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From the President

Giving Thanks and Giving Back

By Sharon L. Nelles

On November 22, the Federal Bar Council held its annual Thanksgiving Luncheon, where members of our Second Circuit legal community came together to socialize, recognize the accomplishments of the Council and the Federal Bar Foundation, and give thanks to those who made those accomplishments possible. This year we also honored Judge Colleen McMahon, the 2023 recipient of the Emory Buckner Award. More on that in a moment.

Of course, the Thanksgiving Luncheon is not the only social event of the holiday season (though it may be my biggest). I attended a different gathering the night before the Luncheon, where I was asked about the work of the Council. I explained that yes, we gather and celebrate, but among other efforts to promote excellence in federal practice, one thing the members do is respond to calls to action.

Backlog of Pro Se Cases

In 2021, at the Thanksgiving Luncheon, at which Judge John Koeltl received the Buckner Award, he used the opportunity to speak to the lawyers present about the critical need to address the growing number of cases in need of pro bono counsel that had accumulated during the COVID-19 pandemic. As Judge Koeltl said then, "We should have a backlog of lawyers waiting to take pro se cases, not a backlog of pro se cases waiting for attorneys to take them."

In response, the Access to Counsel Project was formed to mobilize the private bar to fill in the gaps that currently exist in the civil pro se system and to make sure all litigants get their day in court. The Project marshals the Council's members, committees and programming to support the courts' existing framework for promoting pro bono representation. As Chief Judge Laura Taylor Swain remarked at a reception attended by a number of lawyers who have taken on pro bono cases, the Project has been transformative. The backlog has been cleared and our judges are on the way to being able to place cases whenever they identify a need, and to do so without delay.

Access to counsel is critical to the administration of justice. Chief Judge Swain relayed the words of Judge Edward Weinfeld at this same event: "Every case is different, and every case is important, because it is important to the parties in that case." To date, over 150 persons have responded to the call for help first sounded by Judge Koeltl to make sure these important cases are prepared and heard.

More Lawyers Needed

But the work is not done, and more lawyers are needed. Many volunteers are newer to the practice of law, and the Project has an advisory panel of experts that is available to pro bono attorneys and trial teams for mentorship and support on an as-needed basis. The Project also offers skills-based training in partnership with the American College of Trial Lawyers and NITA. If you are interested in offering representation or learning more, we are here to facilitate. Please reach out to Council Executive Director Aja Stephens.

To the extent that the Project has provided an opportunity for new attorneys to engage with experienced practitioners, develop relationships with clients, take the strategic lead on matters, and work on briefs, depositions, settlements, hearings, and trials, those have been added benefits, indeed. As Judge McMahon compellingly outlined in her Thanksgiving Luncheon remarks, these kinds of avenues for mentoring, feedback, and relationship and skills building are critical for the success of our newest generation of lawyers, many of whom entered the profession in the midst of the COVID-19 pandemic. Her remarks resonated so deeply with those in attendance, that many asked for a copy. In response, we are publishing them for you at the end of this column.

In Praise of Judge McMahon

As I learned in preparing to introduce Judge McMahon, and in speaking with friends and colleagues, it is clear that her career reflects two overriding priorities:

her commitment to the law and her love for her family. She is warm and funny. She is tough and tolerates no nonsense. She is a collector of mentors, mentees, and friends.

In 2014, Judge McMahon was the subject of a wonderful and detailed profile authored by Danielle C. Lesser and Latisha Thompson (www.fedbar.org/wp-content/uploads/2019/10/McMahon_Dec2014_6pgs-pdf-3.pdf). Here is just a bit: We learn she grew up in Ohio, where her paternal grandmother ran a farm and her maternal grandfather was a grocer. She attended the local public high school, where she was voted "the girl most likely to succeed" by her graduating high school class. After graduating summa cum laude from The Ohio State University, she attended Harvard Law School, where she found the time to both excel in her classes and indulge a lifelong passion for singing and musical theater. And although she did not end up on Broadway, she got close, landing just slightly off-Broadway as an associate in the litigation department of Paul Weiss.

Eight years later, she was the first woman litigator to be elected to the partnership. She thrived as a trial lawyer while also raising a family. And whether or not known to her, she became a role model for a generation of women then just entering big law in growing numbers. And if this were not enough, she dedicated significant time during her two decades of private practice to active involvement in bar activities, including serving as chair of the Association of the Bar of the City of New York Committee on State Courts of Superior Jurisdiction and as chair of the Committee on Women in the Profession. She led two consequential undertakings: The Committee on Women's seminal report on the advancement of women at large law firms, and, at the request of Chief Judge Judith Kaye, an effort to reform jury service in the New York State courts. That latter undertaking, the Jury Project, led to crucial changes to how jurors are qualified, called, and treated during their service.

To better combine her passion for law and a desire to be more present in the lives of her children, in 1995 she left private practice to serve as an acting justice of the New York State Supreme Court, which she did for three-and-one-half years before being appointed to the Southern District of New York by President Bill Clinton in 1998. On the federal bench, Judge McMahon has exhibited an unwavering commitment to the law and legal precedent. Her approach is designed to provide careful framing of difficult issues for consideration by higher courts or the legislature, and has served that purpose in several notable cases.

Judge McMahon became Chief Judge McMahon in 2016, a role she held until April 2021. During the pandemic, she worked tirelessly to keep the courts open and functioning. She implemented a four-tiered plan to ensure the safety of court staff and the public while maintaining the integrity of the judicial process. Under her leadership, the Southern District was heralded as a model of "endless creativity" in keeping the courts running, and we are deeply grateful for her leadership during those challenging times.

Thank you Judge McMahon for being such an important leader of the bar and our Second Circuit legal community.

Judge McMahon's Remarks

Thank you, Sharon, and thanks to the Federal Bar Council for this tremendous honor.

It is humbling to see my name added to the list of prior Buckner Award recipients – my predecessors as Mama of the Mother Court, Loretta Preska, Kimba Wood, and the one and only Constance Baker Motley; our beloved John Keenan, whose seat on our bench I was privileged to inherit; Senator D'Amato, to whom I owe my judgeship; Senator Moynihan, for his unwavering commitment to nonpartisan judicial selection; my dear friend, Janet DiFiore; and last year's winner, my good buddy, the soon to be unemployed Roz Mauskopf.

I am sure you are all wondering about this attractive abduction sling I am wearing.

If I may paraphrase the observation that the one and only Woody Hayes made about the forward pass, "There are three things that can happen when you dance the hora at a wedding, and two of them are bad."

You can enjoy yourself exuberantly.

You can make an utter ass of yourself.

And you can trip and fall while the very tall lady next to you is holding your arm aloft, resulting in a torn labrum and rotator cuff, surgery, and six weeks in this contraption.

I apologize for throwing a scare into Aja Stephens and her team, who rightly feared that their award recipient would be a

no-show – though I confess that it would have taken a lot more than this sling to keep me away from today's festivities. This Luncheon is how I have begun my holiday season virtually every year since 1979, and I cannot imagine missing it the one year I am the honoree.

I have long thought of the Emory Buckner Award as the Stanley Cup of our profession – a very prestigious prize, named for someone nobody ever heard of.

No one knows anything about Lord Stanley of Preston, Governor General of Canada in the 1890s – or has any idea that the silver cup given each year to the best team in the National Hockey League is named after him because he bought it.

So too with the Emory Buckner Award for public service. When I learned that I would be receiving the Buckner Award, I felt the need to learn more about this mystery man, to figure out why an award for public service to the legal profession would be named for him.

In this I was aided by my colleague, Kevin Castel, who loaned me his copy of Martin Mayer's biography of Emory Buckner. (I kid you not. Kevin Castel keeps the biography of Emory Buckner on his bookshelf. Does this not make you wonder what else the man reads?)

This is what I learned.

Buckner

Emory Buckner grew up in the bosom of a poor but proud Midwestern family, steeped in the values, the virtues, and the optimism of post-Civil War America.

He came East to attend the Harvard Law School after graduating from the University of Nebraska, one of the great taxpayer-supported land grant universities of the Midwest.

Like so many Midwesterners before and since, he then decamped to New York City to make his name and fortune.

