

JUDGE ALVIN RUBIN: Lessons in ethics and professionalism¹

BY ANTHONY M. DILEO

“When the student is ready, the teacher will appear.”²

As the legal profession struggles to maintain its professionalism in the face of business pressures and competition, a prime counterweight is the appreciation for the debt we owe to our mentors,³ who exhibited the tradition of teaching and mentoring to bring us along, transforming fresh graduates of law schools while instilling the values of service. Here I would like to share a few stories of my clerkship for Judge Alvin Rubin and how he mentored me.



I worked for Judge Rubin as a law clerk for 18 months in the federal district court in New Orleans. During those months he decided to make me into a better lawyer, and a better person—whether I wanted to be or not. But today I am grateful for his mentorship.

Candor to the court

When I clerked for Judge Rubin in 1971 and 1972, all motions were set for oral argument on a set motion day. On those days, the court would be nearly filled with lawyers. On one motion day I remember, the most senior named partner of a major firm argued from his memorandum. Judge Rubin interrupted, saying he had read the memoranda of all counsel. He then went on to ask this prominent attorney about a particular case cited in his memorandum. The judge said to the attorney: “You cite *Smith v. Jones* and you say, without qualification, that this case supports your Motion to Dismiss. I’ve read *Smith v. Jones*, every word of it, twice, and I don’t see anywhere where it says that or anything that could fairly be argued to support your motion. Can you explain your position to me?” Instead of retracting, this attorney pressed on and asserted that a reasonable interpretation of the case, in fact, did support his argument. The judge asked him what words or sentences he was pointing to for that position. The attorney responded, “The case as a whole, in the context of all of the jurisprudence.” The judge continued: “I’m asking you to tell me where in that case there is language in that opinion that supports your argument or even a reasonable extension of the law.” Counsel responded: “It’s simply in the context of all of the jurisprudence.” The judge asked: “What jurisprudence are you pointing to that refers to this case as supporting your argument?” Again, the attorney’s response was “the case law as a whole.” (I believe this colloquy *only* went on this long, because of the judge’s respect for a noted and respected member of the Bar and

because the courtroom was filled with lawyers.) The judge took a deep breath and said: “I rely upon you and all the lawyers in this courtroom to accurately cite authority for your arguments. I do not have the time to read every case cited by every lawyer in every memorandum. I accept as accurate a citation by counsel for a proposition, though I know argument is expected and you may place a fair interpretation upon an opinion. Here, I’ve seen none.” His voice became sterner.

“Now we have two choices, you can show me where in that case there is a sentence or even a phrase to support your argument, or we can sit here in silence until you do. But we’re going to sit here until you either show me where that case supports your argument or you tell me it was mis-cited.” Silence filled the room. There was a flipping of pages, a shifting of body position. An uncomfortable time passed. Finally the attorney said, “Your Honor, I believe that the case may have been inadvertently mis-cited for this proposition.” “Thank you,” Judge Rubin said.

Does it serve the cause of justice?

In the early ’70s, all motions were argued in federal court and, therefore, on motion day dozens, scores of lawyers, would fill the courtrooms. The next several hours would provide a young lawyer with a continuing legal education that should have qualified for course credit as to presentation of argument, style and advocacy.

On one particular morning Judge Rubin said to me, “Please put motion number 14 first.” This was a bad omen for one of the lawyers in number 14. I called that motion first. An attorney took the podium and argued that the claim of the plaintiff should be dismissed, because the plaintiff had sued, by mistake, John T. Smith instead of John R. Smith. Judge Rubin asked the attorney how granting such a motion could promote the cause of justice. Rather than promptly withdrawing the motion and asking opposing counsel for a simple amendment, the moving attorney pressed on, insisting that this was a standard motion widely accepted in the courts. This regrettable strategy by that attorney led to a lengthy explanation of what the court system and lawyers do in the most basic way, and then to an instruction to reread certain basic statutory, ethical and procedural rules. The message was that law was not just about strategy and tactics, but about something bigger. The audience understood.

Ethics in negotiations

In his noted article on ethics in negotiation, Judge Rubin argued, “The lawyer may not accept a result that is unconscionably unfair to the other party.”⁴ There are clear ethical duties in negotiation.

An example is in the story of his representation of the client in a sale of a business and merger. It was apparent from his discussions with opposing counsel that the *other attorney* thought this merger would be a tax-free reorganization, and Alvin felt strongly that it would not be. He felt he could not go forward knowing the other lawyer’s error, so he gave his client two choices: he could quietly resign without explanation and discontinue representation, or he could tell the other lawyer that it was a taxable transaction. The client agreed to let him advise the opposing counsel that it was taxable, after which the transaction terminated, saving much conflict down the road. Alvin would not countenance playing a part in a transaction in which the other party had a significant misunderstanding. The duty to the law was above the duty to the client.

