



JUDGE MAX ROSENN

The editors of the *University of Pennsylvania Law Review* dedicate this issue to the Honorable Max Rosenn, a 1932 graduate of our law school. Judge Rosenn passed away on February 7, 2006, after thirty-six years as a distinguished jurist on the United States Court of Appeals for the Third Circuit.

University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 154

MAY 2006

No. 5

IN MEMORIAM

MAX ROSENN: AN IDEAL APPELLATE JUDGE

RUGGERO J. ALDISERT[†]

They call it the effete East because it conjures up the image of huge modern cities with shining glass skyscrapers, subways, and mass movement of people. Only an hour's drive from New York City, however, brings you to Northeastern Pennsylvania, a region whose history bespeaks more of Western frontier hardscrabble than New York metropolitanism.

It all started with coal, not the bituminous coal that feeds the steel mills of Pittsburgh, Birmingham, and Gary, Indiana, but the hard coal—anthracite coal—first used to drive the steamships and fire huge boilers that provided the heating of houses and buildings from Boston to Philadelphia.

Before the coal was discovered, there was a place known only as the Wyoming Valley, first inhabited by the Shawanese and Delaware

[†] Senior United States Circuit Judge and Chief Judge Emeritus, United States Court of Appeals for the Third Circuit.

Indian tribes in the early 1700s. In 1769, a group of Yankee settlers from Connecticut became the first Europeans to reach the area, and they named it after John Wilkes and Isaac Barre, two members of the British Parliament who supported colonial America. They called it Wilkes-Barre.

The Valley's population exploded when anthracite coal was discovered in the 1800s, and coal also made possible the growth of the neighboring cities of Scranton and Hazelton. Wilkes-Barre was the commercial center of the coal industry and now has a population of over 40,000. It is the county seat of Luzerne County.

The mines are now closed, following the environmental concerns that swept post-World II America. The railroads were forced to switch to diesel or electric power, and oil and natural gas began to heat houses instead of smoky coal. Coal mining was a dangerous occupation and the public's concern for miners' safety became dominant.

Today, Wilkes-Barre is a governmental, educational, and medical center, recognized as the birthplace of modern cable programming dating back over thirty years. It is a quiet town with both Kings College and Wilkes University established on the banks of the Susquehanna on River Street in Center City.

The calm and beauty of the modern Wyoming Valley gives no clue to its turbulent and often violent history. On June 21, 1877, known as "Black Thursday," the first of twenty Irish coal miners, charged with the murder of twenty-four mine foremen and a superintendent in the coal field, were hanged without trial. They were known as the "Molly Maguires," a secret band of miners who took revenge against the Reading Railroad and its mine bosses for the horrible conditions in the mine. They infiltrated, captured, tried, and hanged the Pinkerton agents and railroad and coal mine officials. Some saw the Irish as brutal terrorists and others, as martyred heroes of the labor movement. A hundred years later, the Pennsylvania Board of Pardons recommended a posthumous pardon for the "Molly Maguires."

On February 4, 1910, thirty years after the historic warfare in the mines, Max Rosenn was born in the Wyoming Valley farming hamlet of Plains, Pennsylvania. And, except for the brief periods when he stayed part-time in Harrisburg as Secretary of Public Welfare for Pennsylvania, and World War II Army service in the Philippines from 1944 to 1946, he would never leave the Valley. He would make his home in Kingston, a mile and a half from where he was born and less than two miles from the United States Courthouse that now bears his

name. It was here where he lived his full life with his wife, Tillie Hershkowitz, and their two boys (who would become Professor Keith Rosenn of the University of Miami and Dr. Daniel Rosenn of Boston).

Symbolically, he would die at age ninety-six, on February 7, 2006, the same day as our court's other nonagenarian, Albert Branson Maris, who died at age ninety-five, on February 7, 1989. Our main courtroom in Philadelphia is named after Judge Maris.

Although ninety-six years is a long life by any measure, that number alone does not fully capture the richness of Max Rosenn's life. He founded a prestigious law firm and served as a United States Circuit Judge for thirty-six years. He served as a member of the Pennsylvania Governor's Cabinet as Secretary of Public Welfare and signed the first contract with the federal government for Medicare and Medicaid in Pennsylvania. He chaired important committees to restructure human services in Pennsylvania, as well as the State's Committee for the White House Conference on Children and Youth in the Pennsylvania Human Relations Commission. He was also chair of both the Flood Recovery Task Force (after a disastrous flood spawned by the 1972 Tropical Storm Agnes) and a think-tank advocating a ballot question on forming a commission to study possible changes in Luzerne County's government.

Notwithstanding his professional accomplishments, he always remained deeply attached to the people and geography of the Wyoming Valley. He would die as "the most respected person in Northeastern Pennsylvania."¹

Although I am the oldest judge from the point of service on the Court of Appeals for the Third Circuit, Judge Rosenn was close behind. He joined me on the bench in 1970, only two years after I was commissioned. I soon came to regard him as one of my closest friends and one of the truly outstanding appellate judges in our nation.

In 1981, four members of the faculty of the Senior Appellate Judges Seminar, sponsored by the Institute of Judicial Administration and the New York University School of Law, tried our hand in answering the question: "What should be the qualities of an ideal appellate judge?"² In my presentation, I suggested that an ideal appellate judge

¹ *Judge Max Rosenn: A Man for All Seasons, Part 1*, Windsor Park Stories, <http://windsorparkstories.com/rosenn.html> (last visited Mar. 29, 2006).