When he arrived, Buckner knew no one. He had only his good grades, his membership on the Harvard Law Review, and a few letters of introduction. But those letters called him to the attention of some of the great men of the city and the profession, including then-United States Attorney Henry Stimson and District Attorney George Whitman. They saw something in Buckner, and they mentored him, teaching him the ways of the courtroom and giving him responsibility beyond his years and level of experience.

As a result, Buckner was soon recognized as one of the city's finest trial lawyers. And just five years out of law school, he was named counsel to the Curran Committee, which was investigating into police corruption in this city.

When that important task was successfully concluded, Buckner founded a law firm with a group of men who believed that the practice of law was a noble calling, one that could at once be challenging, collegial, public spirited . . . and fun.

He remained at that firm for all but two of the remaining 28 years of his short life. During those years he tried numerous cases, not one of which is remembered today.

As we all know from reading the blurb in our Luncheon program, Buckner spent those two absent years as the United States Attorney for the Southern District of New York. His tenure in office was brief, but his impact on the office was profound. Buckner refused to hire politically connected hacks as his assistants, and he prosecuted corrupt public officials in spite of political pushback from Washington. One hundred years later, the independence on which he insisted continues to define, not just the so-called Sovereign District of New York, but every United States Attorney's Office in this circuit, to their everlasting credit and our tremendous pride.

So: Emory Buckner practiced his craft in a diligent and principled manner, offered his time and talent to the service of the organized bar, and answered the call to serve in government when it came. Maybe that is enough to get an award named after a man.

But it's not the reason this award was named for this man.

A Mentor

For three decades, Buckner served as a mentor, guide, and promoter of the careers of dozens of promising young lawyers. He was, as it were, the Johnny Appleseed of the New York City Bar. He seeded its ranks with dozens of accomplished judges, prosecutors and public servants – among them, Justice John Marshall Harlan and Second Circuit legends Henry Friendly and J. Edward Lumbard. He also trained two generations of private practitioners, many of whom ended up with their names on the letterheads of the best-known law firms in the city. Buckner's mentees were the men who led the organized bar in this city during the mid-20th century – Cleary, Gottlieb, Steen, Webster, Plimpton, Leisure. And

they created this award to honor the memory of the man who had mentored them.

For my money, mentorship, as much as anything else, defines the public service performed by Emory Buckner and justifies naming an award for him. And it is why I am so honored to receive it.

For I, like Buckner, have had the good fortune both of being mentored and of being in a position to mentor others.

When I arrived in New York City, I was a lot like Emory Buckner – raised in the Midwest, a graduate of another great land grant institution and the Harvard Law School, who had come here to make my name and fortune. I, too, knew no one when I arrived. And I, too, was noticed by great and accomplished men – Arthur Liman, Jay Topkis, Ed Costikyan, Martin London, Lew Kaplan, Bob Smith – at a law firm founded, like Buckner's, in the belief that the practice of law was a noble calling, and that could at one and the same time be challenging, public-spirited . . . and fun. They taught me, and challenged me, and encouraged me – and then threw me into the water at a ridiculously young age and dared me to swim. They let me know when I did well, and they did not hesitate to criticize me when I did what they knew was less than my best. These brilliant lawyers became my role models, my friends, and eventually my partners.

Like Buckner's mentors, my mentors had serious public service credentials, and they insisted that I develop my own. Various bar leaders, including former Buckner Award winner Betsy Plevan, raised my profile beyond Paul Weiss, by entrusting me with tasks – like designing the Glass Ceiling study and writing the introduction to that report – that would get me noticed. At the invitation of another mentor, that great and good lady, Judith Kaye, I, like Buckner, was privileged to run a blue ribbon commission that performed a great public service, by creating the template for the reform of jury service in the New York State courts.

When I left private practice for the bench, I needed and found new mentors. In my three years on the New York State Supreme Court, I was taught the ropes by the man who has been my good right arm and good left arm for two and a half decades – my permanent law clerk, Jim O'Neill (who is, as the members of the criminal bar know, the real Judge McMahon). And when I joined the Mother Court 25 years ago this very month, I was taken under the wing of two great judges, Charlie Brieant and Bill Conner, who taught me how to run a calendar and a courtroom.

All these people became invested in my success, to the point that it became their success too. I would not be standing here today if I had not had the benefit of their teaching and their encouragement.

And so I have tried to pay it forward.

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Johnny Appleseeding

Nothing has been as rewarding in my professional life as promoting the careers of young lawyers – first at Paul Weiss, where it was my honor and privilege to help a cadre of brilliant men and women go on to their own amazing careers; now with my law clerks, 57 and counting, whom I am lucky to have working by my side. I have done some Johnny Appleseeding of my own, and I look with tremendous pride on "my" law professors, "my" city councilman and "my" Cabinet secretary, "my" Congressional staffers and Assistant United States Attorneys, "my" business executives and general counsel, "my" social worker, "my" community activist, "my" three judges, and the many fine lawyers who followed my path into private practice, where they have litigated and won some of the most impactful cases of our time. To each of them I have tried to give a little something; I take more delight in their many and varied accomplishments than I do in my own.

Because mentoring was so important in my own life, I have thought a lot about what I might say to young lawyers who hope to find their own mentors. Three things come to mind.

First, because in my experience it is mentors who find their mentees, you need to get yourself noticed. The best way to do that is, of course, to do really first-rate work, so that people want you on their team.

But you need to do something else – and what I am about to say may not be universally popular. I know things have changed, especially since the pandemic; I recognize that remote work is both here to stay and beneficial to that thing we call work/life balance. But it is no less true today than it was when I started out half a century ago that 90% of life is showing up. The essence of the mentoring relationship, the thing that makes it work, is knowing and being known; observing and being observed; working shoulder to shoulder. That is how you build skills; that is how your mentor comes to trust your abilities enough to turn them into responsibilities. So do not trade the temporary convenience of working at home for the very real benefit of going to the office.

Second, look for mentors in every corner of your life. Don't imagine that the only people who can further your career are your employers. Buckner did not hire everyone he mentored; he found other ways to assist many a young lawyer who came to his attention. I found mentors at the City Bar Association, mentors who were bar leaders and who turned me into one, too. Chief Judge Kaye sought me out; as more than a few women in this room know, she made it her business to locate ambitious young women lawyers and place them in positions where they would be noticed. Colleagues, like my friend Betsy and my co-worker Jimmy, can be your mentors. I worked with one of my best mentors and closest professional friends, George Wade, on what was essentially an extracurricular activity. Mentors are everywhere, if you are looking for them.

Finally, don't be one of these people who can't take criticism. The whole idea of mentorship is to learn. You are going to make mistakes. It is the mark of a true mentor that she will tell you when you do. If you are not willing to be criticized for what you did wrong, you will never learn how to do things right. The best thing the men who became my partners did for me was tell me when I didn't measure up. It stings in the moment to hear that you are less than perfect, but it will prove salutary in the end. And I assure you that if I survived being woodshedded by Lew Kaplan, you can survive anything a caring mentor throws your way.

Finally, a few words to those of you who are in a position to be mentors: you need to be on the lookout for protégés and let them know that you are open to giving them a boost. That has always been a challenge, but one made more difficult by changing attitudes toward work and how we do it. Still, it is your task to identify the best and brightest of the next generation and bring them forward.

And remember that the job of the mentor is to make the mentee look good. You are not doing it right if all you do is train your brilliant younger colleague to make you look good while holding your bag and passing you notes. You want your mentees on their feet, representing your clients, sharing their opinions, offering advice, speaking up in meetings, sparring in court. You need to thrust them into the spotlight – perhaps not quite as literally as Arthur used to (he was famous for pushing us in the back to get us to jump up and object) – but in whatever way you can. Their success will in the end reflect favorably on you.

So I am very proud indeed to receive an award named for Emory Buckner, the Great Mentor. And I thank the Federal Bar Council for conferring this honor on me.

There is one more thing I share with Emory Buckner – a happy

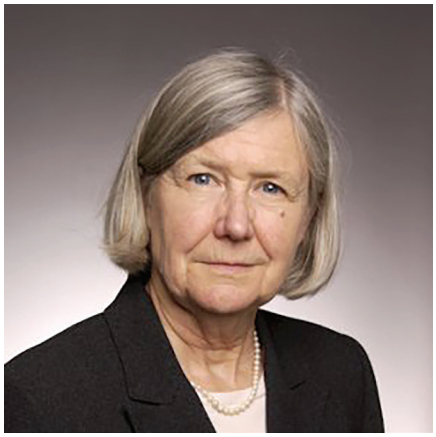
life. I have the best and most supportive of husbands in Frank Sica – a man who thinks a smart, ambitious woman is arm candy – three wonderful children in Katie, Patrick, and Brian – and now three perfect grandchildren, who are the delight of my old age. And I have many true friends to stand by me in good times and in bad. I have so much to be thankful for.

