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## Judge Rubin and Judicial Management of the Docket

*A. Leo Levin\** and *Russell R. Wheeler\*\**

Judge Alvin Rubin was both mentor and friend to each of us.

He was, of course, a friend and mentor to countless federal judges. He shared with newly-appointed colleagues techniques of the craft, but in the process he also shared his vision of the heights to which they might aspire. He always had time for litigants and for the legal profession. He was an important and influential voice in the formative days of the Council on Legal Education for Professional Responsibility, which had a profound impact on clinical education in the nation's law schools. He routinely advised the lawyers before him that the court "is available for conferences of any kind up to the moment trial is to start, and will usually meet with counsel if necessary the evening prior to trial."<sup>1</sup> He was also friend and mentor to those who studied the law from the perspective of other disciplines. More than a few social scientists are in his debt for the time and insight he shared with them. Friends sought out the judge and his wife of so many years, Janice, for wisdom as well as the more usual rewards of friendship.

But Alvin Rubin was first of all a judge, and what greater tribute than to be hailed by a colleague as the exemplification of the Biblical ideal!<sup>2</sup> Our effort here is a modest one, to examine his contribution to what might seem to some a prosaic detail in the business of judging: case management. As prosaic as it might seem to some, it was not prosaic to Judge Rubin. One of his many contributions to the federal judiciary and—more important, he would emphasize—to the litigants and the public who rely on the federal judiciary, was to help develop ways by which federal trial judges could manage their dockets to promote the just, speedy, and inexpensive disposition of litigation called for by Rule 1 of the Federal Rules of Civil Procedure.

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1. Alvin B. Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Courts*, 4 *J. Sys. J.* 135, 144 (1978) [hereinafter Rubin, *Calendar*].

2. See Edith H. Jones, *A Farewell to Judge Alvin B. Rubin*, 70 *Tex. L. Rev.* 1 (1991).

*The Mid-1960s Interest in the Legal Process*

He became a judge in 1966, at a time when the federal courts' role in American society was vastly different than could have been imagined even a generation earlier and subject to widespread professional and political debate. There was also, by the time of his appointment, growing interest in the practical workings of courts and of the needs of litigants. The Supreme Court helped promote that interest by broadening the constitutional dimension of criminal procedure. The 1967 report of the President's Commission on Law Enforcement and Administration of Justice tapped the current thinking of numerous practitioners and students of the criminal justice system.<sup>3</sup> Interest in criminal procedure in turn heightened interest in civil procedure. Parts of the legal academy were producing quantitative research on civil case processing<sup>4</sup> and jury behavior.<sup>5</sup>

The federal courts came in for their share of attention—attention to their administration as well as their decisions. This was the decade of the Criminal Justice Act of 1964,<sup>6</sup> the Bail Reform Act of 1966,<sup>7</sup> the Jury Selection and Service Act of 1968,<sup>8</sup> and the Federal Magistrates Act<sup>9</sup> of the same year. Chief Justice Earl Warren, known best for the constitutional revolution that occurred during his tenure, pleaded for attention to the administration as well as the substance of the law. "The most important job of the courts today," he said at the time, "is not to decide what the substantive law is, but to work out ways to move the cases along and relieve court congestion."<sup>10</sup> But doing that required more than "a continuous tinkering in order to remedy every little outcropping of inefficiency."<sup>11</sup> The need was for "improved methods of adjusting caseloads, dispatching litigation for hearing, resolving complicated issues, eliminating non-essential ones, increasing courtroom efficiency, and [achieving] dispatch in decision making and appeal."<sup>12</sup>

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3. President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967).

4. See, e.g., A. Leo Levin & Edward A. Woolley, *Dispatch and Delay: A Field Study of Judicial Administration in Pennsylvania* (1961) [hereinafter Levin & Woolley]; Maurice Rosenberg, *The Pretrial Conference and Effective Justice: A Controlled Test in Personal Injury Litigation* (1964).

5. Harry Kalven, Jr. & Hans Zeisel, *The American Jury* (1966).

6. Criminal Justice Act of 1964, Pub. L. No. 88-455, 78 Stat. 552 (1964).

7. Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (1966).

8. Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53 (1968).

9. Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (1968).

10. Quoted in Fred F. Graham, Warren, Justice 15 Years, to Seek Speed in Courts, *New York Times*, Sept. 30, 1968 at 1.

11. Earl Warren, *The Problem of Delay: A Task for Bench and Bar Alike*, 44 *A.B.A.J.* 1043 (1958).

12. *Id.* at 1046.