² Other faculty members included William H. Erickson, Justice of the Supreme Court of Colorado; Robert A. Leflar, Professor of Law at the University of Arkansas; and Samuel J. Roberts, Justice of the Supreme Court of Pennsylvania.

would possess the following six qualities: Fairness, Justness, and Impartiality; Devotion and Decisiveness; Clear Thought and Expression; Professional Literacy; Institutional Fidelity; and Political Responsibility.

Applying these criteria to Judge Rosenn is my measure of the man.

THE QUALITY OF FAIRNESS, JUSTNESS, AND IMPARTIALITY

This means regarding people and circumstances without one's interest as a reference point, adhering strictly to a standard of what has been determined as right, true, or lawful, and being impartial towards both parties. It means communicating your humanity by feeling compassion for and understanding of the concerns of the litigants as persons. It also means that to achieve justice for the litigants, you must do more than slavishly adhere to the dictates of mechanical jurisprudence.

This describes Judge Rosenn with precision.

He was founder of what would become the largest law firm in Wilkes-Barre, and, of necessity, this meant representing corporations and business interests. Yet his brother, Harold Rosenn, observed that Max had received "overwhelming" labor union support when he was being considered for appointment to the bench in 1970, even though he had often represented management in labor negotiations.³ Politically, he enjoyed support and respect across a broad spectrum. Indeed, at the time when the Federal Courthouse in Wilkes-Barre was named for Max Rosenn, United States Representative Paul Kanjorski, a Democrat, said, "In a way, Judge Rosenn epitomizes the concept of 'the Valley with a Heart.'"⁴

Although Judge Rosenn came to his robes in 1970, he had stark memories of the coal mines that formed the basic economy of the community from the Twenties to the Sixties. He remembered the miners and the conditions of the company towns in which they lived.

The mine superintendent was the absolute dictator of both the work at the mine and life in these towns, familiarly called mining patches and camps. The foremen and straw bosses—the tough and ruthless men who carried out his orders at the mine—were Anglo-Americans. The miners were mostly a polyglot group of uneducated

³ Tom Mooney, *Farewell, Your Honor*, WILKES-BARRE TIMES LEADER, Feb. 8, 2006.

⁴ *Id.*

peasant stock from Southern, Central, and Eastern Europe who had been herded together at Ellis Island and transported directly to the camps. They worked seven days a week in two twelve-hour shifts, with one twenty-four-hour shift every other Sunday.

The mine superintendent enforced his brand of law and order through the infamous Pennsylvania Coal and Iron Police, who rode big black horses up and down the muddy company streets with huge truncheons fastened to their saddles like cavalry sabers. These were private police, employed by the company, but endowed with all the power of a local, county, or state police officer.

Max Rosenn remembered these men dressed in black on black horses prancing through the streets of Wilkes-Barre in the Twenties. They were brought in at the slightest attempt to organize the surrounding mines. They wore black boots and black helmets styled after the London bobbies. With awesome six-shooters at their hips and truncheons swinging from their saddles, they were the Darth Vaders of the early Twentieth Century.

To the immigrants from Eastern Europe, they were the American counterparts of the Czar's Cossacks, and this was the name by which they came to be known. These private police forces had been authorized by the Pennsylvania legislature as early as 1866 and approved by the state court system. Until the Franklin D. Roosevelt political revolution, they reigned supreme as "Law and Order" enforcers. The mine superintendent and his private police force were the police, judge, and jury.

When Judge Rosenn began practicing law in 1932, during the heart of the Great Depression and at the beginning of the unionization of the mines by John L. Lewis and the United Mine Workers of America, the plight of the miners was firmly ingrained in his ethos. A consummate corporate lawyer, he could not forget the workingman, and this made him a unique figure in the community. Nor did Max Rosenn, the judge, in his decisions and his opinions, forget; and this made a compassionate jurist.

Significantly, when he created the annual lecture series at Wilkes University where he served as a trustee, he named it the "Max Rosenn Lecture Series in Law and Humanities," the emphasis on Humanities being deliberate. Although of the Jewish faith, he established the "Max and Tillie Rosenn Award for Faculty Excellence" at Kings College, a Catholic college sponsored by the congregation of the Holy Cross. It is an award conferred each year on an outstanding member.

Whether witnessing his kind yet incisive demeanor on the bench during oral argument or in the private judicial conferences where cases are decided and opinions assigned, he never failed to extend profound respect to both the lawyers who appeared before him in public and his fellow judges at private decisional conferences.

THE TWIN QUALITIES OF DEVOTION AND DECISIVENESS

By devotion, I mean being industrious, attentive, and thorough. This is the quality the Germans call *Sitzfleisch* ("flesh to sit on"), because they admire the willpower that keeps a person at a desk or a laboratory table hour after hour while she penetrates, inch by inch, the heart of a problem. But the quality of devotion must be tempered with decisiveness, which is the ability to make decisions without unduly prolonging the litigation in the court or interfering with the work schedules of colleagues.

To research without deciding is as much a sin as to decide without research. Hard decisions are not made easier by postponement.

In his ninety-sixth year, Judge Rosenn was still deciding. He was carrying the caseload of a senior judge, and less than a month prior to his death, he filed a dissenting opinion in a case. He had the intellectual courage and confidence to meet the responsibilities of office, irrespective of age, without taking the easy way out, and always without procrastination.

