Alvin B. Rubin: Man of the Law

*Geoffrey C. Hazard, Jr.**

I knew Al Rubin from the time I came to Chicago to become a member of the faculty at the Law School of the University of Chicago and Executive Director of the American Bar Foundation. Our acquaintance arose from some undertaking or another of the American Bar Association, probably the project for the Code of Professional Responsibility. At the time, as I recall, Al was still a practicing lawyer, or had recently been appointed as United States District Judge. He was also a lecturer at the Law School at LSU. In any event, he came across, as he then and everafter was, as a complete man of the law—learned, reflective, tough-minded, practical, and deeply concerned with the well-being of the community in which he lived. Would that all of us in the profession lived up to his example.

For those who knew Judge Rubin, all such description is a poor imitation of the person. For those who did not know him, however, a distinct impression can be formed by reading his judicial opinions. These official pronouncements decided concrete cases and clarified the law. Occasionally, his decisions made law, to the extent that a lower court judge can do so—and Judge Rubin was entirely aware of his place in the system. These immediate "law jobs," as Karl Llewellyn called them, were well and truly done. But beyond getting the job done, Judge Rubin's opinions convey the depth of his knowledge of law practice and of the intricacies in administration of ordinary justice. Perhaps above all, they show how experience as a practicing lawyer can inform the highest fulfillment of judicial office.

As a lawyer, Judge Rubin was primarily involved in trial work, but he could truly be called an old-fashioned general practitioner. This experience as a practicing lawyer made him intimately conversant with the kinds of transactions that were presented to him as judge. An example is a routine case he decided while a District Judge, *Storm Drilling Company v. Atlantic Richfield Corporation*.[1] The immediate litigation in that case was for attorney's fees incurred in defending a prior suit. Judge Rubin's concise description of the prior suit reveals his familiarity with the kind of transaction in question:

Copyright 1992, by LOUISIANA LAW REVIEW.

* Sterling Professor of Law, Yale University.

1. 386 F. Supp. 830 (E.D. La. 1974).

> In 1972 William E. Barnett, a mud logger employed by Formation Specialities, Inc. (Formation), filed suit in this court against a vessel, the STORM-DRILL III, *in rem*; and *in personam* against Storm Drilling Company (Storm), Atlantic Richfield Company (Arco), Formation and their respective insurers. . . . Arco had contracted with Formation to perform mud logging services on an offshore drilling rig. It had contracted with Storm to drill a well there. Its contract with Storm contained an indemnity agreement covering in general claims arising out of Arco's negligence. . . . Storm considered that the lawyer employed to defend Storm and Arco jointly would have a conflict of interest; it therefore engaged separate counsel.[2]

The foregoing passage reads smoothly and may look like an easy exercise. However, such economy and grace in expression could come only from someone who really knew what he was talking about: admiralty proceedings *in rem* and *in personam*, the oil drilling business, indemnity agreements, the prosecution and defense of personal injury cases, and relationships with clients.

After having been elevated to the court of appeals, Judge Rubin gives us a case involving a lending agreement and subsequent bankruptcy, another vivid instance of the stuff of law practice:

> Several banks joined in a single loan, governed by a participating loan agreement. The borrower was thereafter forced into involuntary bankruptcy. Some of the banks made a post-petition loan to the trustee, in the hope of improving the debtor's position, but one bank refused to join. Interpreting the language of the participation agreement, the district court held that the post-petition loan was not a "collection expense" or "disbursement" as those terms were used in the agreement.[3]

This passage reads just as smoothly as that in *Storm Drilling* and looks like another easy exercise. Again, however, such economy and grace in expression could come only from an author familiar with the kind of transaction under consideration: bank loan participation, bankruptcy, "improving [a] position," and the costs and expenses incurred in these legally intricate maneuvers.

These are mere samples, chosen virtually at random, from Judge Rubin's workproduct on the bench. Even alone, however, they demonstrate the point: here was a man who knew law practice from inside and hence also knew from the inside the kinds of out-of-court trans-

---

2. Id. at 830-31.

3. Federal Deposit Insurance Corp. v. First State Bank of Abilene, 779 F.2d 242, 243 (5th Cir. 1985).

HeinOnline -- 52 La. L. Rev. 1482 1991-1992

actions that lawyers deal with. And here was a man who brought that intimate knowledge to bear in making judicial pronouncements.