Loyalty to his law clerks

While listening to one of his clerks present a paper at a conference, Alvin saw the audience was resistant to the ideas being presented.⁵ Alvin took the podium as the next speaker. Clearly, he felt that the young lawyer had something to transmit to the audience, but the audience was not listening. He began his presentation with the following story: “In front of my building on Royal Street is an empty base of an obelisk where a statue of Edward Douglas White used to stand. Then they moved the Louisiana Supreme Court to Loyola Avenue and took that statue with them. Royal Street in the ’60s and ’70s became a haven for the counterculture, and one day a bearded guru dressed in flowing white robes sat in the lotus position on the empty marble base and began to preach to his



Judge Alvin Rubin

followers. He said, ‘My followers, life is but a cloud and nothing more.’ One of his sycophants in disbelief challenged him and said, ‘Oh leader, how can life only be a cloud. Isn’t it more?’ The guru responded, ‘My son, have you come to learn or to argue?’” The message to the audience was clear.

The Socratic Method

He listened *carefully*. We were subjected to ceaseless in-office debates over legal principles, cases, statutes and precedents. Then, this Talmudic-like exercise would merely move locations from the courtroom to the dinner table to the tennis court, and most frequently, to Mena’s Palace, where an even larger group would gather around at lunch time. The young and unwise would in his presence make an absolute unqualified statement such as: “That case is clearly wrong.” His response was: “Really? And tell me more about that.” And, “Have you considered this? And, what about that?” “No, I hadn’t thought of that.” This was a humbling lesson in thinking before speaking.

Openness to other view points

I interviewed with him two or three times. In my last interview, he gave me a hypothetical and asked how I would rule. After I answered he commented: “That’s interesting. I ruled exactly the opposite way yesterday.”

Training for stressful negotiation

Alvin’s leadership and problem solving did not stop with law clerks. After visiting Mrs. Rubin in the hospital late one evening, he was walking to his car when a young man approached him with a gun in hand. Seeing the problem, Alvin began to comfort him and said: “Just stay calm. I am going to give you what you want. Be careful with the gun so no one gets hurt.” Several years later I found myself in the same situation. I remembered his words and repeated them with the same result.

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The book

Though he set challenging standards for others, he set even higher standards for himself. When Judge Rubin and I were completing the Federal Law Clerk Handbook in about 1977,⁶ I asked him what his plans were for his compensation from the Federal Judicial Center, who was paying us both to write the book. Judge Rubin answered that he “was already an employee of the United States Government and, of course, he could not accept any additional payment.” Though I would not have thought of it before, I decided to follow suit and delivered my check to my law firm.

Watering the plants

Alvin Rubin believed we should strive for excellence in everything we do. A small example proves this point. He asked me to housesit while he traveled. I was to water all of the many plants. But, I asked, how would I know when to water them? He said: “It’s easy. Each plant has a painted tongue depressor in the soil. Blue means water Monday, Wednesday, Friday; Pink means Tuesday and Thursday; Yellow means Saturday; Green means Sunday; and White means only when it rains.” Need I say more?

Leading by example

Culturally, we are taught what is valuable, what to pursue, what standards we hold ourselves to. The Buddhist aphorism is, “When the student is ready, the teacher will appear.” And, when we “are ready” (or we are fortunate enough that someone thinks we are ready), we can find mentors, too.

Albert Schweitzer said, “Example is not the main thing

influencing others. It’s the only thing.” Alvin Rubin led by example. (This was easy when you could do everything better.) He worked longer and harder. He was there when I arrived, and there when I left. He took on many projects without compensation in the education of young lawyers, both as a teacher and as an author. He taught many courses at LSU Law School, to which I drove him, and part of my uncredited, but deserved CLE was the weekly two-hour drive to and from Baton Rouge.

For Alvin Rubin, there was no wasted time. During a jury trial break, I watched him scribbling on notepaper a few words and asked what his notes were. He said: “I’ve always been interested in haiku, you know, where you have five syllables, followed by seven syllables, followed by five syllables.”

Alvin even made a list of what he believed his failures were. “Patience” was at the top, and he wrote that word in large letters on a paper that he slid under the glass on his desktop. He looked at that every day. Perhaps after all, that was a lesson I helped teach him. ■

¹ This article is an abbreviated version of a lecture presented at the 18th Annual Judge Alvin B. Rubin Symposium on May 13, 2010. The full article is available as a PDF at www.TonyDiLeo.com.

² Buddhist proverb.

³ The Louisiana Bar has established a formal program to encourage and enlist mentors. See LSBA News, June 3, 2009, “LSBA Seeks Mentors for New Lawyers.”

⁴ Alvin B. Rubin, *A Causerie on Lawyer’s Ethics in Negotiation*, 35 La. L. Rev. 577, 591 (1975).

⁵ The speaker’s premise was clarity and structure in writing.

⁶ Anthony M. DiLeo and Alvin B. Rubin, *Federal Law Clerk Handbook* (Federal Judicial Center 1977).

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