THE QUALITY OF CLEAR THOUGHT AND EXPRESSION

The model judge must instinctively know the difference between the important and the merely interesting. This requires lucid reasoning and having a sense of order and arrangement. A judicial opinion is an utterance that is performative. In the common law tradition, it serves as a basis for future law. It provides a statement of reasons today yet performs for the future.

Judge Rosenn had a style of "writtenness" free from obscurity and ambiguity. His opinions never held the danger of being misunderstood. Moreover, his writings for the court did not promulgate a holding that was beyond the facts found by the fact-finder. In this respect he truly was an apostle of Roscoe Pound, who taught that the legal rules that emerge from judicial opinions are "precepts attaching a

definite detailed legal consequence to a definite, detailed state of facts.”⁵

THE QUALITY OF PROFESSIONAL LITERACY

This means being learned in the law in the sense of possessing a general familiarity with substantive law within the court’s jurisdiction, and a highly developed knowledge of all the court’s procedural rules. Max Rosenn came to our court with a magnificent background. He had learned the pushes and pulls of criminal law and procedure from serving as an Assistant District Attorney as a young lawyer. Yet at the age of thirty-five, when he could have remained a civilian in World War II, he volunteered as “an old man” to enter the Army and to serve with distinction in its Judge Advocate Department in the Philippines, developing sophisticated skills of trial advocacy. As the senior named partner in the law firm he founded after the war, he was superbly trained in federal and state corporate and securities law and had bountiful experience in labor-management relations.

He believed in adherence to precedent, to ensure what Oliver Wendell Holmes called “predictability,”⁶ and what Professor Karl Llewellyn described as “reconability,”⁷ in the law. But to the extent that an intermediate court was able to fill in the interstices, he could push the envelope to expand or retract the law. When he was not bound by Supreme Court precedent, he believed that where reason ends, so does the rule.

THE QUALITY OF INSTITUTIONAL FIDELITY

For over three decades, Judge Rosenn was loyal to our court as an institution that not only adjudicates disputes, but interprets and refines the law for the future guidance of society. He believed that an opinion of the court was designed only to explain the decision publicly; it was not a stage for polemics. He readily accepted suggestions

⁵ Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 482 (1933).

⁶ “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.” Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897).

⁷ “Thus the opinion serves as a steadying factor which aids reconability. Its preparation affords not only back-check and cross-check on any contemplated decision by way of continuity with the law to date but provides also a due measure of caution by way of contemplation of effects ahead.” KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 26 (1960).

from his colleagues in his opinion writing, being of the view that an opinion is not the personal statement of the author, but a reflection of a collegial input, for which every member of the panel must assume responsibility. It was always a joy to sit with him.

THE QUALITY OF POLITICAL RESPONSIBILITY

This means understanding that Congress and the President have primary responsibility to fashion public policy, and that this responsibility falls upon the court only when legislative or executive action is absent or inadequate. Max Rosenn was of the view that broad judicial power exists where precise facts before the court were not controlled by statute; courts were free to interpret broadly if provisions of a statute or regulation were obscure, enigmatic, ambiguous, or equivocal. He believed that scientific symmetry in the law is not an aim in itself, but agreed with Judge Cardozo that “[t]he final cause of law is the welfare of society.”⁸ He also believed in Professor Harry W. Jones’ credo that “a legal rule . . . is a good rule . . . when—that is, to the extent that—it contributes to the establishment and preservation of a social environment in which the quality of human life can be spirited, improved and unimpaired.”⁹

His philosophy was primarily that of a settler of disputes and not a political scientist. Although a judge must sometimes legislate in order to adjudicate properly, he recognized that judicial legislation is only a means to an end. It is never justified as an end in itself; rather, it is merely an adjunct to the resolution of a dispute on the basis of justice between the parties. He adhered to the philosophy that when judicial lawmaking ceases to become an adjunct and assumes the dominant role in the decision process, it runs counter to the quality of political responsibility.

There is often a fine line between appropriate judicial lawmaking and intruding into legislative and executive prerogatives, but Judge Rosenn was a master in striking the appropriate balance.

⁸ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66 (1921). Judge Cardozo was on the New York Court of Appeals in 1921.

⁹ Harry W. Jones, *An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1023, 1026-30 (1974) (emphasis omitted).

* * *

In summary, I refer to Cardozo's prescription of how a judge should perform:

[The judge] is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life."¹⁰ Wide enough in all conscience is the field of discretion that remains.

Judge Cardozo, meet Judge Rosenn.

¹⁰ CARDOZO, *supra* note 8, at 141 (quotation omitted).

* * * * *

STRIVING FOR JUSTICE

JOSEPH F. WEIS, JR.[†]

The Max Rosenn Courthouse in Wilkes-Barre, Pennsylvania is a visible reminder of a man who dedicated his life to the betterment of those who live there. To all who pass through the doors seeking justice, the building will continue to be a testimonial to a judge who spent his years working to make justice a reality. Many of the law's finest hours have been, and will be, spent there.

But brick and mortar, impressive classic columns, polished marble, and beautifully finished woodwork are, after all, mere inanimate objects that can reflect, but cannot create, the beauty and priceless value of the law. It is the work and dedication of lawyers and judges like Max Rosenn who give life to the spirit of the law. He personified the qualities that are so vital to the ever challenging preservation and improvement of the law. In him there was a confluence of dignity, compassion, integrity, and an unflagging search for justice.

Max Rosenn deserved the honors, and there were many, that were bestowed upon him by governments, organizations, and individuals throughout his distinguished career. Those who have associated with him over the years are familiar with his record of service to the country and the community. But one must wonder if the population at large grasps the extent to which what he has done has improved the world in which we live.