And so do each of you. So let's get to it. Have a wonderful Thanksgiving.

From the Editor

Southern District Judge Colleen McMahon Receives Buckner Award at Council's Thanksgiving Luncheon

By Bennette D. Kramer



On November 22, 2023, the day before Thanksgiving, the Federal Bar Council once again held its annual Thanksgiving Luncheon in person. The Luncheon was held at Cipriani Wall Street and was completely sold out with a waiting list. Luncheon Chair Scott Musoff opened the Luncheon with a welcome to everyone.

Federal Bar Foundation President Seth Levine encouraged everyone to contribute to the Foundation to fund the projects it supports. Those projects include scholarships for interns in the U.S. Attorney's Offices and Federal Defenders Office, the Immigrant Justice Corps, civics education activities through the Justice For All Courts and the community initiative through the Robert A. Katzmann Civics Education Grant.

Council President Sharon Nelles presented the Emory Buckner Award in recognition of outstanding public service to U.S. District Judge (and former Chief Judge) Colleen McMahon of the Southern District of New York. Before the presentation, Frank H. Wohl, chair of the Nominating Committee, installed the new officers, trustees, and directors of the Federal Bar Council and Foundation.

Nelles thanked Scott Musoff for chairing the event, Frank Wohl for chairing the Nominating Committee, and Seth Levine for all his efforts on behalf of the Foundation. Nelles noted that that two years ago, Judge John Koeltl had asked the lawyers present to take on pro bono cases that had accumulated during the COVID-19 pandemic. In response to this plea, the Council formed the Access to Council Project, which, according to Chief Judge Laura Taylor Swain, cleared the backlog. Nelles said that lawyers are still needed and she encouraged everyone present to sign up to offer representation.

Presenting the Buckner Award to Judge McMahon, Nelles described her as a judge's judge who has consistently exhibited thoroughness, kindness, and patience. Nelles said that Judge McMahon has two overriding priorities: "her commitment to the law and her love for her family." Judge McMahon grew up in Ohio, attended the local public high school and then The Ohio State University, graduating summa cum laude. Next was Harvard Law School, where she excelled academically and sang in musical comedies. After law school she joined Paul Weiss and, eight years later, became the first woman litigator elected partner at Paul Weiss.

As Nelles described, during private practice, Judge McMahon served as chair of both the City Bar Committee on State Courts of Superior Jurisdiction and Committee on Women in the Profession. She was responsible for the City Bar's report on women and the glass ceiling at large law firms. In addition, at the request of then-New York Court of Appeals Chief Judge Judith Kaye, she led the Jury Project which resulted in 82 recommendations for improving state court jury service, most of which were enacted and changed the way jurors were qualified, called and treated during jury service in New York State.

In 1995 Judge McMahon left Paul Weiss to serve as an acting justice of the New York State Supreme Court. She was appointed to serve in the Southern District by President Bill Clinton, and was confirmed in October 1998.

On the Southern District bench, Judge McMahon has handled many

challenging matters, including the "Newburgh Four" domestic terrorism case, the New York Times/American Civil Liberties Union case, and the Purdue Pharma bankruptcy settlement. According to Nelles, Judge McMahon "has exhibited an unwavering commitment to the law and legal precedent. Her judicial philosophy is a straight forward respect for the rule of law: apply the facts and law consistent with Supreme Court and the Second Circuit interpretation."

Judge McMahon served as chief judge of the Southern District from 2016 to April 2021. After the COVID-19 pandemic began, Chief Judge McMahon was responsible for keeping the courts open and functioning. She focused on ensuring the safety of court staff and the public on one hand and ensuring that the judicial process continued.

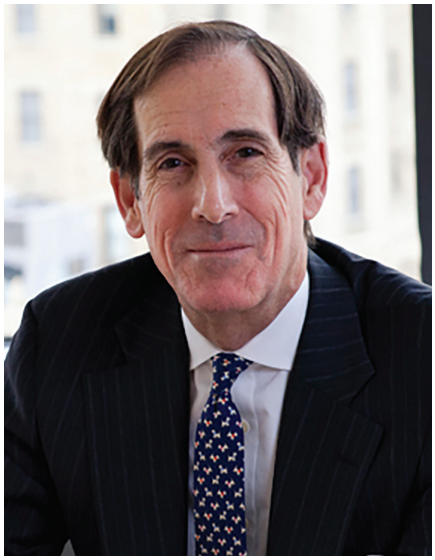
Nelles thanked Judge McMahon for her service to the courts and for being an important leader of the bar and the Second Circuit community and congratulated her as the 2023 recipient of the Federal Bar Council's Buckner Award.

Accepting the Buckner Award, Judge McMahon emphasized the importance of mentors. Nelles, in her From the President column in this issue of the *Federal Bar Council Quarterly*, has included the text of Judge McMahon's remarks, so you can read for yourself that Emory Buckner was an important mentor in our legal community. For Judge McMahon, mentors have been key to her career and promoting the careers of young lawyers has been rewarding and satisfying for her. She encouraged each of us to reach out and look for young lawyers whose careers we can support.

Theresienstadt

A Visit to a Nazi Concentration Camp

By C. Evan Stewart



After a three week bench trial in federal court in Washington, D.C., and then (immediately thereafter) a two week arbitration in Singapore, I was ready for a vacation. And so my wife and I flew to Europe, first to Vienna and then to Prague – two cities to which I had never been. The Prague visit looked to be particularly fun because we had been invited to have dinner with the American Ambassador to the Czech Republic, my former partner, Norman Eisen.

At dinner at the ambassador's residence – the Petschek Palace (which became the U.S. Embassy as a result of World War II reparations) – Norm asked me how many days we were planning to stay in Prague and what was on our list to see and do. Hearing my answer, he told me we really needed to devote a day to visiting Theresienstadt. And so we did, hiring a local driver to spend the day with us exploring the site.

Theresienstadt

Theresienstadt is a walled garrison town about an hour's drive north from Prague. It was founded in 1784 by Emperor Joseph II of Austria in honor of his mother, Empress Maria Theresa. Originally a holiday resort for Czech nobility, it was later converted into a military base – the "Main Fortress" – with the "Small Fortress" across the river converted into a prison. After the Nazis took over Czechoslovakia, the Gestapo in 1941 turned the town into a Jewish ghetto and concentration camp.

Initially, the town was intended to house Jews from Czechoslovakia; over time, Jews from Germany, Austria, the Netherlands, and Denmark were deported there as well. During World War II more than 144,000 Jews were sent to Theresienstadt. Although it was technically not an extermination camp, approximately 33,000 people died there. About 88,000 others were transported to Auschwitz, Treblinka, and other extermination camps (of that number, it is estimated 3,500 people survived the war).

Because of inquiries made by the Danish government about its citizens "housed" at Theresienstadt, the Nazis authorized representatives of the Danish Red Cross and the International Committee of the Red Cross (from Switzerland) to visit the town in 1944. Prior to the visit the Nazis initiated "Operation Embellishment" – an attempt to

present the town as an example of enlightened stewardship: the area was cleaned up, gardens were planted, fake shops and cafes were built, many inmates were moved to nicer living quarters (especially the Danish Jews), and 7,503 people (the sick, elderly, or disabled) were shipped to Auschwitz. On June 23, 1944, the inspection took place under the supervision of Adolf Eichmann. The Red Cross representatives were taken on a carefully choreographed tour of the town, a tour that included a children's soccer game and a performance of Verdi's "Requiem," conducted by Czech composer Rafael Schächter and sung by an adult chorus of 150 Jews. Eichmann was later quoted as saying: "Those crazy Jews – singing their own requiem." (Schächter was sent to Auschwitz on October 16, 1944; he was executed the following day.) Incredibly (and unfortunately), the Red Cross representatives were fooled by the ruse and later issued a benign report to the world about the conditions at Theresienstadt (that, as the Nazis had claimed, the ghetto was essentially a self-governing Jewish settlement).

