

PRESENTED BY ANTHONY M. DiLEO¹ TO:

18TH ANNUAL JUDGE ALVIN B. RUBIN SYMPOSIUM
ON ETHICS AND PROFESSIONALISM

FEDERAL BAR ASSOCIATION
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EASTERN DISTRICT OF LOUISIANA

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Judge Alvin Rubin: Lessons in Ethics and Professionalism²

"When the student is ready, the teacher appears."³

I want to thank the Symposium Committee for their invitation to make some brief comments today. I'm honored to be here to speak of Judge Rubin: of his life as a lawyer and judge and of how he set an example for me on these subjects of ethics and professionalism.

I worked for him 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. "Whew!, did he have a lot of work to do." But today I am grateful for the experience. (I just heard someone up here say he failed!)

In writing these notes, I began thinking more broadly about mentorship and its importance to the legal profession, especially now. In fact, this issue is of such prominence currently that the Louisiana Bar has established a formal program to encourage and enlist mentors.⁴ Mentors serve as models not only of values, but also of style, attitude, technique, and even social skills.⁵

An issue for all of us is the weighing of values, and what proportions they play. How do we weigh the relative importance of demands that compete for our time? How do we rank relatively our service to clients, service to the community, to teaching, to writing, or to lecturing, and what about gaining affluence and economic security.⁶ As the legal profession struggles to maintain its professionalism in the face of business pressures and competition, a prime counterweight to that is the appreciation for the debt that we owe to our mentors who exhibited the tradition of teaching and professionalism to bring us along, transforming us fresh graduates of law schools while instilling the values of

service.^{7 8} And today I would like to share with you a few of the stories of my clerkship for Judge Rubin and how he mentored me.

Negotiations

In his noted and frequently quoted article on ethics in negotiation, published in 1975, Judge Rubin argued. "The lawyer may not accept a result that is unconscionably unfair to the other party." A. Rubin, 35 La. Law Review, at 591 (1975). That article is now posted on the FBA website for you. Ethics in negotiation is not an oxymoron. In fact, there are clear ethical duties.

An example of ethics in negotiation is told by 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. Alvin felt he could not go forward knowing the other lawyer's error, so he gave his client two choices: (1) he could quietly resign without explanation and discontinue representation, or (2) he could tell the other lawyer that, in fact, it was a taxable transaction. The client agreed to let him advise the opposing counsel that it was taxable at which point the transaction terminated, wisely 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 law was above the duty to the client.

Ethics & Professionalism in Negotiations

The La. Rule of Professional Conduct and ABA Model - Rule of Professional Conduct say:

- Rule 4.1:
"In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person...."
- This is a mandatory ethical rule.

As the Louisiana Professionalism Code says:

- "My word is my bond. I will never intentionally mislead ... other counsel. I will not knowingly make statements of fact or law that are untrue." (see also La. Rule 4.1)

ABA Comments to Rule 4 says:

*"Misrepresentation - A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentation can also occur by failure to act."*⁹

The ABA Comments to Rule 4:

- *"Statements of Fact... Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and party's intentions as to an acceptable settlement of a claim are in this category..."*¹⁰
- However, Louisiana did not adopt the comments.

And, in drafting documents, the Louisiana Professional Code states: "I will clearly identify for other counsel changes I have made in documents submitted to me."

Some Negotiation Issues May Possibly Create Ethical or Legal Duties – Not Just Inspirational

1. General Rule - No Duty to Disclose.
2. Certain cases decided in other jurisdictions:
3. Exception based on relationship such as partners, fiduciaries, trustees, executors.
4. When a previous representation becomes misleading.
5. When information has been requested by the opposing party in discovery.
6. When disclosure may be mandated by Rules of Professional Responsibility.¹¹

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 and said he had read the memoranda of all counsel. The Judge 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 responded: "What jurisprudence are you pointing to that refers to this case as supporting your argument?" Again, the response by the attorney was "the case law as a whole." By the way, 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 even a phrase or a sentence 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" was the Judge's response.

Does it Serve the Cause of Justice?

In the 60s and 70s, all motions were argued in federal court and therefore on motion day dozens, scores of lawyers would fill the courtrooms. And then 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, and an attorney took the podium and argued that the claim of the plaintiff should be dismissed, because he said, 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 and insisted that this was a standard motion widely accepted in the courts. This was a regrettable strategy for that attorney, because it 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. His message was that this was not just about strategy and tactics, but about something bigger. Most importantly, the audience understood.