Without dedicated citizens like Max Rosenn, no society can progress. Indeed, without devoted citizens like Max Rosenn, no society in the long run can survive. Max was the rare sort of man who, in his own innate modesty, was unaware of his true worth, but who through his deeds has so richly earned our gratitude. His example gives us the courage to face the future's forebodings.

Although I knew of Max Rosenn's enviable record as the Secretary of Welfare under Governors Scranton and Schaffer, I had no personal contact with him during that period. The first foreshadowing of a future association with Judge Rosenn came in the spring of 1970 as Senator Hugh Scott escorted me to the Senate for my confirmation hearing as a district judge. The Senator remarked that Max Rosenn

[†] Senior Judge, United States Court of Appeals for the Third Circuit.

would be nominated to fill the then-existing vacancy on the Third Circuit Court of Appeals.

Senator Scott said there was some question about whether the American Bar Association screening committee would be concerned because Max was sixty years old, the highest age that was considered suitable for a lifetime judicial appointment. The guideline apparently was based on life expectancy tables and the desire that a judge serve for at least ten years. As was usually true of Max, he then exceeded standards applicable to most individuals. His tenure on the bench was not ten, but thirty-six years, his work continuing past his ninety-sixth birthday to just before his death.

Three years after Senator Scott's remarks, I was privileged to become one of Max's colleagues, an experience that has truly enriched my life.

Judge Rosenn has been praised by the lawyers who appeared before him for his unfailing civility and courtesy. During oral arguments he listened carefully to the lawyers' presentations. When he could not accept an advocate's position, he quietly and courteously explored his differences with the argument.

I can recall occasions when lawyers argued positions that deeply disturbed Max. I could see the blood vessels in his face throb quite a bit faster than normal as he struggled successfully to suppress his internal disagreement and maintain a thoughtful and calm exterior. No lawyer, whether a novice or a seasoned appellate advocate, ever left a courtroom in which Judge Rosenn sat without knowing that it had been a fair hearing and that the cause would be decided in accordance with the law.

To some extent, that judicial temperament was the result of Max's experience as a trial lawyer. His disposition showed that he remembered what it was like to be in the advocate's chair—tense, concerned, and uncertain about what a court would do. In a setting like that, a trial lawyer does not need a querulous judge to add to the stress. That Judge Rosenn was truly an outstanding trial lawyer is evidenced by the fact that he was elected as a Fellow by both the International Academy of Trial Lawyers and the American College of Trial Lawyers—two elite organizations noted for the care with which they select their membership.

But one should not mistake his civility and courteous manner for evidence that he lacked convictions. His opinions clearly revealed that he held fast to the basic principles of justice and did not hesitate

to speak out when positive law appeared to do injustice, rather than justice.

For example, in a dissenting opinion in a sentencing guidelines case, Judge Rosenn observed that neither Congress, the Sentencing Commission, the Government, nor the Court of Appeals has “the agonizing *moral* burden” of sentencing a convicted defendant.¹ He then posed this disturbing question: “Can we, sitting separately and far removed from the center where punishment is meted out by and to flesh and blood, require that a sentencing judge impose a sentence which the judge conscientiously believes is fundamentally impractical, unsound, and unjust?”² He continued that if such a result is mandated by a guideline, then he must register his “abiding concern” with a provision that “substantially alters our notion of just punishment”³

Further, Judge Rosenn’s commitment to realistic justice never waned, even after many years on the bench. In the case of *De Leon-Reynoso v. Ashcroft*, the court considered a deportation proceeding in which the Attorney General’s ability to exercise discretion had been curtailed by legislation.⁴ The alien had been convicted of a minor crime and placed on probation, but the government wished to deport him. Judge Rosenn wrote, “We urge Congress to reconsider the ramifications of entirely eliminating the Attorney General’s discretion in this area. At times, pathetic, heart-wrenching pain for families and burdensome consequences for employers and taxpayers accompany removal proceedings.”⁵ He continued, “Although Congress’s goal of expediting the removal of criminal aliens is understandable and even praiseworthy, denying the Attorney General of the United States the discretionary power to adjust the status of a lawful permanent alien who has committed a crime of moral turpitude, regardless of the circumstances of the crime and his familial conditions, can be harsh, self-defeating, and unwise.”⁶ These critical expressions come from a judge who approved weighty sentences in cases when he was convinced they were justified. However, Judge Rosenn also firmly believed that a judge should be a thinking, understanding being and not a “bean-

¹ *United States v. Shoupe*, 929 F.2d 116, 125 (3d Cir. 1991) (Rosenn, J., dissenting).

² *Id.*

³ *Id.* (quoting *United States v. Leavitt*, 925 F.2d 516, 518 (1st Cir. 1991) (Coffin, J., concurring)).

⁴ 293 F.3d 633 (3d Cir. 2002).

⁵ *Id.* at 640.

⁶ *Id.*

counter” whose function is simply to tote up figures from a chart to discharge his duty to an individual and to his community.

Judge Rosenn’s opinions are noteworthy for their intelligent explanation of precedent, sharply defined statements of the issues, and logical reasoning that lead to the result. Shining through the formalism of the opinions, however, is his humanity as well as his understanding of life’s difficulties and his compassion for those who merit special consideration.

Not only was Max Rosenn a fine judge, but he was also a delightful and warm colleague. He was always ready to take on an extra burden if it would in any way help or ease an inconvenience for another judge on the court.

