

## Judge Alvin B. Rubin: The Highest Standards of Ethics and Professionalism

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As I was thinking about our topic for today and the model for ethics and professionalism that Judge Rubin provided, I ran across a recent commentary by Ezra Klein in *Newsweek* in which he discussed the Securities and Exchange Commission's charges against Goldman Sachs. Klein's piece nicely illustrates much of the concern that drove Judge Rubin's views on ethics and professionalism. Here's an excerpt from Klein:

After 10 hours and 43 minutes of testimony before the Senate's Permanent Subcommittee on Investigations on Tuesday, the hapless Goldman Sachs employees and the angry senators interrogating them were still talking past each other. "I firmly believe that my conduct was correct," said a tired-looking Fabrice Tourre, the Goldman employee who structured the Abacus trade that led to the SEC's lawsuit against Goldman. Meanwhile, Sen. Carl Levin had used the word "stupid" 12 times and Sen. Tom Coburn had reminded the witnesses that "we're not that stupid."

The problem for Tourre—and for Wall Street more broadly—is that they're so intent on proving that what they did was legal that they can't see that what they did was wrong.

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Banks mislead customers, make money from betting against housing bubbles they help fuel, get bailed out with taxpayer dollars, and then pay out massive bonuses to their executives while the rest of the country is mired in a recession they caused. This might not be illegal, and the bailout might have been necessary to save our economy, but all of it is deeply unfair.<sup>2</sup>

Well, Judge Rubin very much understood that lawyers and other professionals owe the public a standard of behavior that is guided by principles of fairness, not merely by the minimal requirements imposed by the law.

In the remainder of my remarks, I'll use three examples to illustrate how Judge Rubin pushed for standards of fairness when lawyers and judges fulfill their obligations of ethics and professionalism.

I'll start with the ethics of negotiation, an area of great importance to Judge Rubin, one in which he continues to exert great influence.

### **Ethics in Negotiation**

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<sup>2</sup> Ezra Klein, *Golden Rules*, NEWSWEEK, April 30, 2010, <http://www.newsweek.com/id/237215>.

In my preparation, I consulted Prof. Nathan Crystal's casebook on professional ethics. Crystal is an outstanding scholar in the field, and in his discussion of the duty of honesty in negotiation, he writes that "the leading article" for the view of a strong duty of honesty is Judge Rubin's "A Causerie on Lawyers' Ethics in Negotiation."<sup>3</sup>

In identifying the lawyer's duty of honesty in negotiation, a couple of provisions from the codes of ethics and professionalism are relevant.

First, according to Louisiana's Code of Professionalism:

"I will conduct myself with dignity, civility, courtesy and a sense of fair play."

Judge Rubin brought to the bench a strong belief in the principle of fair play. This was true in many ways, but I especially remember his practice of circulating questions to counsel in advance of oral argument. Before each sitting, he asked the other clerks and me to draft questions that he might ask the lawyers at oral argument, and after he added his questions and edited (or deleted) our questions, the administrative office of the court would send the questions to the lawyers. Rather than viewing oral argument as a game or an opportunity to demonstrate his intellect, he wanted to make sure that he (and his judicial colleagues) had developed a full understanding of the issues at stake.

Judge Rubin's belief in principles of fair play was very much evident when he wrote about the ethics of negotiation. In his "Causerie," he sketched out a strong view on the duty of lawyers to act on the basis of candor and fairness.<sup>4</sup>

Unfortunately, the Rubin perspective has not found favor with the drafters of legal codes of ethics. According to Rule 4.1 of the Louisiana Rules of Professional Conduct (which is essentially the same as the ABA Model Rule version of 4.1),

**Rule 4.1. Truthfulness in Statements to Others**

In the course of representing a client, a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

The requirement of truthfulness in statements to others might impose a meaningful duty of fair play. Under 4.1(a), lawyers may not make false statements of fact.

But the comments to Rule 4.1 make it clear that the duties it imposes are rather minimal.

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<sup>3</sup> NATHAN M. CRYSTAL, *PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* 411 (4<sup>th</sup> ed. 2008).

<sup>4</sup> Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577 (1975).

First, the obligation to be truthful does not include an “affirmative duty to inform an opposing party of relevant facts.” Rather, the rule prohibits only misrepresentations, as when the lawyer “affirms a statement of another person that the lawyer knows is false.” But as Judge Rubin wrote, honesty, “as the oath administered to witnesses makes clear, implies not only telling literal truth but also disclosing the whole truth.”