Among the many subjects about which Judge Rubin made many judicial pronouncements was the practice of law itself. This subject is often called "legal ethics," and indeed is properly so called. The term "ethics" derives from the Greek "ethos," meaning "usage" or "custom." More generally, it means "way of life." Judicial pronouncements on legal ethics therefore are about the lawyer's way of life. They not only describe that way of life but define and regulate it. Pronouncements about how practice give life to the rules and conventions that govern the profession and determine whether these standards have been honored in the specific instance.

Hear now some of Judge Rubin's pronouncements on our profession's way of life. These are made in the course of deciding ordinary cases in a hard day's work of judging, not in Law Day speeches or other apologies or self-congratulation.

Consider *Lamar v. American Finance System of Fulton County, Inc.*[4] The lawyer for the plaintiff, in resisting a motion for summary judgment, sought to augment his position with evidence and legal argument presented after the trial judge had taken the motion under submission. Every lawyer should know that this is impermissible, or at least that the judge is not required to give heed to matter presented after time has run. Adjudication in its very nature requires that argument stop sometime; the deadlines for filing legal papers are little statutes of limitation that give effect to this necessity. Speaking from knowledge of this tragic truth, Judge Rubin said:

> Lawyers of experience, who practice what we boast to be a learned profession, owe a duty both to their clients and to the court, and, perhaps, even to other members of their profession, who appear as opposing counsel, to prepare cases properly, to give the issues full consideration before preparing pleadings, and, in general, to exercise diligence in the practice of their profession. Code of Professional Responsibility DR 6-101. While a trial court may use other remedial measures, we do not consider that it was an abuse of discretion under the circumstances of this case for the trial court to deny counsel the right, after submitting the case on one set of hypotheses and learning that this was not enough, to attempt to inject new issues in the hope of achieving a different result.[5]

---

4. 577 F.2d 953 (5th Cir. 1978).
5. Id. at 955.

Observe:

-"Lawyers of experience know": The rule being applied—that late argument need not be considered—is not some arbitrary invention of the law, but one of the rules of the game well known to all who claim the right to play.

-"What we boast is a learned profession": We lawyers say that ours is a learned profession and, although not all members of our profession are in fact learned, saying that they are commits lawyers to being judged as though they were. Hence, they must be assumed to have a learned person's knowledge of what is expected.

-"Owe a duty to their clients": The duties of a lawyer begin with a duty to the client, because the functions of a lawyer begin with having a client. The duty to the client entails a duty to the court, because the lawyer's function for the client requires dealing with the court on the terms laid down by the law, specifically the law of procedure.

-"And to the court": Independent of the duty to the client is the duty to the court. This duty is a concomitant of the special right of lawyers to act in the courts on behalf of clients. Formerly, this special right was called the "privilege" of practicing law. Whatever it is called, it is a legal power qualified—like all legal powers—by legal responsibilities.

-"And, perhaps, even to other members of their profession": The cautiously qualifying term "perhaps, even" reflects keen awareness that the creation of a duty to other lawyers is arguable in the minds of many lawyers but unthinkable to some. But the rules of procedure, which the rules of ethics presuppose, require that motion papers be served on opposing counsel. That requirement creates a legal duty, one of many that exist to other lawyers. The sanction for breach of these duties is rarely monetary damages or even an injunction. The typical sanction is invalidation of a legal undertaking that fails to comply with such a duty. Hence, in the instant case, the trial court properly treated as a legal nullity the "attempt to inject new issues in the hope of achieving a different result."

Consider also *McGowan v. King, Inc.*[6] This involved a determination of the proper fee for a prevailing borrower-plaintiff under the fee-shifting provision of the Truth in Lending Act. The damages awarded were $218.02; the trial judge allowed the borrower an attorney's fee of slightly over $3,000. While this may sound disproportionate, the court of appeals, speaking through Judge Rubin, increased the award to nearly

6. 661 F.2d 48 (5th Cir. 1981).