Judge Rubin did much to fill the need that Chief Justice Warren outlined.

### *Judge Rubin's Forums*

Judge Rubin's active extrajudicial career looked within the federal judiciary as well as outside it, to the law schools and the profession. His national service on the federal judicial administrative structure included membership from 1969 to 1975 on the Subcommittee on Judicial Statistics and from 1978 to 1984 on the parent Committee on Court Administration, then the major forum in which the judiciary developed its legislative program and oversaw the management of numerous administrative housekeeping matters involved in the operation of a large national court system. He chaired a special Judicial Conference Subcommittee to Examine Possible Alternatives to Jury Trials in Complex Protracted Civil Cases.

From 1987 until 1989, he was a member of the Board of the Federal Judicial Center, the federal courts' research and education agency, created in response to a request that the United States Judicial Conference made to Congress in the same year that Alvin Rubin became a federal judge.<sup>13</sup> His service on the Board capped a long tenure of involvement with the Center's research and educational activities. He lectured at least twenty-six times in Center educational programs from the early 1970s through 1987. These lectures included regular participation in the Center's most well-known and important service for the federal courts, its orientation seminars for newly appointed district judges.<sup>14</sup> He also joined Judges Richard Arnold and Carol Los Mansmann and then-Judge Anthony Kennedy in a specially produced video program to help new appellate judges learn how to function as members of a multi-judge court and how to manage their chambers. Finally, Judge Rubin and one of his former law clerks authored the Center's Law Clerk Handbook.<sup>15</sup> This project, which Judge Rubin proposed and for which he volunteered, reflects not only the close regard in which he held his clerks, but, perhaps more to the point of this article, his willingness to deal with prosaic details, hardly exciting intellectually or likely to attract praise or attention from the academy or the bar, and yet important to the smooth functioning of the system.

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13. Federal Judicial Center Act, Pub. L. No. 90-219, 81 Stat. 664 (1967); 28 U.S.C. §§ 620-29 (1968). See Russell R. Wheeler, *Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center*, 51 *Law & Contemp. Probs.*, Summer 1988, at 31.

14. Based on records maintained by and on file at the Federal Judicial Center Information Service Office.

15. The most recent edition is Alvin B. Rubin & Laura B. Bartell, *Law Clerk Handbook: A Handbook for Law Clerks to Federal Judges* (rev. ed. 1989).

*Judge Rubin and the Purposes of Case Management*

Judge Rubin's teaching and analysis elevated the judge's obligation for active and effective docket management. He did not see it as a bureaucratic imperative. He saw it as an essential element in doing justice. One indication of the importance he attached to case management and what it could accomplish is his tendency to open his writings on the subject with literary references. Case management, Judge Rubin might say, may be plodding, but one can learn something about its importance from observers as divergent as Kafka,<sup>16</sup> Ezekiel,<sup>17</sup> and the New Union Prayerbook.<sup>18</sup>

Two aspects of case management were paramount to Judge Rubin. One was a constant stress that case management is not simply a device for reducing judicial workload, but is the due of litigants and the public. He taught judges case management so they could better serve the public. He also recognized, for sure, as others have put it, that "[j]udges who think they are too busy to manage cases are really too busy not to,"<sup>19</sup> and therefore he also taught case management to his colleagues because he cared about them.

In 1976, Chief Justice Burger asked him to address the management of the criminal docket at what has become known as the Pound Revisited Conference. In doing so, Judge Rubin elaborated numerous procedural mechanisms that judges could take to improve the processing of criminal cases. He also called for an end to plea bargaining, and he decried the fact that

the trial process in many courts appears dominated by a production ethic. . . . Throughout the system the pressure is for dispositions. A society that prides itself on its concern for *due* process, for justice, humanitarianism and individual self worth, should be ashamed to see its foremost symbol of these values degenerate into a bureaucratic process whose single purpose is to terminate cases without adequate regard for the human des-

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16. Franz Kafka, *The Trial* 267-69 (definitive ed. 1965), quoted in Alvin B. Rubin, *Trial of the Civil Jury Case*, in *Seminars for Newly Appointed United States District Judges Conducted by the Federal Judicial Center, 1970 and 1971* at 135 (1971) [hereinafter Rubin, *Jury*].