Europe, No Respite

When Alvin announced he would be traveling to Europe for two weeks, we looked forward to a quieter environment, only to discover, later, that he had worked in the taxi on the way to the New Orleans airport, worked on the plane to New York, worked while waiting for his transatlantic flight, and then mailed many large, thick, franked envelopes to us directly from the New York airport, as he was boarding the plane to Europe, to be certain we had enough to occupy ourselves during his trip, all of which we received about two days after he departed. (And that was when everything was on paper!) But Judge Rubin never asked more of us

than he did of himself. In fact, he asked much less of us than he demanded of himself. We did our best to just catch up.

The Vacation

His law clerks looked forward to his vacation and the welcome respite it would provide them. One day he gave me good news and bad news – the good news was that he was taking his one-month vacation in Boston. Wonderful! (Exclamation Point!) A month without the Judge in the office would be bliss. Time for us to catch up. But, the bad news was, I was going with him on his "vacation" where he would sit for trial and he would try cases. Oh No! (Exclamation Point!) He had decided to "take his vacation" by going to the Federal District Court in Boston where they would set about 100 cases for trial in the period of one month, knowing that most would settle if a judge was ready to try the case. And, he was ready. Apparently, he felt I needed continued improvement in my clerkship skills, so I traveled with him, walking briskly to the courthouse every morning, walking briskly home every evening, but skipping the energetic Sunday jogs, the early morning jogs, and the many dinners with colleagues. I needed to rest. It was the legal equivalent of being a Navy Seal or Delta Force member for 30 days.

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.¹² Alvin took the podium as the next speaker. Clearly he felt that the young lawyer had something to transmit to the audience. He began his presentation with the following story. He said: "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 where

Edward Douglas White now sits.¹³ Royal Street in the 60s and 70s became a haven for the counterculture, and one day a bearded guru dressed in flowing white robes took the lotus position on the now empty marble base and began to preach to his 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.

Demolition

The atmosphere in the United States District Court was one of constant motion, where either a trial was going on with motions *in limine*, a temporary restraining order had been filed, a settlement conference was about to begin, or the finishing touches of an opinion were being drafted. Or usually, all of the above. Needless to say, it was not a pensive, tranquil environment where we calmly reflected and proceeded at our leisure. My description of it was "catching hand grenades one by one and seeing if the pin was in." When I moved from Judge Rubin's trial court to work at the 5th Circuit, the atmosphere was quite different.

Mostly the quiet sounds of rustling pages turning as records would be read with profound reflection on sometimes arcane and esoteric issues; quite a contrast to just days before in the district court. Indeed, in 1973 the telephone rarely rang in a 5th Circuit law clerk's office. Sometimes, the clerks for fun would simply pick up the phone and say: "*Sorry, you have the wrong number*" startling the caller. This was decades before caller ID. How did we know? But we were nearly always right.

In early 1973, if I looked out my window at the 5th Circuit, to where this United States District Court building now stands, there was an old abandoned warehouse. That warehouse was being torn down to build this new building. One day I watched as a tall crane pulled up with a very large steel ball about 36 inches in diameter, and it would swing the steel ball in a pendulum action and slam it into the warehouse, at which point everything would shake and vibrate with the explosive sounds of large cracking timbers. Just then, Judge Rubin called me from the old Royal Street courthouse and asked me, "Is it different over at 600 Camp Street," and I said, "Well, at first it was quite different, but only moments ago it began to remind me a lot of the district court."

Buzzers

In the District Courthouse on Royal Street, the courtroom was at the opposite end of the hall from the office, so Judge Rubin had a buzzer system rigged next to the clerks' desk so he could signal us when he was on the bench during trial. One long buzz meant: "immediate research needed, come to the courtroom ASAP." Two buzzes meant: "bring me a cup of coffee," a blend that he brought from home. We never used silver plate with that coffee because it would take the plate off. Three buzzes meant: "I have drafted handwritten documents to bring to Betty White," his secretary and typist. Four buzzes meant: "Get down

here. You really need to see this." Five meant: "Incoming missiles. Get under your desk." And so on.