I remember with pleasure the many conversations we had when we were sitting together on panels in Philadelphia. We had many stimulating discussions at dinner and I recall one in particular where we explored religious influences on the law. The following week, Max sent me a commentary on the Pentateuch and Haftorahs. That book has an honored place in my chambers and I have consulted it on a number of occasions with fond remembrances.

Judge Rosenn’s view of the role of the legal profession was clearly expressed in an address he delivered to law students at the Iowa College of Law in 1983 titled *The Social Conscience of a Lawyer*.⁷ He noted lawyers’ obligation to society generally and continued, “Lawyers, educated in the humanities and history, trained in the power of analysis of issues and the logical formulation and expression of ideas, are natural community leaders.”⁸ He admonished the students, “You must not be insensitive to societal needs; you should demonstrate interest and understanding of the world about you, for you will be called upon to give what has been referred to as ‘the essential element of coherence and stability.’”⁹ Judge Rosenn referred to this commitment “as a superb adventure in service and understanding.”¹⁰

This was not another of those “do as I say, not as I do” directives. Judge Rosenn’s record of service is breathtaking. He worked to benefit his local community in a number of areas, including higher education, health, government, and charitable cases. Some measure of his

⁷ Max Rosenn, *The Social Conscience of a Lawyer*, Address to the Students of the Iowa College of Law (Apr. 11, 1983), *in* 69 IOWA L. REV. 319 (1984).

⁸ *Id.* at 324.

⁹ *Id.* (quoting Francis Raymond Evershed, *Our Common Heritage of Law*, 27 N.Y.U. L. REV. 32, 35 (1952)).

¹⁰ *Id.* at 325.

activity is demonstrated by the seemingly endless list of governmental, civic, religious, professional, and social organizations in which he has been a presider or member.

Truly this was a man who spent his lifetime striving mightily for justice, a judge who enlightened the administration of justice, a model of fairness, impartiality, and integrity. He left a legacy of excellence to the bench and bar alike.

* * * * *

HONORABLE MAX ROSENN:
CONSCIENCE AND ROLE MODEL OF THE COURT

LEONARD I. GARTH[†]

On February 7, 2006, my dear friend and colleague Judge Max Rosenn died. I was deeply saddened by his death as I know all of our colleagues were. As a distinguished jurist on the United States Court of Appeals for the Third Circuit for more than thirty-five years, Judge Rosenn exemplified those qualities that singularly mark all great appellate judges: he was modest, dignified, fair, courteous, compassionate, courageous, learned and wise. Judge Rosenn was also the conscience of our court, ensuring that the judicial decision-making process in the Third Circuit conformed to the highest standards of integrity and collegiality. For these reasons—and because he was such a wonderful friend—Max will be sorely missed.

Judge Rosenn was born February 4, 1910, and when he died within hours after authoring his last opinion, it was just after his ninety-sixth birthday. As my colleague Judge Weis once reminded us, Judge Rosenn was appointed to our court when he was sixty years old. At that time the appointing authority believed that sixty-year-old nominees should not be appointed to the federal courts because they were not likely to serve even ten years, which was considered the minimum service for a seat on the federal bench. It is ironic—though not surprising to me and his other colleagues—that Max exceeded that standard and served more than thirty-five years on our court—more than thirty-five years of sheer judicial excellence.

We had all hoped that Max would judge until he was at least 120!! That was not to be, but in the course of his 96 years, Judge Rosenn accomplished more than most people could in 120.

A graduate from Cornell and the University of Pennsylvania Law School, Judge Rosenn also held honorary degrees from Dickinson, Kings College, and College Misericordia. Prior to his judicial service, Max performed noteworthy services for the Commonwealth of Pennsylvania as Secretary of Public Welfare and as a member of the Governor's Commission to Revise the Public Employee Laws of Pennsylvania. Moreover, Max continued to serve the public interest in

[†] Senior Judge, United States Court of Appeals for the Third Circuit.

various capacities—as the Chairman of the Pennsylvania Human Relations Commission, as Chairman of the Flood Recovery Task Force of Wyoming Valley following the Hurricane Agnes disaster of 1972, as Chairman of the Governor’s Council for Human Services, and as Chairman of the Governor’s Committee on Children and Youth. It is obvious that, even leaving aside his primary role as a federal appellate judge, Max exhibited tireless energy in fostering the public good and contributing to the public interest.

It is indeed telling that the Federal Courthouse in Wilkes-Barre, Pennsylvania was named the *Max Rosenn United States Courthouse* in 1996, a most unusual tribute for someone who was still alive at the naming. And, of course, the Law Library at the William J. Nealon Federal Building and Courthouse in Scranton was also dedicated to Max and is known as the *Max Rosenn Law Library*.

I didn’t meet Max until 1970. That was the year he became Judge Rosenn on the Court of Appeals of the Third Circuit. I became his Court of Appeals colleague when I left the District Court of New Jersey and joined the Third Circuit Court of Appeals in 1973. The Court that both Max and I joined had been headed by Chief Judge William H. Hastie, and directly thereafter by Chief Judge Collins Seitz. The other active members of that Court were Judge Ruggero Aldisert, Judge Arlin Adams, Judge John Gibbons, Judge Frank Van Dusen, Judge James Hunter, and Judge Joseph Weis. Of that court, now only Judge Aldisert, Judge Weis, and I remain.