17. Ezekiel 7:23, cited in Alvin B. Rubin, *How We Can Improve Judicial Treatment of Individual Cases Without Sacrificing Individual Rights: The Problems of the Criminal Law*, in *The Pound Conference: Perspectives on Justice in the Future* 187 (A. Leo Levin & Russell R. Wheeler eds., 1979) [hereinafter Rubin, *Rights*].

18. *Gates of Prayer: The New Union Prayerbook* 677 (1976 ed.), cited in Rubin, *Calendar*, *supra* note 1.

19. William W. Schwarzer & Alan Hirsch, *The Elements of Case Management* 1 (1991).

tinies it affects or the social toll it inflicts not only on defendants, but on the law that it claims to enforce and uphold.<sup>20</sup>

The same theme appears in his more extensive analyses of civil case management. The titles of his lectures and articles—such as “Trial of the Civil Jury Case”<sup>21</sup> and “Pre-trial Procedure”<sup>22</sup>—do not reveal the scope and depth of what they contain. “Taxpayers and litigants alike,” he wrote in 1978,

have a right to expect effective docket management. Docket management, however, is not a goal in itself. It ought not be merely busy work, with much shuffling of forms and compilation of statistics. Unless the court’s administrative supervision of the cases pending before it can achieve some purpose of value to the litigants, the public, and the judicial process, it is a vexatious preoccupation.<sup>23</sup>

The other theme in Judge Rubin’s observations about case management was a flinty recognition that whatever could be achieved by effective and skillful case management, it was in itself no ultimate cure for the fundamental problems besetting the American justice system. One problem was the bureaucratization of the courts, the threat of institutional judging noted above. “[I]mprovement of administration alone,” he wrote in 1980, “cannot solve the problems of bureaucratization of the judiciary and institutionalization of decision-making. It will simply make the machine run more smoothly.”<sup>24</sup> Effective docket management would not solve the problems represented on courts’ criminal dockets. He told the Pound Conference that we “can no more control [crime] in the courts alone than we could eliminate biological disease in the operating room.”<sup>25</sup> Case management, though, could make a difference, a difference that would depend in part on the disease in question. As an appellate judge, for example, he asserted “that the symptoms of appellate malaise can be alleviated even if the disease cannot be cured,” and cited as evidence “the therapeutic effort” pursued by his own Court of Appeals for the Fifth Circuit.<sup>26</sup>

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20. Rubin, *Rights*, supra note 17, at 199 (emphasis in original).

21. Rubin, *Jury*, supra note 16.

22. Alvin B. Rubin, *Pre-trial Procedure*, in *Seminars for Newly Appointed United States District Judges Conducted by the Federal Judicial Center, 1973, 1974, and 1975*, at 311 (1976) [hereinafter Rubin, *Procedure*].

23. Rubin, *Calendar*, supra note 1, at 136-37.

24. Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 *Notre Dame Lawyer* 648, 655 (1980).

25. Rubin, *Rights*, supra note 17, at 208.

26. Alvin B. Rubin & Gilbert Ganucheau, *Appellate Delay and Cost—An Ancient and Common Disease: Is It Intractable?*, 42 *Md. L. Rev.* 752 (1983).

*Judge Rubin and the Techniques of Case Management*

By 1992, Judge Rubin's particular teaching about case management has, for most judges and students of judicial administration, a certain ho-hum quality to it. The basic principles that he and Judges Alfred Murrah, Hubert Will, Robert Merhige, and others taught in the early 1970s have largely become a part of the conventional wisdom. In 1990, in fact, Congress seriously considered mandating the universal adoption of those principles, a move that Judge Rubin might well have questioned.<sup>27</sup>

That his views are now conventional wisdom does not mean that it is pointless to examine them. Examining his teaching serves more than to honor his memory. It informs the debate still with us over the virtues of settling cases instead of trying them<sup>28</sup> and over the desirability of judges managing their dockets.<sup>29</sup> To review Judge Rubin's contributions is to return to first principles. His way was to reason and to persuade, and thus there emerges from his seminar notes and his other, more elaborate writings not merely a roster of techniques, a how-to-do-it manual, but more important, an understanding of the reasons for which he advocated a managed docket. Understanding his reasons, in turn, illuminates limits, and it highlights potential pitfalls and ways of avoiding those pitfalls.

