RABINOWITZ TRIBUTES

JUDGE ANDREW J. KLEINFELD

This tribute was prepared by Judge Andrew J. Kleinfeld as a preface to the bound compilation of Justice Jay A. Rabinowitz's judicial opinions.

Justice Rabinowitz gave me my first look at the work of an appellate judge, when I was his law clerk from 1969 to 1971. Much of what I do now is influenced by how he did his work then.

The State of Alaska was only ten years old, so many cases were matters of first impression. The Alaska Supreme Court was of a vigorous and confident temperament, not inclined to dodge issues. In *R.L.R. v. State*,[1] Justice Rabinowitz passed comprehensively on all of the major constitutional issues which then affected juvenile justice: The right to jury trial, the right to public trial, the right to be present during trial, and the procedure for waiving rights. *R.L.R.* was among the first of the state supreme court opinions that used the state constitution rather than the United States Constitution as a basis for deciding these kinds of issues. The practical effect of this analytic device is to foster federalism and a diversity of approaches from which the nation may gain the benefit of experience, without the risk of experiments being imposed by federal courts on the entire nation.

In *State v. Chaney*,[2] Justice Rabinowitz articulated the goals of criminal sentences in Alaska in a manner which has stood up well for three decades. In *National Indemnity Co. v. Flesher*,[3] he explained with clarity the distinction between a liability insurer's duty of defense and its duty of coverage. To most law students and law professors this would not sound important, but to most practicing lawyers, it obviously is. The law controlling insurance is perhaps the most important body of law in practice for determin-

1. 487 P.2d 27 (Alaska 1971).
2. 477 P.2d 441 (Alaska 1970).
3. 469 P.2d 360 (Alaska 1970).

ing who gets sued for what, because it determines who is worth suing.

My personal favorites among the cases I worked on as a law clerk tended to be the more ordinary ones, rather than the great cases. *Rego v. Decker*[4] was a particularly nice analysis of when a contract is specific enough to be enforced. It dealt sensitively with the distinction between a judge making up the contract, and a judge filling gaps as the parties would have had they had the time and money to draw up a more complete document. *Brand v. First Federal Savings & Loan Ass'n*[5] was aided by a particularly good brief I recall, from Fred Brown, and was a model of how to construe a complex statute. It involved a mechanic's lien statute, so nearly all the conduct which would be affected by the decision would be private and out of court, in the hurly-burly of construction projects trying to beat freeze-up. It was essential that the decision be right, and that it be clear.

There are two lessons I took with me from my clerkship. One is that the public needs good judges more for the ordinary than for the great cases. The other is that judges should do their own work.

The great cases lesson was a surprise. I applied for the clerkship with Justice Rabinowitz because I had been tremendously impressed by his dissents in a great case, *Watts v. Seward School Board*.[6] But I've learned that everyone has opinions on great issues, laymen's opinions are usually as good as lawyers' and judges', and you don't have to search very hard for a lawyer who will do high quality work as a judge on great cases. What is really difficult is to interest a person whose money is not involved in a dispute over a gas station lease, as in *Rego v. Decker;* or priority in payment for construction work, as in *Brand v. First Federal Savings & Loan Ass'n;* or in how to read the language of an insurance policy, as in *National Indemnity Co. v. Flesher*. People need courts and judges for this work – they can resolve most great issues themselves through the political process. One sometimes hears judges say amongst themselves that it does not matter what the resolution is, so long as the docket is cleared of the case. That is not so. It matters a great deal what the resolution is, and how the decision is written, because otherwise injustice is done to the parties before the court and to many people whose conduct subsequently is affected by the decision. The litigants and all of Alaska benefited

4. 482 P.2d 834 (Alaska 1971).

5. 478 P.2d 829 (Alaska 1970).

6. 421 P.2d 586, 610 (Alaska 1966) (Rabinowitz, J., dissenting), *vacated by* 391 U.S. 592 (1968), *on remand to* 454 P.2d 732, 739 (Alaska 1969) (Rabinowitz, J., dissenting), *cert. denied*, 397 U.S. 921 (1970).

because Justice Rabinowitz enjoyed working on these routine cases and did it well.

The second lesson was that a judge can and should do his own work. In those days, Justice Rabinowitz used to write his decisions out longhand with a fountain pen. Doris Wilken would type them up, and Bob Coates and I, his law clerks, would go over them for substantive and formal correctness. In two years as a law clerk, I can identify only one decision that I wrote. I don't think this reflected my deficiencies as a writer, because my predecessor and successor law clerks had the same experience. The practical effect of Justice Rabinowitz writing his own decisions was that he understood the details of his cases, grounded his decisions on the facts in the record, and caught errors which would have been missed had the writing been delegated after the result was determined.

These were good lessons. One of them, that a judge should do his own work, is now very much the minority position among state and federal judges. In most American appellate courts today, law clerks just out of law school, and even "externs" still in law school, write the decisions, and judges edit them. In some, judges neither read the briefs nor write the decisions – they just vote on outcomes based on staff memoranda and edit staff drafts.

This damages both the quality and the legitimacy of what courts do. Quality is harmed because however intelligent, inexperienced lawyers tend to be long on doctrine and short on the ability to understand the facts in a record. It takes imagination borne of experience to understand what happened from the papers in a record. You don't really know exactly how a case of any difficulty should be decided until relevant portions of the transcript, exhibits and motion papers, and also the relevant statutes, regulations and judicial decisions are all tabbed, underlined, spread out on a table or the floor and studied with care. Editing is no substitute, because a bright lawyer can make anything sound plausible. As for legitimacy, Justice Brandeis said that the reason the Supreme Court was so respected in his day was that, alone of governmental institutions in Washington, "[w]e do our own work." The authority of judges has much to do with their selection at the highest level of government, but if much of the real work of judging is done by persons who have been selected by judges themselves rather than the democratic organs of government, legitimacy of that authority is diluted. Authority also is undermined if those choosing the outcomes do not really know exactly what they are doing.

I still apply these lessons learned from Justice Rabinowitz when I was his law clerk. Though it is hard to apply them to caseloads much larger than the Alaska Supreme Court then had, the way Justice Rabinowitz performed the tasks of an appellate

judge was, I am persuaded, the right way. He was a model of what the citizens are entitled to expect of a judge.