Based upon that experience, the Nazis then determined to make a propaganda film about their "model" internment camp. Starting on September 1, 1944, Kurt Gerron – a Jewish prisoner who was an experienced actor and director – oversaw 11 days of movie making. After the filming was completed, most of the cast and Gerron were sent to Auschwitz (he was executed on October 28, 1944). The film was entitled: "Theresienstadt. Ein Dokumentarfilm aus dem jüdischen Siedlungsgebiet" ("Terezin: A Documentary Film from the Jewish Settlement Area"). Because of the imminence of the end of World War II, the film was never distributed publicly, although a few screenings were held and excerpts were included in a German newsreel.

Eisenhower ordered Patton not to advance into Czechoslovakia farther than Pilsen, and so it was the Soviet army that liberated Theresienstadt on May 8, 1945. Because of a typhoid epidemic, the Russians imposed a quarantine over the area (ultimately 1,500 prisoners and 43 Soviet medical personnel died). After the quarantine was lifted, the thousands of remaining inhabitants of the camp were repatriated to their countries of origin.

In October 1991 (after the Velvet Revolution), the Theresienstadt Ghetto Museum was inaugurated. It is estimated that 250,000 people visit the town every year.

Our Visit to the Camp

Driving into Theresienstadt is a very eerie experience in and of itself. Like Dealey Plaza in Dallas (which will forever be frozen in time in November 1963), both the town (called its Czech name, Terezin, with a population of about 3,000 people) and the camp seem frozen in 1944. Everything looks just as it must have when the Red Cross was duped by the Nazis. And while the buildings and grounds are intact and in 1944 condition, the "feel" of it all seems much like a ghost town, devoid of lively noise and everyday activity.

Above the gate leading into the Small Fortress is the infamous "Arbeit Macht Frei" (Work Sets You Free). Once inside, we toured the rooms where prisoners were onboarded to the camp; then we went through the "barracks" where the inmates were housed. Outside, we saw the wall against which people were lined up and shot, as well as the area where prisoners were hung by piano wire. Not far from those gruesome spots is the crematorium, which suffered some flood damage in 2002. In the town itself, we saw the commandant's house, with the swimming pool built nearby by prisoners.

Moving inside to the Ghetto Museum, things took a very different turn. Many educated Jews were interned at Theresienstadt; there were numerous scholars, philosophers, scientists, artists, and musicians (some, like Schächter, internationally known). As a result (and unlike other Nazi camps), the ghetto enjoyed a rich cultural life, especially in 1943-44 (as Eichmann, et al., were planning the Red Cross visit).

Vibrant artwork created in those years (by both adult artists and children) is prominently displayed. Also extensively documented are the musicals performed and the compositions written for those performances (musicians had been allowed to bring their instruments); I still have a vivid memory of the costumes used for a production of "Carousel." Newspapers and magazines were also produced on a regular basis; and there was a library that, at its peak, housed over 100,000 books. Finally, although formal education was barred by the Nazis, children were secretly taught, among other things, Czech, German, Hebrew, history, geography, and mathematics; evidence

The infamous "Work Sets You Free" sign above the entrance to the Small Fortress. (Author's collection.)

of this pedagogy is prominently on display.

My wife and I came away from seeing all of these materials inspired by the grit and determination of the Theresienstadt prisoners to create full and meaningful lives for themselves in the midst of this absolute horror. It was only later I learned that Viktor Ullman, who composed over 20 works of music while imprisoned at Theresienstadt, felt the same way. He believed that the cultural life created in the camp constituted a spiritual resistance to the imprisonment (a "spark of humanity"): "By no means did we sit weeping by the rivers of Babylon; our endeavors in the arts were commensurate with our will to live."

At the conclusion of our day, we came to a small (for lack of a better word) "souvenir" shop. I have two distinct memories of that shop.

The first is numerous pictures of children, taken during the Red Cross visit, with plaques below as to the dates they died in Auschwitz. (I remember one boy playing soccer, who was sent to Auschwitz on August 4, 1944, and was killed on August 6).

My other memory is the cache of very large and very numerous books in that room in which the Nazis kept the most detailed records of all the people who came to Theresienstadt and their ultimate fates. Holocaust deniers do not seem to understand that the Nazis were very meticulous in wanting to document the "Final Solution."

A Return to New York City

The week after we got back to New York City, I was having lunch with a good friend I had known for 40+ years (Charlie Temel, who was in the class behind me at Cornell). Not surprisingly, I was interested in relating to him our visit to Theresienstadt. Charlie listened very carefully, and in silence, to my recounting of the experience.

After I had finished, he very quietly said to me: "Do you know that my mother and grandmother were at Theresienstadt?" With my jaw agape, all I could say was: "How did they survive?"

Charlie answered: "Well, after Theresienstadt they were shipped off to the death camps, first to Riga, then to Kaiserwald, and then to Stutthof." Again, all I could say was: "How did they survive?"

Again, very quietly, he asked me: "Have you seen "Sophie's Choice"?" "Yes," I replied. "Well, on the second day at Riga they were in a line of people [two by two] being onboarded, with a fellow inmate behind a cardboard table keeping a record for the Germans. Once the two got to the table, one person would go right, and the other would go left – and the person going right would never be seen again. As my mother was about to go right, my grandmother grabbed her and said: 'You're coming with me.' The recordkeeping inmate did not report this obvious, important rule infraction to the Germans [an infraction for which she could be killed]. Later that week in the camp, my grandmother ran into her fellow inmate, who asked whether she was from a small town in Eastern Europe. After my grandmother replied 'yes,' the woman said: 'I thought so. When I was a small girl in that town, I went into your father's store and picked out the most delicious piece of food I could find. I went up to your father and said: 'I am so hungry, but I have no money.' And your father said to me: 'That's all right!'"

Listening to that amazing story – in which the father's small act of kindness had saved his entire family – filled my eyes with tears (and even today, when I tell people this story, it still does). A few months after our lunch, I met my friend's mother for the first time. All I could say to that amazing woman was: "Your son just recently told me how you survived World War II. I don't know what to say other than, can I give you a hug?"

Postscripts

- Charlie's mother survived the two subsequent camps for two reasons: (i) she was tall for her age and her mother passed her off as a near adult, and (ii) the Russian troops were advancing rapidly toward the camps, which were very far east.
- At the Ghetto Museum shop, I purchased two books documenting the history of the walled garrison town and its use by the Nazis as a concentration camp. The best book on the camp, however, is by Czech writer and historian H. G. Adler: "Theresienstadt 1941-45: The Face of a Coerced Community" (originally published in German in 1955; published in English by Cambridge University Press in 2017). Adler and his family were deported to Theresienstadt in February 1942; they were later sent to Auschwitz in October 1944. He ultimately survived that death camp, but his wife (who also could have lived) refused to abandon her mother and died with her in the gas chamber.

  Adler believed that the Nazis' use of Theresienstadt as a propaganda tool to demonstrate to the world that Jews were being treated in a humane fashion was "the most gruesome ghost dance in the history of Hitler's persecution of the Jews." Even more ominously he wrote:

  > Theresienstadt is still possible. It can be imposed on a massive scale, and, in the future, the Jews – who in mankind's overall history of suffering so often have had to serve as harbingers and as those most especially at others' mercy – might not be the only victims. Theresienstadt stands not only as an experiment but as the writing on the wall, and it is more alluring than our disgust at the horror is yet willing to admit.

- Other important works on Theresienstadt include Helga Hoskova – Weissova's "Helga's Diary: A

The Jewish Cemetery at Terezin. (Author's collection.)

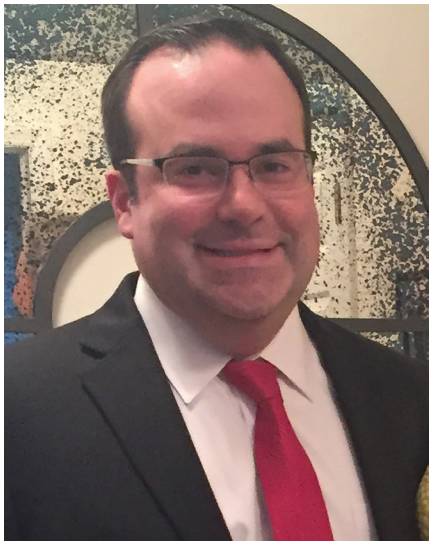
Young Girl's Account of Life in a Concentration Camp" (W. W. Norton 2013) and Zuzana Justman's "My Terezin Diary: And what I did not write about," The New Yorker (September 16, 2019).