For Alvin Rubin, "early involvement of [the judge] in planning the progress of a case, controlling the discovery process, and scheduling hearings, trials, and other litigation events"<sup>30</sup> was not simply a prerogative but an obligation. He routinely reminded lawyers who came before him of the often quoted statement of Chief Judge Alfred P. Murrah:<sup>31</sup> "While the case is in the hands of the lawyers before it has been filed in court, it is their business—but after it reaches the court, it is the public's business, and it is the duty of all to see that it is moved along to final disposition."<sup>32</sup>

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27. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified at 28 U.S.C. §§ 471-482 (Supp. 1992), encourages the adoption of basic case management principles, but mandates them for only ten "pilot" courts. Earlier versions of the statute would have mandated them for all district courts.

28. E.g., Owen M. Fiss, *Against Settlement*, 93 Yale L. J. 1073 (1984).

29. E.g., Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982). For a critique of Resnik, see Steven Flanders, *Blind Umpires—A Response to Professor Resnik*, 35 Hastings L.J. 505 (1984).

30. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 102(5)(B), 104 Stat. 5089 (1990). See also 28 U.S.C. § 473(a)(2) (Supp. 1992).

31. Chief Judge Murrah of the U.S. Court of Appeals for the Tenth Circuit focused the Judicial Conference's attention on case management by chairing special committees on pretrial procedure, which sponsored the new judge seminars in the early 1960s, prior to the creation of the Federal Judicial Center. Judge Murrah also served as the second Director of the Federal Judicial Center.

32. Quoted in an explanation of the Pre-Trial Conference accompanying the uniform pre-trial order, in Rubin, *Procedure*, supra note 22, at 323.

Did judicial assumption of responsibility for case control actually result in advantages to the litigants? Yes, it did, and Judge Rubin rostered seven specific advantages based on some thirty years of experience. Among them: the time required for actual trial is shorter, each case can be processed according to its own characteristics, and preliminary matters are disposed of more efficiently.<sup>33</sup>

In a colloquy on complex litigation with leading practitioners, Judge Rubin extended the concept of "public business," applying it to the cost of litigation as well as to timely disposition of cases. Lawyers "must understand that the escalation of litigation costs is a matter of public concern even if both parties are willing to expend unlimited amounts. Litigation cost is public business. It reflects on our system for controversy disposition." And recognizing that his view hardly commanded unanimous support with respect to avoiding unnecessary delay in disposition, let alone the cost of adjudication, he added: "I think we need broad, massive professional reeducation."<sup>34</sup>

Alvin Rubin was not content to stop with broad principles, broadly stated major premises, or philosophical postulates. He knew that they are not self-executing and that the good judge must be master of the pragmatic. Always give the parties a date by which to complete the next step.<sup>35</sup> Involve the lawyers in fixing deadlines. This helps the judge be reasonable, but thereafter be firm. He would make himself available for conferences up to and including the evening before trial, but once the time set for trial had arrived, a request for just "ten minutes" to try to nail down a settlement would be summarily denied.

There was candid recognition of what he could not succeed in doing. Once a case gets out of hand, "a judge cannot restore order. I've tried. . . . It's almost impossible to get the genie back into the bottle."<sup>36</sup> And this, of course, was a powerful incentive to assume early and on-going control of civil litigation.

One of the most difficult problems in the management of civil litigation is the proper role of the judge in the "settlement dynamic." There is near universal agreement that without settlements civil litigation would virtually grind to a halt. But settlements do more than avoid trial; early settlement is a powerful instrument in controlling the cost of litigation. Finally, as Justice Brennan observed when he was a state

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33. Rubin, *Calendar*, supra note 1, at 138.

34. Alvin B. Rubin et al., *Colloquy on Complex Litigation*, 1981 B.Y.U. L. Rev. 741, 803 (1981) [hereinafter Rubin et al., *Litigation*]. See also discussion of delay in class actions with no information going to members of the class for extended periods. *Id.* at 748-49.

35. Rubin, *Calendar* supra note 1, at 139-40.

36. Rubin et al., *Litigation*, supra note 34, at 746. Judge Rubin was talking specifically about cases he had allowed to grow "too big," but his concluding comment was more general: "I don't think you can rely on the notion, 'Well the case has gone two years and has gotten out of hand; judge, come in and save it.'" *Id.* at 746-47.



court judge, "a case settled is a case best disposed of, because then one of the parties certainly avoids the heartache of losing at trial."<sup>37</sup>

There is widespread agreement on the advantage of settlement; there is no such consensus about the role judges should play in achieving it. There is little doubt that judges can wield tremendous influence in the process; it is precisely that power—"awesome" is not an inappropriate term—that raises questions about appropriate limits on its exercise.