Chief Judge Collins Seitz always spoke of the “court” as a “family,” and Max shared this view. Our court did indeed exhibit all the qualities and characteristics of a close, devoted, albeit contentious, family—quarrelsome, of course; espousing differing views and conclusions, of course; and always argumentative, of course; but when it came to the outside court universe, we the court always presented a cohesive, collegial, and united front. And who was our role model? You might have guessed—Judge Max Rosenn—the quintessential courtly gentleman and colleague.

Indeed, the late Lord Chief Justice Goddard of England must have had Max in mind when he told us what the highest authorities in Britain look for in an ideal judge: “He should be a man of even temper and one who can be trusted to display courtesy to the litigants and bar; in short, if I may use a much abused expression, he should be a

gentleman.”¹ He was describing Judge Max Rosenn, a public servant in every particular.

Before I leave the subject of family, I must mention Judge Rosenn’s love and reverence for the group of people that were his family in the more traditional sense: Tillie, his wife of fifty-eight years (to whom we were all endeared, and who passed away some fifteen years ago); Professor Keith and Dr. Dan, his two sons; and his grandchildren and great-grandchildren.²

Judge Rosenn’s love and respect for his family members extended as well to his family of colleagues and to his law clerks. I would be remiss if I did not mention Max’s commitment to and his devotion to his Jewish faith and religion. He served in almost every major leadership position of his faith.

Having discussed all the various groups that Max genuinely regarded as his “family,” let me now tell you about Max Rosenn as a judge and as a person. What a superb jurist he was! His opinions were models of wisdom, clarity, and scholarship. Max sat on almost 5000 appeals, and not only in this, the Third Circuit, but also in our sister circuits where he was constantly in demand. His majority opinions were compelling in their reasoning, and it was not unusual for his dissenting opinions to sway the majority in his favor or to result in significant modifications to the majority’s views.

I have said before, and I repeat again: during his time with us, Max Rosenn was the conscience of the court. He “kept us honest.” His opinions, which reflect his learning and foresight, will always be recognized by judicial historians for the impact they have had on our national jurisprudence. Although I could write further about the very great number of significant opinions which were authored by Judge Rosenn, I will forbear to do so—they speak for themselves in our circuit and national jurisprudence. No doubt their influence will continue in the future. I know of no one who has brought to our discipline and to the court the values and the wise counsel that is now Max’s legacy.

On a very personal note, there were many times that I was counseled by Max to modify a strongly worded letter to colleagues or a dis-

¹ Lord Goddard, *Politics and the British Bench*, 43 J. AM. JUDICATURE SOC’Y 124, 131 (1959).

² A few years ago I made note of the fact that Keith, who is a professor of law at the University of Miami Law School in Florida, is named in “Who’s Who,” just the line above Max’s name. This is a rare distinction that only very few fathers and sons ever experience.

sent, or to temper the language in an opinion. On reflection, in all those instances I took Max's advice, and it was our jurisprudence that benefitted.

Let me add just a few brief lines to describe Max, apart from his life as a judge. When Max was not robed, he always appeared "dressed to the nines": always elegant and most always with a boutonniere in his coat lapel. His portrait, presented to the court three years ago, is an excellent likeness of Max, but it cannot depict Max's innate kindness, his generosity, and his concern for others. He treated everyone with whom he dealt with respect, no matter their station; and he recognized the dignity of every individual.

Despite his personal, community, and judicial involvement, Max somehow always found time to inquire about his colleagues' health and their families. I cannot recall how very many times he called me to ask about my wife Sarah's health.

Max, as I noted, was a most modest man. Although early on he was characterized as a statesman who always "knew the big picture" in both his personal and judicial life, he invariably would disclaim any praise directed to or about him. He would turn the attention of those who complimented him back to the speaker. His humility pervaded his personal and professional life and was reflected in his own statement that "I thank God for all His blessings and for the opportunity to serve my community for all these years." The power of his persona and his conduct endear him to all who knew him.

I conclude, therefore, by expressing my colleagues' and my particular good fortune in having had Max Rosenn as a dear friend, a trusted advisor, and most importantly, a colleague without peer. We would not be the great court we are today without the very special talents, wisdom, and values of judges such as Max Rosenn—a true role model and conscience for those of us with whom he served and those who will follow us.

Dear Max—God bless and may you rest in peace.

COMMENTS ON THE PASSING OF
THE HONORABLE MAX ROSENN

DOLORES K. SLOVITER[†]

I first met Max Rosenn in August 1979 on the day I was sworn in as a judge of the Third Circuit, and my pleasure at having him as a colleague and friend increased on each occasion thereafter. Max was an elegant human being—elegant in the sense that he was truly decent. He treated all those with whom he came in contact—colleagues, lawyers, staff, and others—with kindness and courtesy. He was refined, polished, and cultured. These qualities were evident in his writings. His opinions were written with grace, whether or not he agreed with his colleagues. In the twenty-seven years I knew him, I never knew him to say or write any intemperate word or phrase.

One need only watch or listen to the two-part documentary prepared about Judge Rosenn as part of the *Windsor Park Stories* to understand that my view of Judge Rosenn's personal qualities is not unique. Person after person interviewed reported the same things. He was described as fair, judicious, down-to-earth, and charismatic. One of the judges stated that "Judge Rosenn has been a role model for all of us on the bench." I certainly echo that sentiment.

Of particular interest to me was to listen to Judge Rosenn's comments about the characteristics he thought good judges should have: morality, respect for law and country, and respect for the individual. As for himself, he stated that he had always tried to live a life of moderation. And from my observation, he certainly did.