- Norm Eisen has written a fascinating account of the history of the Petschek Palace: "The Last Palace" (Crown 2018).

From the Courts

Magistrate Judge Pilot Program Takes Off in the Eastern District of New York

By Magistrate Judge Joseph Marutollo



On September 25, 2023, Chief U.S. District Judge Margo K. Brodie issued Administrative Order 2023-23 in the Eastern District of New York. This administrative order governs a two-year pilot program (the Pilot Program), approved by the Eastern District of New York Board of Judges, concerning the direct assignment of civil cases to United States magistrate judges in the Eastern District of New York.

This article provides a brief history of magistrate judges, an overview of the Pilot Program, and a guide to additional resources for those who wish to learn more about the Pilot Program.

Brief History of Magistrate Judges

Magistrate judges – whose title formally changed from "magistrates" to "magistrate judges" in 1990 – are officers of the district courts who are appointed by a majority vote of the district judges of the court following a competitive merit selection process. Magistrate judges serve an initial term of eight years; their terms may be renewed for successive terms of eight years after a comprehensive review of their work and consideration of community input.

As readers of the *Federal Bar Council Quarterly* are well aware, magistrate judges play a vital role in federal civil litigation, particularly in the Eastern District of New York. Reflecting the Eastern District's long tradition of excellence in magistrate judges, the Eastern District's Division of Business Rules provide that all federal civil cases, with limited exceptions, are automatically referred to a magistrate judge for pre-trial case management. Magistrate judges routinely handle a host of issues that arise in these cases. Among other things, magistrate judges typically oversee all initial and pre-trial conferences, address a wide range of discovery disputes, handle settlement conferences, and handle the day-to-day management of a myriad of cases. In 2022, the Eastern District's magistrate judges, amazingly, handled over 25,000 civil pretrial duties – the highest of any district court in the United States.

The Supreme Court has repeatedly affirmed the importance of magistrate judges. In *Peretz v. United States*, 501 U.S. 923, 928 (1991), Justice John Paul Stevens said that "given the bloated dockets that district courts have now come to expect as ordinary," the role of the magistrate judge "in today's federal judicial system is *nothing less than indispensable*." (emphasis added). In *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), Justice Sonia Sotomayor (a former district court judge in the Southern District) emphasized that, "[i]t is no exaggeration to say that without the distinguished service of [magistrate judges], the work of the federal court system would grind nearly to a halt."

Under a law passed by Congress in 1976, the parties in a civil lawsuit in federal district court have the option of consenting to have their case handled by a magistrate judge. As a result, litigants frequently consent to have magistrate judges preside over the entire case, including dispositive motion practice, jury or court trials, up to the entry of judgment.

The Pilot Program

Effective September 25, 2023, in a percentage of civil cases determined by the Eastern District's Board of Judges, a magistrate judge will be assigned as the sole judge on the matter at the time of case initiation, except that a magistrate judge will not be assigned to any

bankruptcy appeals or any case where the case-initiating document is a motion for a preliminary injunction or a temporary restraining order.

Each of these Pilot Program cases is assigned solely to a magistrate judge. No district judge is assigned at the outset. For every Pilot Program case assigned solely to a magistrate judge, all parties may consent to have the entire case handled by a magistrate judge – all the way through trial and entry of judgment. It is entirely an opt-in program. The parties are encouraged to make a decision regarding consent for assignment of the entire case to a magistrate judge as early in the case as possible, and no later than 30 days after the first case management/Federal Rule of Civil Procedure 16 court conference.

Should a party not consent, a district judge will be assigned to the case, and the magistrate judge will remain assigned to handle all pre-trial case management. In cases exempt from Fed. R. Civ. P. 16 scheduling orders pursuant to Local Civil Rule 16.1 (to wit, motions to vacate sentences, forfeitures, and reviews from administrative agencies), the deadline for consent is 30 days following the appearance of all defendants. In Social Security disability cases, the deadline is 30 days following the notification to the Commissioner, as provided in Social Security Supplemental Rule 3. In habeas corpus petitions under 28 U.S.C. § 2254, the deadline is 30 days following the deadline to file an answer to the petition.

It should be noted that parties may still consent to magistrate judges handling the entire case after a district judge has been assigned as well. The parties may consent at any time to magistrate judge jurisdiction for final decision on any motion, or for all purposes, including entry of final judgment.

In adopting the Pilot Program, the Eastern District joins approximately 40 other district courts in the "direct assignment" system, including in multiple extra-large districts around the country, resulting in a significant increase in the number of cases handled by magistrate judges in these districts.

One advantage of the Pilot Program is that litigants may be able to proceed to trial or resolution faster before a magistrate judge than a district judge. District judges preside over felony criminal trials and handle felony criminal caseloads. While magistrate judges in the Eastern District have certain criminal responsibilities, they generally do not preside over felony criminal trials or otherwise handle felony criminal caseloads.

Further, a criminal defendant's speedy trial rights may force a civil trial to be re-scheduled in favor of a criminal trial – which would force civil litigants to cancel their trial plans on short notice. A trial date with a magistrate judge is much less likely to be postponed given the nature of the magistrate judge's docket.

Resources Available

The Eastern District has endeavored to promote availability of the Pilot Program as much as possible, including with a special page on its court website dedicated to the Pilot Program (https://www.nyed.uscourts.gov/edny-direct-assignment-pilot-program). The court created a sleek and informative brochure for litigants entitled "Consenting to the Jurisdiction of a Magistrate Judge" (https://img.nyed.uscourts.gov/files/local_rules/Booklet-MJ-EDNY.pdf). The brochure outlines the Pilot Program and provides brief biographies of each of the Eastern District's magistrate judges. The Eastern District also created a "frequently asked questions" webpage that answers many of the most commonly-asked questions about the program in an easy-to-follow manner (https://www.nyed.uscourts.gov/edny-direct-assignment-pilot-program-frequently-asked-questions). In September, Eastern District Judges Gary R. Brown, Nina Gershon, and Kiyo A. Matsumoto and Magistrate Judges Sanket J. Bulsara and Peggy Kuo wrote an article in the New York Law Journal discussing the successful launch of the Pilot Program.

On December 5, 2023, the Federal Bar Council hosted a webinar entitled, "Local Rules Update: Everything You Need to Know About Upcoming Changes and the New EDNY Magistrate Judge Assignment." The webinar was moderated by Magistrate Judge Bulsara and featured Judge Jesse Furman, Magistrate Judge Ona T. Wang, and Magistrate Judge James M. Wicks as panelists. As part of the informative and entertaining webinar, Judges Bulsara and Wicks spoke extensively about the benefits of the Pilot Program and the advantages in consenting to magistrate judge jurisdiction. Additionally, on December 7, 2023, a presentation about the Pilot Program was made to the Federal Courts Committee of the Suffolk County Bar Association.

The Eastern District of New York welcomes public comments about the Pilot Program. Commenters may email clerk-of-court@nyed.uscourts.gov to share their thoughts.

