wedding; he was in ours. Our kids have grown up together." In this article, we consider the halacha regarding the eligibility of a judge to preside over a case involving a personal friend.

Oheiv and sonei

The *mishnah* cites a dispute about whether a witness who is a friend (*oheiv*) of a litigant is eligible to testify in his case; R' Yehudah rules that an *oheiv* who is a groomsman (*shushbin*) of the litigant is ineligible, whereas the Sages disagree and assert that Jews are not suspected of testifying falsely due to friendship.[1] From the Gemara's discussion, it emerges that even the Sages agree that an *oheiv* is ineligible to **judge** his friend, and they only disagree regarding **testifying**. [2] Personal partiality will not induce a Jew to lie, but it will impair his judgment.

The Ri Migash explains (regarding the Gemara cited below) that there are actually two reasons why one should not judge his friend: he may be swayed in his favor, and if he escapes this pitfall and judges him fairly (and arrives at an adverse decision), he will then be guilty of repaying good with evil.[3]

The previous discussion seems to imply that the *oheiv* who is ineligible to serve as a judge is the *shushbin* that R' Yehudah considers ineligible to testify. Elsewhere, however, the Gemara states categorically, "A person should not judge a case involving one whom he loves...as he will not find any fault in him,"[4] implying that any level of friendship is disqualifying. There are two approaches in the *poskim* to this apparent contradiction:

- The Rambam (as understood by many *Acharonim*) understands that the latter Gemara clarifies that the Sages indeed disqualify **any** *oheiv* from serving as a judge, not just the *shushbin* that R' Yehudah disqualifies from testifying.[5] The *Acharonim* disagree, however, whether according to the Rambam the disqualification of an *oheiv* is only *lechatchilah*[6] or even *b'dieved*. [7]
- Many Ashkenazic *Rishonim* explain that while only a *shushbin* is absolutely ineligible (*pasul*) to serve as a judge, it is preferable that no *oheiv* should do so.[8] Within this school of thought that distinguishes between a *shushbin* and an ordinary *oheiv*, some maintain that even the latter is forbidden *lechatchilah* to serve as a judge,[9] while others maintain that this is only a

chumra[10] or a *midas chasidus*. [11] Some understand this to actually be the view of the Rambam as well, that an *ohev gamur* is absolutely *pasul* to serve as a judge, whereas an *ohev she'aino gamur* is forbidden *lechatchilah*. [12] Additionally, some suggest that there may actually be three levels of *ohev*: an *ohev gamur* is *pasul*; an *ohev she'aino gamur* is prohibited from judging *lechatchilah*; and someone with merely a slight partiality toward a litigant should refrain from judging him as a *midas chasidus*. [13]

Regarding the category of *shushbin*, many *poskim* assume that any close friend is in this category, [14] although there is a dissenting view. [15] R' Refael Yosef Chazan and his son R' Rachamim Eliyahu Chazan both assert that a communal enactment that an appointed judge may judge even his relatives does not extend to allowing them to judge their enemies (whom they may not normally judge, similarly to their friends), since "this is not explicit" in the enactment. [16] The clear implication is that an enactment explicitly allowing judges to judge their enemies (or, presumably, their friends) would be valid.

Conclusion

A judge is completely disqualified from judging his *shushbin*, and according to most *poskim* this extends to any *ohev gamur*. A judge should also not judge even an *ohev she'aino gamur*, although some consider this obligatory (*lechatchilah*), while others consider it only a *chumra* or *midas chasidus*. It appears, however, that a community has the right to allow appointed judges to judge their friends. Furthermore, it is unclear to me how these *halachos* apply to a case where the judge's friendship is not with the litigant himself, but merely to a senior officer of a corporate litigant.

[1] *Sanhedrin* 27b and *Rashi* there.

[2] *Ibid.* 29a.

[3] *Mishlei* 17:13. *Shu"t Ri Migash siman* 202. Cf. *Orach Mishpat (Chazan) ibid. os* 21; *Halacha Pesukah ibid. n.* 233.

[4] *Kesubos* 105b.

[5] *Hilchos Sanhedrin* 23:6; *Kesef Mishneh ibid.* and *Beis Yosef C.M. siman* 7; *Radvaz ibid.*; *Shu"t Oholei Yaakov siman* 49 p. 88a. Cf. *Kesef Mishneh Hilchos Eidus* 16:6 and *Lechem Mishneh ibid.*

[6] *Beis Yosef ibid.*

[7] *Oholei Yaakov ibid.*; *Lechem Mishneh Hilchos Eidus* 16:6; *Shu"t Toras Emes siman* 97. Cf. *Shu"t Chaim Sha'al cheilek* 2 *siman* 42 *os* 38, and *Birkei Yosef ibid. os* 18 at length.

[8] *Tosafos Kesubos ibid.*; *Rosh* and *Mordechai*, cited in *Beis Yosef ibid.*

[9] *Rosh ibid.*

[10] *Tosafos ibid.*; *Mordechai*, cited in *Shu"t Maharik shores* 21.

[11] *Maharik ibid.*

[12] *Shu"t Maharam Lublin siman* 63. *Oholei Yaakov ibid.* proposes but rejects a similar interpretation of the Rambam. Cf. *Orach Mishpat (Analik) ibid. s.v. Rama v'yeish omrim debeson'o mamash.*

[13] *Maharam Lublin ibid. s.v. Ha'arnam.* He proposes this as the view of

the *Tur*, but he proceeds to note that *Tosafos* seems to acknowledge only two categories.

[14]*Tur ibid.*; *Rama to Shulchan Aruch ibid. se'if 7*; and cf. *Bach ibid.*

[15]*Kenesses Hagedolah ibid. Hagahos Beis Yosef* end of os 15. Cf. *Shu"t Shevus Yaakov cheilek 1 siman 141*; *Birkei Yosef ibid. os 19*.

[16]*Chikrei Lev C.M. cheilek 2 siman 24 p. 32a s.v. umilvad*; *Orach Mishpat (Chazan) ibid. os 14*.