It may be somewhat less well known to the bar how careful and conscientious Judge Rosenn was about his work—how seriously he investigated each issue, how thoughtful he was before reaching a decision, and how intently he listened to the views expressed by his colleagues. He was also very courageous—willing to strike out along new paths when he believed justice so required.

Because he became a senior judge relatively early in the period that we both sat on the Third Circuit, I had less occasion to sit on panels with him than I had with the active judges. However, I was for-

[†] Judge, United States Court of Appeals for the Third Circuit.

tunate to sit with him in the three-year period between 2002 and 2005 when he issued two of his most important decisions.

The first of the two raised the knotty issue of parole decision-making policies of the Pennsylvania Board of Probation and Parole. It is an area usually left to the discretion of the Board, with judges rarely intruding—much less federal judges. But Max Rosenn did not hesitate when he believed a provision of the Constitution of the United States was at stake.

The prisoner had been convicted in state court and sentenced to life in prison for the rape and murder of a twelve-year-old girl. When his case came before us he was seventy-four years old and had been in prison for nearly forty years. He became eligible for parole in 1996 and all of the prison authorities recommended commutation of his sentence because he had attained a college degree, participated in Alcoholics Anonymous and sex-offender therapy, had served a long time and been a good prisoner, had recommendations from scholars and religious and community leaders, and had achieved overall maturity and stability. The statute in effect at the time of his conviction some forty years earlier did not expressly mention public safety as a factor to be taken into consideration in making the decision as to parole. The statute enacted in 1995 did.

In a decision that took great courage, Judge Rosenn, writing for all three members of the court, concluded that the Board's repeated denial of the prisoner's parole application on the basis of the nature of the original offense despite many other significant factors favoring parole violated the Ex Post Facto Clause of the Constitution. He remanded the matter to the Board for further proceedings consistent with the opinion.¹

That was not to be the end of the matter. The Board once again denied parole. Once again, Judge Rosenn stood firm and directed that the Parole Board release the prisoner.² I am not sure that either Judge McKee or I would have been able to escape a barrage of criticism that would have followed had either of us authored that opinion. I believe that Max Rosenn's stature was such that little, if any, criticism was levied. At least none came to my attention.

The other case I referred to was similar, because it too involved a Pennsylvania institution. In 2004, I had written an opinion holding that the continued institutionalization of persons with mental disabili-

¹ *Mickens-Thomas v. Vaughn*, 321 F.3d 374 (3d Cir. 2003).

² *Mickens-Thomas v. Vaughn*, 355 F.3d 294 (3d Cir. 2004).

ties who could safely be discharged to community-based programs violated the Americans with Disabilities Act, and directed remand so that the district court could determine whether Pennsylvania had shown that a program of community placement would constitute a “fundamental alteration” of the state’s mental health program.³

A year later, the case returned to our court, as the district court once again ruled in favor of the Department of Public Welfare. Judge McKee and I both thought that Judge Rosenn, who had been the state’s Secretary of Public Welfare, was the perfect judge to maneuver through the difficult waters the issue presented. And he did. He wrote that DPW had failed to meet its responsibility under the Mental Health and Mental Retardation Act, and directed that it do so, offering some practical suggestions in the conclusion.⁴ The deftness with which Judge Rosenn managed that is admirable.

The bar has lost a great judge. I have lost a good friend.

³ *Frederick L. v. Dep’t of Pub. Welfare*, 364 F.3d 487 (3d Cir. 2004) (citing *Olmstead v. L.C.*, 527 U.S. 581 (1999), for development of the “fundamental alteration” doctrine).

⁴ *Frederick L. v. Dep’t of Pub. Welfare*, 422 F.3d 151 (3d Cir. 2005).

* * * * *

THE CHARACTER OF MAX ROSENN

JAMES J. SANDMAN[†]

Max Rosenn was not a judge who sought attention. He did not write his opinions for the law reviews, or for the legal or popular press; he wrote them for the litigants before him and for their lawyers, and to give clear guidance to the district courts of the Third Circuit. He was modest by nature. As a result, the quality of his contributions to the judiciary was not as widely known as it should have been.

But those who knew him best—the judges who served with him during the course of his thirty-six years on the Third Circuit—spoke of him in extraordinary terms. Former Chief Judge A. Leon Higginbotham, for example, described Judge Rosenn as “one of the most magnificent judges in the history of our nation,” and as “one of the crown jewels in our judiciary.”¹ Judges Ruggero Aldisert and Walter Stapleton called him a “judge’s judge.”² And former Chief Judge Edward H. Becker has characterized Judge Rosenn as “one of the most remarkable men who has ever graced the Federal Bench in the history of this republic.”³ These are not words one can use often in describing one’s colleagues.

Judge Rosenn’s decisions combined scholarship, wisdom, and pragmatism. He prepared for every case with a diligence and thoroughness that was both intimidating and inspiring to his law clerks. From his thirty-eight years in practice before he became a judge at the age of sixty, he knew the importance of mastering the record, and he was familiar with the realities of life in a trial court, both for trial lawyers and trial judges. He was without an agenda and open to persuasion, even after he had cast his vote in conference. He thought his role was to decide the controversies before him, not to make sweeping

[†] A.B., Boston College; J.D., University of Pennsylvania; Senior Partner, Arnold & Porter LLP, Washington, D.C.; President-Elect, The District of Columbia Bar; Law Clerk to Hon. Max Rosenn, 1976-1977.

¹ A. Leon Higginbotham, 1996 Max Rosenn Lecture in Law and Humanities at Wilkes University (Wilkes-Barre, Pa.) (on file with author).