From the Courts

U.S. Magistrate Judge Kim Berg Thrives in Position

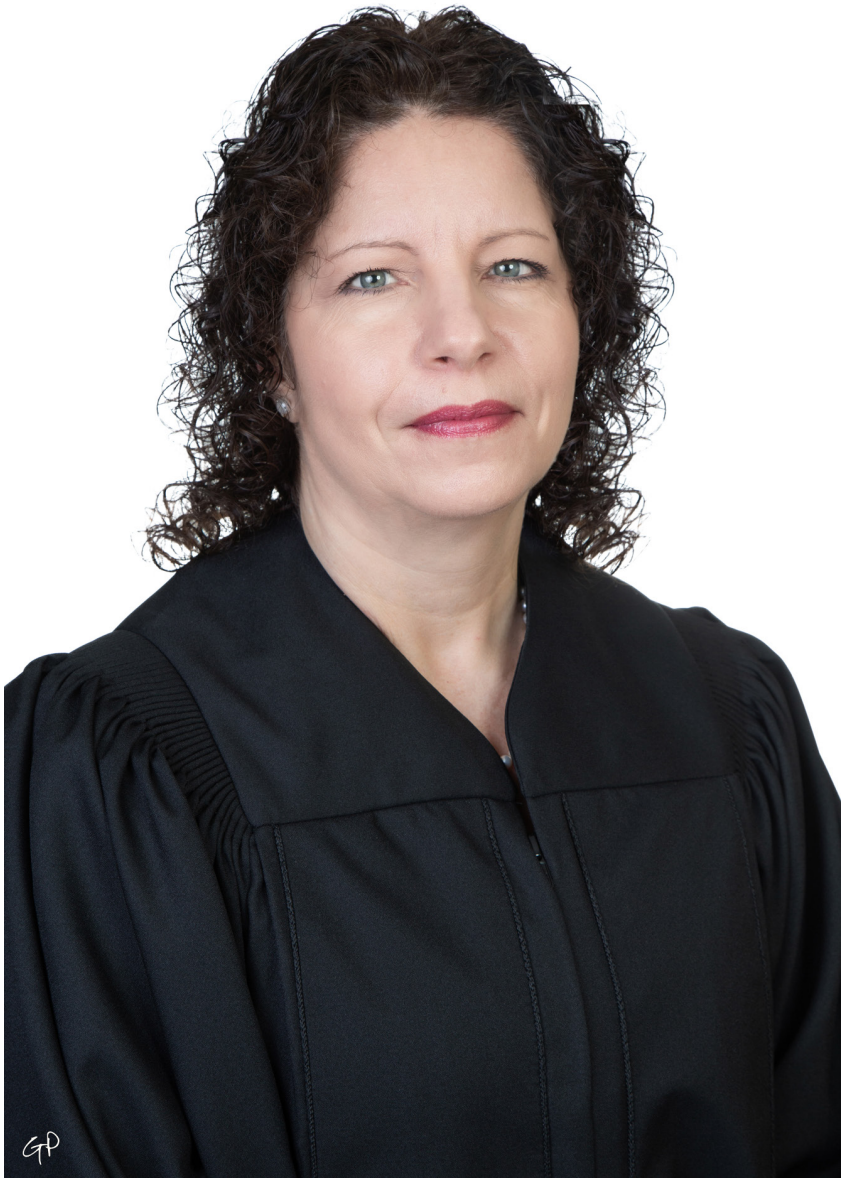
By Magistrate Judge Lisa Margaret Smith (Ret.)

On September 12, 2022, Kim Berg was sworn in as a part time magistrate judge for the Southern District of New York. See "Kim Berg Selected as Newest Magistrate Judge in Magistrate Judge in Southern District of New York," Federal Bar Council Quarterly, Vol. XXX, No. 1, Sep./Oct./Nov. 2022, at 14. In a recent interview, Judge Berg offered that after more than a year she truly loves the job and that one reason for her high job satisfaction is that her colleagues and all of the staff in the court have been so welcoming to her.

Magistrate Judge Berg succeeded Magistrate Judge Martin R. Goldberg, who had served as the Southern District's part time magistrate judge for 30 years. Not surprisingly, Judge Berg found that when she took over responsibility for what is called "The Petty Offense and Misdemeanor Docket," there were improvements available that could increase the efficiency of the court's handling of the docket, particularly through utilization of both the Central Violation Bureau's (CVB) and the court's electronic filing systems. This docket primarily consists of violations and misdemeanors alleged to have occurred on properties under exclusive or concurrent jurisdiction of the United States and in locations where provisions of the Code of Federal Regulations apply. The areas within the northern counties of the Southern District include the Roosevelt Home National Historic Site, portions of the Delaware Water Gap National Recreation Area, federal park lands, Veterans Administration facilities, and the United States Military Academy at West Point (civilian matters only). Many of the charged offenses are based on crimes under the New York State Penal Law and the New York State Vehicle and Traffic Law, which are assimilated into federal law in areas under federal jurisdiction by virtue of the Assimilated Crimes Act, 18 U.S.C. § 13. Others are based on the Code of Federal Regulations, namely Title 32 for military installations, Title 36 for park lands, and Title 38 for Veterans Administration properties.

One of the complicating factors for the Petty Offense Docket stemming from the many violations and misdemeanors based on New York State law is that such a disposition before Magistrate Judge Berg can have collateral consequences. The federal system is not set up to apply those consequences automatically and various documents need to be issued to enforce them. These most commonly occur in cases where a defendant has been charged with a violation of New York State Vehicle and Traffic Law, and where license suspension or revocation can be a mandatory collateral consequence. In addition, for those charged with driving while intoxicated, evaluations must be performed to assess alcohol or drug addiction. Magistrate Judge Berg has arranged to have the necessary New York State Department of Motor Vehicle forms submitted to be sure the requisite collateral consequences are meted out.

Magistrate Judge Berg typically sits two days per month, either in the U.S. Bankruptcy Courthouse in Poughkeepsie, which is her official duty station, or in the Charles L. Brieant United States Courthouse and Federal Building in White Plains. A third day per month is set aside in the event that a matter is scheduled for trial. As a level 4 part time magistrate judge, Magistrate Judge Berg is expected to work 400 hours per year, or 20% of the hours expected of a full-time magistrate judge, which are documented monthly. The number of cases on each docket varies greatly but ranges between 15-60 cases for each calendar date. Of those, anywhere between one and 15 matters are heard on the initial appearance date. For those who do not appear in court, Magistrate Judge Berg will reissue notices to appear and in the event of multiple non-appearances, she will issue a summons or warrant, depending on the level of the offense charged. For vehicle and traffic law



Magistrate Judge Kim Berg

offenses she can also "scofflaw" the defendant's privileges to drive or register a vehicle in New York, a measure that usually prompts the defendant's payment of the collateral or appearance in court.

Approximately 50 percent of the cases on the docket are resolved either by guilty pleas, deferred prosecutions, which are ultimately dismissed after a period of months upon the defendant's compliance with conditions set by the court, government motions to dismiss, or by the payments of fines with or without an appearance in court. Fines imposed by the court are paid online through CVB or the court clerk's office. In addition, pursuant to Local Criminal Rule 58.1, fines set forth on appearance tickets can be paid online, referred to as forfeitures of collateral, for any person who is charged with an offense that does not require a mandatory appearance. Typically these are low level petty offenses where the individual can forfeit collateral in the amount identified in the District Court Violation Notice or other charging instrument. If the fine is paid at least two weeks before the scheduled appearance date, the case will not even be listed on the magistrate judge's calendar. However, if the payments are made within the two week window before the appearance date, the matter will be placed on the docket and either the defendant will have to appear before the magistrate judge on the date noticed or forfeit collateral before the date of the appearance to avoid the issuance of a summons, warrant or scofflaw.

One common issue that Magistrate Judge Berg is careful to address relating to cases emanating from a Veterans Administration facility, which are all classified as Class B Misdemeanors, is the competency of the defendant, as many of those cases involve defendants with mental health, alcohol, or drug issues that are being treated at these facilities. A Veteran's Administration officer is always present in court, and Magistrate Judge Berg takes the time to consider and make certain that the defendants in those situations are provided with appropriate resources aimed at rehabilitation, including housing, employment, and treatment opportunities for their addiction or mental health problems. In addition, most of the veterans qualify for the appointment of counsel under the Criminal Justice Act, and Magistrate Judge Berg has arranged the schedule of dates to have the Federal Defenders of New York be present at least one day per month to represent individuals who qualify for this appointment.

Another adjustment that Magistrate Judge Berg has made during

her first year on the bench is to have Pretrial Services provide a report for any defendants charged with Class A Misdemeanors and for some who are charged with Class B Misdemeanors. This is so that she has the necessary information to adjudicate the case appropriately, including for setting conditions of release and because many offenses assimilated under New York State laws carry higher penalties for those with convictions of certain prior offenses.

Magistrate Judge Berg started preparing for the job before she was sworn in on September 12, 2022. She knew her docket was exclusively criminal law, which she had limited experience with, having focused primarily on civil matters throughout her career. Drawing on her experience in handling Fourth and Fourteenth Amendment cases, as well as representing individuals in local justice courts, she researched, took continuing legal education courses, and spoke with others in the criminal law field, allowing her to quickly pick up on the nuances of these cases. On her very first day in court she had a Class B Misdemeanor case where a defendant had been recently arrested on a three year old warrant and the case was not listed on her case list until late the night before court. The defendant, who had initially been arrested on a more serious state charge triggering the alert of his arrest to the U.S. Marshals, was brought in in shackles and wearing an orange jumpsuit, which made the situation a bit more daunting for the new judge's first day on the bench. She managed to quickly obtain a report from Pretrial Services and realized that, even without time to prepare for the particulars of this case, she was able to competently conduct the Rule 5 Initial Appearance.