In a recent study of lawyers' attitudes, U.S. Magistrate Judge Wayne Brazil reports that a "staggering 85 percent" agree that "involvement by federal judges in settlement discussions [is] likely to improve significantly the prospects for achieving settlement."<sup>38</sup> In all four districts studied, substantial majorities "also concur that judges should involve themselves in the settlement process even when the lawyers have not asked for the court's help with settlement."<sup>39</sup>

Judge Rubin was not one who thought a judge should refrain from even mentioning settlement, although he stressed that "there isn't any settlement device better than a firm trial date."<sup>40</sup> He usually referred settlement discussion to magistrates early in litigation, and he emphasized the importance of reminding the parties that "the earlier the settlement, the less the litigation expense."<sup>41</sup> He thought the best time for the district judge to get involved was shortly before trial, at the pretrial conference. His emphasis at this point, however, was on the assistance the court could provide in making the negotiations successful.<sup>42</sup> At judicial orientation seminars, he suggested ways in which the judge's advice could help achieve what he called "a non-pressure atmosphere where the judge acts as the kindly mediator figure."<sup>43</sup> Precisely how much further the judge should go would depend on a variety of factors: was the case jury or non-jury, might the judge avoid expressing a judgment, were the parties aware that there was always the possibility of the case being reassigned to another judge if that became necessary?

Judge Rubin has long been recognized as a towering figure, innovative and influential, particularly in the area of case management. On closer examination of his writings and teachings, what emerges is the picture of a very modest man, one who would urge newly appointed

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37. Proceedings of the Attorney General on Court Congestion and Delay in Litigation 87 (1956), quoted in Levin & Woolley, *supra* note 4, at 232 n.23.

38. Wayne D. Brazil, *Settling Civil Suits* 1 (1985).

39. *Id.* at 1-2.

40. Hubert L. Will et al., *The Role of the Judge in the Settlement Process*, in *Seminars for Newly Appointed United States District Judges Conducted by the Federal Judicial Center in 1976* 115, at 131 (1977) [hereinafter Will et al.].

41. Rubin, *Calendar*, *supra* note 1, at 145.

42. *Id.*

43. Will et al., *supra* note 40, at 133.

judges to try a particular technique but to return to their own ways if they preferred them. He urged his peers and the members of the bar to find some way to "measure good judging and bad judging, or quality performance versus nonquality performance."<sup>44</sup> He recognized that consumer surveys could be useful in any business, even in the business of dispensing justice.

His concern for the litigants was manifest, even for the members of a class who were litigants only in the sense that they had not chosen to opt out. How would they construe a lengthy period of silence concerning their litigation, during which period apparently nothing was going on?<sup>45</sup> His hope was that the machinery of justice would become "less rigid, more just, and more compassionate for the litigant [and] for the public."<sup>46</sup>

He was certainly sensitive to and solicitous of the interests of the attorneys. Even in the relatively rare case where complexity necessitated firmer management, his focus was on the need for lawyers to "accept and tolerate a degree of judicial intervention that perhaps would be unacceptable in other cases."<sup>47</sup> Judges were from the profession and remained part of the profession, and this was to the good.

Most striking of all, however, was his conception of an appropriate self-image for the judge. "If a judge's concept of judging is to be on a bench in a black robe saying, 'I sustain' or 'I overrule that objection,' it is very hard" for that judge to become effective.<sup>48</sup> On the other hand, there are judges, like some he chose to mention, who believe "that the role of the judge is to assist in the administration of justice."<sup>49</sup> For them, ignoble detail was simply part of fulfilling the higher calling. And with typical modesty he added to the members of the bar with whom he was visiting: "You have to help the judge reshape his image of judging."<sup>50</sup>

For Alvin Rubin, case management was important in realizing his own image of judging.

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44. Rubin et al., *Litigation*, supra note 34, at 804.

45. *Id.* at 748-49.

46. Rubin, *Calendar*, supra note 1, at 145.

47. Rubin et al., *Litigation*, supra note 34, at 803.

48. *Id.* at 761.

49. *Id.*

50. *Id.*