Even more troubling are the comments to Rule 4.1 that explain what the drafters of the rule meant when they adopted the duty not to make a “false statement of material fact.” According to the drafters, in understanding Rule 4.1, we should look to “generally accepted conventions in negotiation” rather than to principles of ethics. And what is required by generally accepted conventions? In an important article, Prof. James J. White of the University of Michigan Law School wrote:

Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways, he must facilitate his opponent’s inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled.

Some experienced negotiators will deny the accuracy of this assertion, but they will be wrong. I submit that a careful examination of the behavior of even the most forthright, honest and trustworthy negotiators will show them actively engaged in misleading their opponents about their true positions.<sup>5</sup>

Thus, it turns out that misrepresenting what would constitute an “acceptable settlement” to a client does not amount to a misrepresentation of a material fact! It is permissible under the Rule to say that your client will not accept anything less than \$100,000 even if the client would accept \$75,000.

Judge Rubin took a very different view. Under his sense of ethics, the lawyer-negotiator could not misstate the client’s bargaining position. In “A Causerie,” Rubin wrote:

To most practitioners it appears that anything sanctioned by the rules of the game is appropriate. From this point of view, negotiations are merely, as the social scientists have viewed it, a form of game; observance of the expected rules, not professional ethics, is the guiding precept. But gamesmanship is not ethics.<sup>6</sup>

Here are some other examples of permissible misrepresentations under Rule 4.1:

“If you don’t lower your price, my client will find a new supplier.” The client has told the lawyer that no one else can supply the particular product.

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<sup>5</sup> James. J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. BAR FOUND. RES. J. 926, 927-928.

<sup>6</sup> Rubin, *supra* note 4, at 586.

“We are considering very serious charges.” In fact, the prosecutor says this to encourage cooperation and has no intention of charging the accused.<sup>7</sup>

Here are some examples of impermissible misrepresentations:

“We have documentary proof of the claim.” None exists.

“We have an eyewitness who will identify/exonerate the accused.” None exists.

“That benefit would cost the company \$200 per employee.” In fact, the company lawyer in a labor negotiation knows it will cost only \$20.<sup>8</sup>

What’s the difference between the permissible and impermissible examples? The allowed statements are all about prospective behavior and client intentions, not statements of fact. The disallowed statements are factual statements that certain things are true now even though they actually are false.

This distinction may seem rather troubling, and it’s one that Judge Rubin rightly dismissed.

Just as Judge Rubin believed that lawyers should adhere to high ethical standards when negotiating for their clients, he also urged a high ethical standard for judges when faced with conflicts of interest.

### **Duty to avoid even the appearance of impropriety**

As I’ve indicated, Judge Rubin rejected the minimalist view of ethics that lawyers may pursue any negotiating tactics they wish as long as they do not violate any legal requirements. As Judge Rubin believed, it’s not enough just to follow the law. Lawyers have higher duties based on principles of ethics. And even adhering to those higher standards was not sufficient for Judge Rubin. It also was important to avoid even the appearance of impropriety.

This principle is nicely illustrated by Judge Rubin’s opinion in *Hall v. Small Business Administration*,<sup>9</sup> a case involving judicial ethics.

*Hall* involved a class action, employment discrimination lawsuit against the Small Business Administration (SBA). It was tried before a federal magistrate judge. It turned out that the magistrate’s law clerk had previously worked for the SBA and was a member of the suing class. Moreover, after the trial but two days before the magistrate rendered judgment, the law clerk accepted a position with the counsel who represented the plaintiffs in the lawsuit against the SBA.

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<sup>7</sup> STEPHEN GILLERS, REGULATION OF LAWYERS 511 (8<sup>th</sup> ed. 2009).

<sup>8</sup> *Id.*

<sup>9</sup> 695 F.2d 175 (5<sup>th</sup> Cir. 1983).