Magistrate Judge Berg has found the tasks assigned to her to be challenging but this motivates her to continue to expand her knowledge base. At the same time, she describes the role as incredibly rewarding. She is grateful to have the opportunity to serve in the Southern District, the court where she was first admitted to practice upon passing the bar exam and before which she routinely appeared as an attorney up to the point of her appointment to the bench.

From the Courts

Magistrate Judge Victoria Reznik Is Sworn In

By Magistrate Judge Sarah L. Cave

Victoria Reznik was sworn in as a magistrate judge for the Southern District of New York on May 22, 2023. Born in Latvia, Magistrate Judge Reznik immigrated to the United States as a child with her parents. She later majored in English and Anthropology at UC Berkeley before obtaining her J.D. at NYU Law School, where she was a Florence Allen Scholar and served on the editorial board of the Journal of Legislation and Public Policy. Following law school, she litigated complex commercial cases at Kirkland & Ellis, rising to partner in 2005. In 2012, she joined the boutique plaintiff-side litigation firm, Grais & Ellsworth, where she served as lead counsel prosecuting RMBS claims against financial institutions arising out of the 2008 financial crisis. Before taking the bench, Magistrate Judge Reznik had extensive training and experience in mediation and served as a volunteer mediator for a local community dispute resolution center.

Magistrate Judge Reznik and her parents were refugees from the former Soviet Union, which they fled seeking religious, economic, and political freedom in the United States. Throughout her childhood, Magistrate Judge Reznik's parents told her their stories about the prejudice and persecution they suffered in the former Soviet Union. And they instilled in her a deep respect for the democratic institutions of their adopted country. That deep respect inspired her to attend law school and become a lawyer, with the goal of using her skills in a practical way to help others. She had also witnessed pro bono lawyers and volunteers assisting her family with all aspects of their integration into American society,

including the naturalization process, and sought to carry their service forward.

As a lawyer, Magistrate Judge Reznik aspired to become a judge, which she perceived as the ultimate way to promote equal justice and fulfill her commitment to public service. It was a goal, however, that "always felt out of reach." During the COVID-19 pandemic, she experienced "a moment of reckoning" that led her to apply for the seat being vacated by Magistrate Judge Paul Davison. On being selected by the Board of Judges and then sworn in at a ceremony her parents attended, she realized her goal with a sense of awe and humility.

A Government Servant

Since becoming a magistrate judge, among the biggest surprises have been losing her first name in conversation with others on entering the courthouse and realizing that she is no longer a private person, but a government servant. Magistrate Judge Reznik has enjoyed the challenge of getting up to speed on the new subjects the position entails. While she did not have prior criminal practice experience, she had always cared about issues surrounding the criminal justice system and longed to be part of the decision-making process. Magistrate Judge Reznik has become acquainted with the different constituencies that are part of the federal criminal process, including the U.S. Attorney's Office, the Federal Defenders, and Pretrial Services. She has been grateful for the evidence-based tools these constituencies and her judicial colleagues have shared to help guide her in making sound and informed decisions in criminal cases.

Magistrate Judge Reznik has thus far selected her law clerks through referrals from other judges and law schools and anticipates that future openings will be posted on Oscar. Because so many law clerk candidates are highly qualified on paper, references are one of the most important factors in her law clerk selection process. She also seeks out candidates who have post-law school litigation experience, strong research and writing skills, and intellectual curiosity. Magistrate Judge Reznik wants clerks who want to learn and engage in the litigation process, while also challenging her to make good decisions.

When attorneys appear before her, Magistrate Judge Reznik seeks out the pragmatic solution to the dispute. Her aim is to get to the heart of the issue and resolve the matter efficiently. In the cases over which she has presided, she has enjoyed the problem-solving aspects of helping people solve day-to-day problems.

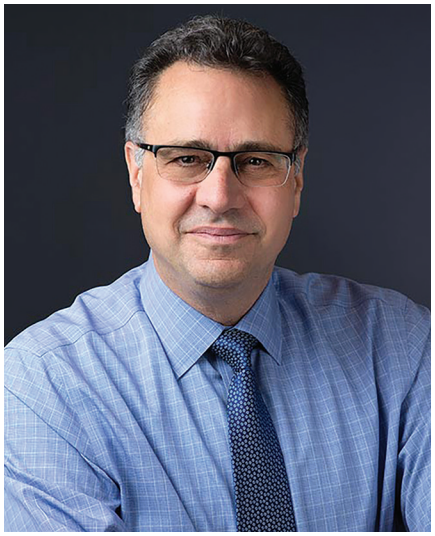
In her spare time, Magistrate Judge Reznik is an avid reader, knitter, and hiker. Also a lover of art and music, she sometimes dabbles in making her own when inspired. Other pursuits include serving on non-profit boards like the Advisory Board of City Rocks, a non-profit charitable organization that promotes rock climbing as a means to mentor and empower students in under-resourced communities.

Magistrate Judge Reznik is very much looking forward to the years ahead of her on the bench.

FBC News

Council's Access to Counsel Project Keeps on Rolling

By Larry Krantz



The Federal Bar Council's Access to Counsel Project, known as the A2C Project, has been rolling in high gear for the past two years. The A2C Project actively recruits and trains counsel to represent pro se civil litigants, on a pro bono basis, in the Southern and Eastern Districts of New York.

The results have been impressive. In the past two years, through the auspices of the A2C Project, scores of pro se litigants – whose cases were identified by the courts as worthy of pro bono representation (and who wanted pro bono representation) – have

had volunteer attorneys assigned to represent them. Mostly larger firms have taken on these matters, with some smaller firms and solos as well. The pursuit of justice has been all the better for it.

In the Southern District, the bulk of the cases have been civil rights suits, including actions for alleged excessive force by prison or law enforcement authorities, or for alleged unconstitutional prison conditions. Approximately 10 of these civil rights cases have gone to trial in the Southern District, with a pro bono team leading the charge. One case – alleging excessive force by corrections officers – was tried recently in the White Plains courthouse. The result was a plaintiff's verdict.

In the Eastern District, the bulk of the cases have been employment related. After the appointment of pro bono counsel, most of these cases went to mediation, often settling favorably for the formerly pro se plaintiffs.

But win or lose at trial or at mediation, these pro bono cases are important because they provide a great service to those unable to afford representation, enhance the quality of our system of justice, relieve the burden on the court's pro se docket, and give lesser experienced lawyers a unique opportunity to exercise and hone their trial skills.

The pro bono teams assigned through the court and assisted by the A2C Project receive great support from the Federal Bar Council. This support comes in two ways.

First, in partnership with the American College of Trial Lawyers (Downstate N.Y. Chapter), the Council conducts trial skills training programs for lawyers willing to commit to taking on pro bono cases. Five training programs have been held so far, covering depositions, direct and cross examination, impeachment, and opening and closing statements. All of the programs follow a "learn by doing" method, requiring participants to prepare for and perform mock trial exercises under the tutelage of highly experienced faculty members (who donate their time). Following the participants' performances, they are critiqued by the faculty, with an emphasis on concrete suggestions for improvement. The performances are also videotaped and reviewed by a faculty member with each participant. The programs have had about 15-20 participants with 10 or more experienced trial lawyers serving as faculty members. The feedback from the participants has been outstanding.

Second, through the A2C Project, the Council has formed a cadre of experienced trial lawyers who serve as the Pro Bono Advisory Panel. This Advisory Panel provides guidance for the teams taking on pro bono matters. Lawyers from the Advisory Panel are assigned to each case, resulting in experienced trial lawyers assisting the less experienced lawyers every step of the way. It is a wonderful mentoring opportunity for both mentor and mentee.

The judiciary has praised the results of the A2C Project. According to Magistrate Judge Sarah Cave, who is a member of the Southern District of New York Pro Se Committee, the A2C Project has "almost completely eliminated the backlog of pro se cases awaiting appointment of pro bono counsel, with almost 50 cases being assigned." She notes that while there have been wins and losses, the "pro bono counsel appointed have presented the best possible case, and have done so with sensitivity, candor, patience and passion."