Fearlessness

I now realize how fortunate I was to drive Judge Rubin to LSU where once a week he taught negotiations. One night driving him back from LSU in my car, at about 11 p.m. on a dark Airline Highway, before the I-10 opened, I noticed that the gas gauge needle was resting on "E"! I did not know how long it had been on "E"! Had it been there an hour? Had we only feet, yards, or minutes to drive before we ran out of gas? The prospect of telling him we ran out of gas on a dark Airline Highway at nearly midnight was something I would rather avoid. I held my breath until about 7 miles later I drove into the first dimly lit gas station I saw in Gonzales, Louisiana, and after filling the tank and with relief I told him we had been on "E" for quite a while. He said "I knew that, but I didn't want to frighten you." These weekly ventures with several hours of being alone in the car would certainly deserve CLE credit.

The Book

Though he set challenging standards for others, he set even higher standards for himself. When Alvin and I were completing the Federal Law Clerk Handbook in about 1977¹⁴, I asked what his plans were for his compensation from the Federal Judicial Center, who was paying us both to write the book. He answered that he "was already an employee of the United States Government and he would not accept any additional payment." Though I never would have thought of it before, I decided to follow suit and delivered my check to my law firm.

Training for Stressful Negotiation

Alvin's leadership and problem solving did not stop with law clerks. After visiting Mrs. Rubin at Touro late one evening, he was walking to his car in the dark 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 exact same situation. I remembered his words and repeated them with the same result.

Rules of Professional Conduct – Post Clerkship

I once asked Judge Rubin if I should stay out of his courtroom for a year or two after clerkship and he calmed my concern saying he'd have no difficulty ruling against me. Of course, there are ethical duties arising out of being a law clerk.

Rule 1.12 Former Judge, Arbitrator or Law Clerk says:

"(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after disclosure."

The Rules of Professional Conduct say:

"(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, A lawyer serving as a *law clerk to a judge, other adjudicative officer or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and*

substantially, but only after the lawyer has notified the judge, other adjudicative officer or arbitrator." Rule 1.12

Other Models of Mentorship and Values to Emulate Abound

Culturally, we are taught what is valuable, what to pursue, what standards we hold ourselves to.

There are great mentors throughout history; we all know of the historic importance of Aristotle to Alexander the Great and Bach to Mozart. We aren't in these spheres; however, the sentiment and motive is the same. The Buddhist aphorism is "When the Student is Ready, the Teacher Appears." And, when we "are ready" (or we are fortunate enough that someone thinks we are ready), we can find mentors too.

Alvin Rubin led by example. This was easy to do when you could do everything better. He worked longer and harder. He was there when I arrived, and he was 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, and part of my uncredited, but deserved CLE was the weekly two-hour drive to and from Baton Rouge.

Alvin Rubin believed we should strive for excellence in *everything* we do! Yes, everything. A small example proves this point. He asked me to house sit while he traveled and 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? There is a famous definition of work in Peter Pan: "It Isn't Work Unless You'd Rather Be Doing Something Else."¹⁵ By that definition, he was rarely "at work."

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 which 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.

And speaking of patience, thank you for yours.

¹ Mr. DiLeo earned his B.A. and J.D. degrees from Tulane University and an LLM degree from Harvard Law School. Mr. DiLeo was a member of the Tulane Law Review and the Order of the Coif. He has taught at Boston University Law School, and is presently an Adjunct Associate Prof. at Tulane Law School. He was a law clerk for Judge John Minor Wisdom of the United States Fifth Circuit Court of Appeals and Judge Alvin B. Rubin of the United States District Court in New Orleans (later of the United States Fifth Circuit Court of Appeals).

He also served as a member of the Louisiana Committee on Bar Admissions appointed by the Supreme Court of Louisiana, and is a life member of the American Law Institute.

In 2004 he won the Louisiana State Bar Association statewide Pro Bono Publico Award.

Previously, he was also appointed by Governor Bobby Jindal to the Hurricane Katrina Transition Committee and as a member of the Board of Commissioners of the Ernest Morial New Orleans Exhibition Hall Authority and was named by New Orleans City Business as one of New Orleans' Top 50 Lawyers in its 2005 Leadership in Law awards.

He served as the Chairman of the Louisiana State Bar Association's Section on Corporate and Business Law and the Section of Health Care Law.