The court held that the magistrate should have disqualified himself per the Code of Judicial Conduct and a federal statute which both require judges to disqualify themselves when their “impartiality might reasonably be questioned”:

**Disqualification of justice, judge, or magistrate [magistrate judge]**

(a) Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.<sup>10</sup>

In explaining why the magistrate’s impartiality might reasonably be questioned, Judge Rubin invoked concerns about the appearance of impropriety. As he wrote,

Judicial ethics reinforced by statute exact more than virtuous behavior; they command impeccable appearance. Purity of heart is not enough. Judges’ robes must be as spotless as their actual conduct. These expectations extend to those who make up the contemporary judicial family, the judge’s law clerks and secretaries. Because a magistrate’s sole law clerk was initially a member of the plaintiff class in this suit, had before her employment with the magistrate expressed herself as convinced of the correctness of its contentions, and accepted employment with its counsel before judgment was rendered, we hold that the magistrate erred in refusing to disqualify himself.<sup>11</sup>

The strictness of the Judge’s views is further illustrated by how he addressed the issue of waiver—parties are allowed to waive the judge’s duty to withdraw from a case, once there has been full disclosure of the basis for disqualifying the judge. In *Hall*, the law clerk’s membership in the class of plaintiffs was raised on the opening day of trial, and the magistrate invited counsel to object to his participation in the trial. No objection was lodged by the SBA’s counsel at that time. Judge Rubin observed that there was no valid waiver because the SBA was not aware on the opening day of trial that the law clerk would later leave the magistrate’s chambers to accept a position with the plaintiffs’ counsel. This was important because the law clerk opted out of the plaintiff class on the morning of the second day of the trial.

I turn now to a third example of Judge Rubin’s strong sense of professional ethics, the duty to provide competent representation.

**Duty to provide competent representation**

I discussed earlier how Rule of Professional Conduct 4.1 sets a low standard for the obligation to be truthful and how Judge Rubin urged a more stringent standard. We find the same disparity between the requirements in the ethics code and what Judge Rubin expected when we consider Rule 1.1 of the Louisiana Rules of Professional Conduct. That rule addresses the duty to provide skillful representation to clients. According to the Rule (which mirrors Rule 1.1 of the ABA’s Model Rules):

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<sup>10</sup> 28 U.S.C. § 455.

<sup>11</sup> *Hall*, 695 F.2d at 176-77.

### **Rule 1.1. Competence**

(a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Note an important aspect about this rule. One need provide only “competent” representation, or as the rule further provides, only that level of ability and effort that is “reasonably necessary” for the representation.

Of course, it would not be fair for the rule to require the highest levels of skill—not every lawyer can be a Perry Mason or an Alvin Rubin—but we can expect a more demanding standard than required by the rule for a lawyer’s thoroughness and preparation. As I point out to my students, the lawyers who sweat the details will save their clients—and themselves—a lot of trouble.

The low standard for competence is reflected in the infrequency with which lawyers are disciplined for providing low quality representation. And there are two aspects to this low frequency. First, it is very difficult for a client to show that a lawyer has failed to provide competent representation. Under the Sixth Amendment’s standard for providing ineffective assistance of counsel, for example, the Supreme Court has instructed lower courts to be “highly deferential” when scrutinizing the performance of lawyers and to employ a strong presumption that lawyers have “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”<sup>12</sup> The client also has to show a reasonable probability that but for the alleged ineffective assistance, the outcome at trial would have been different.<sup>13</sup> Under the Supreme Court’s standard, you have to show pretty flagrant behavior by a lawyer, like sleeping through substantial portions of a trial. But even when a Sixth Amendment violation is found, it is still unlikely that the lawyer will be disciplined.<sup>14</sup>

Judge Rubin of course set a much higher standard for himself than one of “reasonably necessary” thoroughness and preparation. Indeed, he went well beyond the level of “reasonably necessary” preparation. For example, by the time of oral argument, he knew the trial transcript inside and out and was able to draw on that knowledge during his colloquies with counsel.

### **Conclusion**

We live in an era where professional conduct is driven more by the mores of the marketplace than principles of ethics and professionalism. This is unfortunate, because lawyers do more than represent clients with zealousness. Lawyers participate in a legal system that uses law to promote justice. That’s why it is so important that we act according to the highest standards of justice. If lawyers engage in legal – but less than ethically ideal – behavior, they run the risk of undermining the very purpose the legal profession attempts to serve. Fortunately for

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<sup>12</sup> Strickland v. Washington, 466 U.S. 668, 689-690 (1984).

<sup>13</sup> Id. at 698.

<sup>14</sup> GILLERS, *supra* note 7, at 685-686.

us, Judge Alvin B. Rubin provided an exemplary role model for lawyers and judges in his advocacy for, and practice of, the highest standards of ethics and professionalism.