² Letter from Hon. Ruggero J. Aldisert to Hon. Max Rosenn (Mar. 2, 1995) (on file with author); Letter from Hon. Walter K. Stapleton to Hon. Max Rosenn (Mar. 10, 1995) (on file with author).

³ Portrait Dedication, Hon. Max Rosenn, 327 F.3d xxv, xxix (3d Cir. 2002) (remarks of Becker, C.J.).

pronouncements. His opinions were those of a craftsman—clear and precise.

The qualities that made Judge Rosenn such a fine jurist were ingrained in his character. He had an innate respect for others, which was apparent in his dealings with every person he met. He was kind, generous, and gentle. He understood human frailties, though he had very few himself, and was compassionate, merciful, and forgiving. In discharging his judicial duties, Judge Rosenn exhibited all of these qualities. I recall his reminding me repeatedly during the year I clerked for him that each case before the court involved real people, who understandably regarded their case as the most important on the docket. He approached each case in a way that reflected that sensitivity. He was unfailingly courteous to the lawyers who appeared before him, even, perhaps especially, to those who were not as prepared as they should have been. He appreciated and learned from the different experiences and perspectives of his judicial colleagues. You will not find an unkind word in his opinions. In fact, he even refused to refer to a district court as a “lower court,” because he regarded that term as disrespectful of a fellow judge.

Among the many beneficiaries of Judge Rosenn’s character were his law clerks, the 82 women and men who started their careers as lawyers at his elbow. Judge Rosenn’s clerks had an uncommonly close relationship with him, in significant part because of the location of his chambers in Wilkes-Barre, a city of about 42,000 in northeastern Pennsylvania. Almost all of Judge Rosenn’s clerks were not from northeastern Pennsylvania; almost all of us spent a year of our lives in Wilkes-Barre solely because we wanted to work for and be with Judge Rosenn. He felt responsible for many (actually, most) aspects of his clerks’ lives during their year in Wilkes-Barre and wanted to make the experience as enjoyable as possible for them. For example, no reunion of Judge Rosenn’s clerks is complete without a raucous recounting of the Judge’s many efforts to find mates, or at least dates, for those who entered his service unattached. (His efforts were notoriously and universally unsuccessful.) He took us into his family, inviting us to his house for dinner and introducing us to his sons and his brother and sisters. For those of us who clerked for Judge Rosenn in his first twenty-two years on the bench, his remarkable wife, Tillie, was our friend, our counselor, and our co-conspirator.

Judge Rosenn was more than a mentor to us. He was a role model for all we should be as lawyers. He taught us with patience and caring. He spent hours at the table in his library reviewing his clerks’ work

with them, gently probing their reading of cases and their choice of words. He would not change a phrase a clerk wrote without explaining why. He treated us as valued professional colleagues, even though we were young, inexperienced, and nervous. He talked to us about his reasons for voting as he did and critiqued for us, always respectfully, the oral arguments of the lawyers who appeared before the court. I recall thinking during my clerkship that when the day came that I was supervising younger lawyers, I would do my best to follow Judge Rosenn's example.

Judge Rosenn believed law is a noble profession, and he demonstrated why it is. He used his enormous legal talent for the benefit of others throughout his career. He regularly did pro bono work and was involved in bar activities while he was a practicing lawyer. He served the Commonwealth of Pennsylvania as Secretary of Public Welfare under Governors Scranton and Shafer and as Chairman of the Human Relations Commission. While serving on the Third Circuit, he chaired the Wyoming Valley's Flood Recovery Task Force following the devastation of Hurricane Agnes in 1972, working closely with federal and state officials to rebuild his community. He served on the boards of numerous religious and charitable organizations. He felt that a lawyer has an obligation to give back to the communities of which she is a part, and to use her talents of analysis, reasoning, expression, and persuasion for the good of society. I cannot recall a day during my clerkship when Judge Rosenn did not spend some time, at lunch or in the evening, on one or more of his many community projects. He did not talk much about this; he taught the lesson by his example. The power of his conduct said it all: of those to whom much is given, much is expected.

I completed my clerkship with Judge Rosenn in August 1977. I left Wilkes-Barre very grateful for the experience and thinking that it was over. Little did I know that my relationship with Judge Rosenn had just begun. For the next twenty-nine years he was my counselor, my coach, my sounding board, my friend, and my inspiration. He was the same for all his law clerks.

Judge Rosenn died three days after his 96th birthday. He was active and serving others to the end. The Clerk of the Third Circuit filed Judge Rosenn's last opinion two days after his death.⁴ Hundreds attended his funeral—a range of young and old that attested to the

⁴ *Monteiro v. City of Elizabeth*, 436 F.3d 397 (3d Cir. 2006).

breadth of Judge Rosenn's impact and his relationships. He was still making new friends in his 90s.

Judge Rosenn's judicial colleagues have spoken not only of the quality of his judging, but of his personal character as well. Judge Dolores K. Sloviter has described him as "the most elegant human being I have ever met,"⁵ and Judge Becker called Judge Rosenn "a man of almost divine grace."⁶ Judge Rosenn's life is a testament to the difference one person can make, to the importance of character in a lawyer and in those who serve the public, to the inherent nobility of the legal profession, and to the complete compatibility of human kindness and professional success.

⁵ *Max Rosenn, Longtime Jurist*, THE LEGAL INTELLIGENCER, Feb. 9, 2006.

⁶ *Portrait Dedication*, 327 F.3d at xxix.