He is an Adjunct Professor at Tulane Law School and is the author of numerous legal materials and is a frequent speaker.

² This is to be presented at the 18th Annual Judge Alvin B. Rubin Symposium on May 13, 2010.

³ Buddhist proverb.

⁴ See LSBA News, June 3, 2009, "LSBA Seeks Mentors for New Lawyers."

⁵ <http://en.wikipedia.org/wiki/Mentor> - Mentorship

The first recorded modern usage of the term can be traced to a book entitled "Les Aventures de Telemaque", but the French writer François Fénelon[3]. In the book the leader character is that of Mentor. This book was published in 1699 and was very popular during the 18th century and the modern application of the term can be traced to this publication.[3]

This is the source of the modern use of the word mentor: a trusted friend, counselor or teacher, usually a more experienced person. Some professions have "mentoring programs" in which newcomers are paired with more experienced people, who advise them and serve as examples as they advance. Schools sometimes offer mentoring programs to new students, or students having difficulties.

Today, mentors provide expertise to less experienced individuals to help them advance their careers, enhance their education, and build their networks.

In [Greek mythology](#), **Mentor** ([Greek](#): *Μέντορ* / *Méntōr*; gen.: *Μέντορος*)^[1] was the son of [Alcumus](#) and, in his old age, a friend of [Odysseus](#). When Odysseus left for the [Trojan War](#) he placed Mentor in charge of his son, [Telemachus](#), and of his palace. When [Athena](#) visited Telemachus she took the disguise of Mentor to hide herself

from the suitors of Telemachus' mother [Penelope](#).¹² As Mentor, the goddess encourages Telemachus to stand up against the suitors and go abroad to find out what happened to his father.

When [Odysseus](#) returns to [Ithaca](#), Athena (in the form of Mentor) [takes the form of a swallow](#) and the suitors' arrows have no effect on him.

⁶ Script of the film "Risky Business" during a poker game amongst high school seniors: [Joel](#): "Listen, you guys. Doesn't anyone want to accomplish anything? Or, do we just want to make money?" [Answer](#): "Make money. Just make money. Make a lot of money. What about you, Joel?" [Joel](#): "Serve my fellow mankind."

⁷ I previously wrote an article about another such a mentor, Paul O.H. Pigman, for the New Orleans Bar newsletter in the Winter, 2002, which is available by contacting them, or a copy is available at www.TonyDiLeo.com/articles where a PDF of the Paul Pigman article can be read and downloaded.

⁸ Another mentor to everyone I worked with was Ewell Walther, who was recognized by his partners and associates alike as a genius, not in a hyperbolic use of that word, but in the literal sense. He had perfect eidetic imagery for complex partnership agreements and I would watch him dictate them out of his head. To me, research seemed unnecessary when Ewell had encyclopedic knowledge of the law, so my path of least resistance was to visit him and ask for an answer, which he patiently gave on many occasions. However, after a while he responded, "*Young man there is an answer to that and it is in the library.*" However, Ewell's more important mentorship was in his leadership qualities. He said so little that when he did, the response was unanimity.

⁹ Negotiated Settlements Gone Bad in Other States. ABA Model Rules 4.1 in comments called "Truthfulness in Negotiations" 4th Edition (1999) p. 395.

- Slotkin, A lawyer saying there was no excess coverage when there was.
- Virzi, A lawyer settling without telling defendant that the plaintiff, a star witness, had died and wouldn't be there at trial to testify.
- Nebraska Bar, A lawyer negotiating hospital settlement without telling the hospital that patient had insurance to pay.
- Pennsylvania State Bar, A settlement based on assumption that client could transfer real estate when client likely could not.

¹⁰ See American Bar Association, Standing Committee on Ethics and Professionalism Responsibility, *Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation*, Formal Opinion 06-439, April 12, 2006.

¹¹ *Settlement Agreements in Commercial Disputes: Negotiating, Drafting and Enforcement*. Edited by Richard A. Rosen, Vol.1, Aspen Law & Business.

¹² The premise was clarity and structure in writing.

¹³ When the Louisiana Supreme Court returned to Royal Street in the past several years, the refurbished statue of Justice Edward Douglas White returned too.

¹⁴ Anthony M. DiLeo and Alvin B. Rubin, Federal Law Clerk Handbook (Federal Judicial Center 1977).

¹⁵ Peter Pan