HeinOnline -- 52 La. L. Rev. 1484 1991-1992

$10,000. Addressing the question of disproportionality, Judge Rubin observed that the litigation had involved two appeals on the merits before the instant appeal over the adequacy of the attorney's fees award. He then said:

> The borrower's counsel did not inflate this small case into a large one; its protraction resulted from the stalwart defense. And although defendants are not required to yield an inch or to pay a dime not due, they may by militant resistance increase the exertions required of their opponents and thus, if unsuccessful, be required to bear that cost.[7]

Observe again Judge Rubin's complete awareness of practical realities in assessing the propriety of the fee claim. On its face, the claim appears disproportionate to the point of banditry: $10,000 for enforcing a $200 claim—subject matter for another "lawyer joke." But consider:

> -The very small damages award could have been the product of parsimony by the trial judge, and hence no indisputable measure of the value of the plaintiff's claim. Judge Rubin would know that.
>
> -If plaintiff incurred $10,000 in prosecuting the claim, defendant surely must have spent at least a like sum in "stalwart defense." That in turn invites the question of why the defendant felt it worthwhile to offer "militant resistance" if the plaintiff's claim was paltry. One inference occurring to a legally knowledgeable mind is that the settlement value of the claim was not paltry. If the claim had substantial settlement value, the plaintiff's lawyer was justified in putting a large effort into prosecuting it, even though the recovery actually obtained fell far short. Winning on liability but being awarded minimal damages is simply an ordinary risk in damages litigation. Another inference is that the defendant was resisting as a matter of principle, in which case the defendant was "not required to yield an inch." But if that was the case, then by the same token plaintiff was no less justified in prosecuting as a matter of principle.
>
> -And so, when the calculations have been made that take into account the uncertainties as they appeared *ex ante*, rather than merely the certainties as they appeared *ex post*, plaintiff's attorney fee claim appears not unreasonable at all. Unless, of course, the standard of assessment is what would be reasonable if there were no fee-shifting provision in the Truth in Lending Act. But there is such an Act. The whole point of the Act, which is a congressional mandate the court must accept, is that

7. Id. at 51.

HeinOnline -- 52 La. L. Rev. 1485 1991-1992

a losing defendant in Truth in Lending Act is "required to pay that cost."

A moral that can be drawn is that the ethics of a litigation game depend in part on the rules of the particular game. Judge Rubin knew what they were.

A final example is *Doe v. A Corporation*.[8] This was a case in which a lawyer formerly employed in a corporation's law department undertook to bring a class action suit against the corporation on behalf of the corporation's employees to establish certain rights under the company's pension plan. The lawyer had worked on pension matters before he resigned. The question before the court was whether the lawyer could bring such an action. In addressing the problem, Judge Rubin said:

> To allow Doe [the lawyer] to act as class representative would create a tension between his obligation as representative to do all he can to vindicate the rights of the class members and his personal ethical duty to protect a corporation's [the former client's] secrets. A lawyer may not, simply by assuming a new identity, escape the strictures that would govern his conduct were he representing the class as counsel. . . .
>
> If there are meritorious causes of action against a corporation, someone other than Doe can and must file the suit. . . . If no other class member ever learns of the claim, it may go forever unvindicated. The lawyer's duty to his client creates the possibility that his silence will permit valid claims to lie unasserted.[9]

-"A lawyer may not, simply by assuming a new identity, escape the strictures that . . . govern his conduct." Being a lawyer involves a professional servitude, a change in identity that entails disabilities as well as powers. This servitude is inchoate upon admission to practice but becomes actively engaged when a lawyer takes on a client. As a lawyer for a client, one has no right to be a class representative against the client, even though a member of the protected class and even though others similarly situated have the right. "A lawyer may not . . . escape . . . ."

-"The lawyer's duty to his client creates the possibility that his silence will permit valid claims to lie unasserted." The duty to the client precludes not only potential class actions against the client but most other litigation as well—perhaps all litigation against a *present* client—and other kinds of endeavors inimical to a client's interests as well. And this even though "the lawyer's

8. 709 F.2d 1043 (5th Cir. 1983).
9. Id. at 1047-48.

HeinOnline -- 52 La. L. Rev. 1486 1991-1992

> silence . . . will permit valid claims to lie unasserted." Lying unasserted, by reason of a lawyer's silence, are not only valid class actions but myriad other kinds of valid claims, and myriad other endeavors that could right wrongs done or threatened by clients.

"A lawyer may not escape . . . that his silence will permit" wrongs to go unrighted. This is a sobering truth about a lawyer's work, as Al Rubin well knew. And it is a sobering truth as well about a judge's work, for judges will never be told about injustices about which lawyers are forbidden to tell. And thus complete justice remains beyond reach: "Valid claims . . . lie unasserted."

It takes strong will to acknowledge that fact—a special detachment—and strong faith to continue in the law's work while knowing it—a special engagement. Reconciling professional detachment with personal engagement requires sensitivity to tragedy, and not only this but a sense of humor. As shown by his life and work, Al Rubin had all of these.

HeinOnline -- 52 La. L. Rev. 1487 1991-1992