According to Chief Magistrate Judge Lois Bloom, who oversees pro se litigation and the Pro Bono Panel program for the Eastern District of New York, the A2C Project has been a great benefit for both the court and the lawyers taking on cases. It is a "win-win," with the "court getting the benefit of skilled representation for formerly pro se plaintiffs, and the pro bono lawyers gaining invaluable experience and confidence."

If you have an interest in volunteering for the A2C Project and taking on a case as a pro bono attorney, please reach out to us at: fbca2c@federalbarcouncil.com. You can read more about the project on the FBC website (https://www.federalbarcouncil.org/access-to-council-project/).

In Appreciation

The A2C Project is co-chaired by Magistrate Judge Steven Gold (Ret.) and Marjorie Berman. The cases are coordinated by A.J. Agnew. Chief Magistrate Judge Bloom and Magistrate Judge Cave have assisted in the trial training programs, which are coordinated by Martin Karlinsky and this writer. Faculty trainers are too numerous to mention (20+), but have our deepest appreciation. We also thank the

pro bono offices of the Southern and Eastern Districts and Sullivan & Cromwell and Wachtell Lipton for providing space (and food) for the programs.

Second Circuit Decisions

Class Certification and the Scope of an Injunction

By Adam K. Magid

The U.S. Court of Appeals for the Second Circuit closed out 2023 in typical prolific fashion, issuing a total of 229 reported and over 1,300 unreported decisions (on par with 2022's numbers). While it is impossible to capture the many textures of the court's 2023 jurisprudence here, two decisions in the year's latter months stood out as impactful for litigants and fertile ground for future judicial development.

In *Arkansas Teacher Retirement System v. Goldman Sachs Group, Inc.*, 77 F.4th 74 (2d Cir. 2023), the court brought finality to a 13-year class action saga in decertifying an investor class alleging securities fraud based on "generic" misrepresentations.

In *Havens v. James*, 76 F.4th 103 (2d Cir. 2023), a divided Second Circuit panel articulated a restrictive view on who, other than those expressly named, may be bound by a court's injunction.

Arkansas Teacher

After over a decade of litigation and multiple rounds of appeals, this case involving a defendant's ability to defeat class certification in cases asserting securities fraud claims under Section 10(b) of the Securities Exchange Act of 1934 finally reached its conclusion in 2023. Under the "*Basic*" (or fraud-on-the-market) presumption of reliance, courts long have recognized that, in an efficient market that incorporates all public information into a stock's price, an investor is presumed to rely on any public misrepresentations in buying or selling stock. This presumption effectively makes large-scale Section 10(b) class actions possible. Otherwise questions over whether individual class members relied on an alleged misrepresentation (an essential element of a 10(b) claim) typically would overwhelm common ones. On the other hand, courts also recognize that a defendant may rebut the presumption of reliance, and defeat class certification in most cases, by proving the misrepresentation did not actually impact stock price.

The *Basic* presumption – and the ability to rebut it – was front and center in *Arkansas Teacher*. Asserting Section 10(b) claims on behalf of a proposed investor class, plaintiffs alleged that defendants artificially propped up the Goldman Sachs Group, Inc.'s stock price by misrepresenting, among other things, that the bank had "extensive procedures and controls" to "identify and address conflicts of interest" in transactions. Plaintiffs alleged that the truth came to light when the SEC brought an enforcement action alleging defendants failed to disclose the role of a client in selecting assets and taking a short position in a transaction. Goldman's stock price declined upon the news.

The Southern District of New York (Judge Crotty) originally certified the proposed class, holding that defendants failed to provide "conclusive evidence" of no price impact to rebut the *Basic* presumption. The Second Circuit vacated that order, explaining that "preponderance of the evidence," not "conclusive evidence," is the correct evidentiary burden. On remand, the district court again certified the class. This time the Second Circuit affirmed, disagreeing with defendants' argument that the alleged misrepresentations could not have inflated Goldman's stock price due to their "generic" nature. The Supreme Court, however, granted certiorari and vacated the Second Circuit's decision. The Supreme Court cautioned that any inference that a misrepresentation caused stock price inflation "starts to break down" when the misrepresentation is "generic" and the disclosure alleged to have corrected it is "specific."

On remand, the district court stood firm and certified the class yet again, holding that the "generic" nature of the alleged misrepresentations at issue did not "vanquish" the strong inference of price impact. On appeal for a third time, the Second Circuit ultimately disagreed and ordered the class decertified. Taking the Supreme Court's guidance to heart, the court (Judges Wesley and Chin, with Sullivan, concurring) explained that, to draw an inference that a generic misrepresentation caused price inflation, a subsequent disclosure must reveal the truth, in some respect, "at an equally generic level" as the alleged misrepresentation itself. Here, however, there was too much of a mismatch between the generic alleged misrepresentations about conflicts of interest and highly specific subsequent disclosure of the SEC enforcement action to draw that conclusion.

The *Arkansas Teacher* cases have made important contributions to the law governing high-stakes securities fraud class actions, including by clarifying that the degree to which a statement is "generic" or "specific" is relevant to rebutting the all-important *Basic* presumption of class-wide reliance. Fierce disputation over the application of these concepts is all but inevitable in 10(b) class actions moving forward. For the *Arkansas Teacher* litigants, however, the Second Circuit's decision was the final chapter: the parties agreed to dismiss the action in November, putting an end to the 13-year saga.

Havens v. James

Havens involved anti-abortion "sidewalk counseling" by Jim Havens and his group near a Planned Parenthood in Rochester. Havens conducted training sessions for these activities at a center run by Mary Jost. Jost and various others (but not Havens or his group) were named in the so-called "Arcara Injunction" (named after the issuing judge) that enjoined certain individuals and groups from entering a public sidewalk within 15 feet of the entrance of any abortion clinic in the Western District of New York. Havens preemptively sued the New York Attorney General and City of Rochester seeking a declaration that the injunction did not bind him. The U.S. District Court for the Western District of New York (Judge Larimer) dismissed the complaint, holding that the Arcara Injunction applied to Havens because he was acting in "active concert or participation" with Jost, an enjoined party.

A divided Second Circuit panel reversed. The majority (Judges Menashi and Nardini) explained that "no court can make a decree which will bind any one but a party." Because "everyone should have his own day in court," an individual not expressly bound can only violate an injunction by aiding and abetting a violation committed by a named party. Federal Rule of Civil Procedure 65(d), the majority opined, codified that common-law principle by limiting an injunction only to parties, their officers, agents, and employees, and anyone who acts "in active concert or participation" with them. Here, the majority observed, there was no alleged violation by a named party for Havens to aid and abet, and conducting training sessions at one's facility did not meet that bar. At least at the pleadings stage, Havens had adequately alleged that the Arcara Injunction did not apply to him.

Judge Lohier dissented. In his view, the "active concert or participation" proscribed by Federal Rule of Civil Procedure 65(d) extends beyond aiding and abetting, and includes "active association" and "coordination," as alleged. The majority's holding, Judge Lohier warned, would allow parties to easily circumvent injunctions by "enlisting" non-parties "to do what they are unable to do directly" and threatened to "undermine the authority of federal district courts to enforce their injunctive decrees well beyond the context of anti-abortion protests and sidewalk counseling." Given Judge Lohier's concerns, and the ubiquity of injunctions as a judicial remedy across the spectrum of federal cases, *Havens* is perhaps unlikely to be the final word on this interpretive question.

Conclusion

Although involving very different circumstances, *Arkansas Teacher* and *Havens* are both certain to loom large in cases to come. Applying *Arkansas Teacher*, plaintiffs and defendants in large-scale securities fraud class actions will spar over concepts such as the genericness of alleged misstatements, the specificity of corrective disclosures, and whether there is a mismatch between them – fact-intensive issues that will inevitably lead to further clarification and development on a case-by-case basis.

Havens, in turn, marks either a new restrictive standard as to the reach of a court's injunction in the Second Circuit, or possibly an intermediate step on the road to a

broad association-and-coordination test extending injunctions to non-parties. Where the court ultimately lands, only time will tell.

The Supreme Court

The Friendship Between Two Justices

By Layaliza Soloveichik

It has been observed, with some truth, that civil society has lately gotten more polarized, more fractious, and that U.S. Supreme Court jurisprudence often seems to be a flashpoint. That is why it is striking to me that two late intellectual luminaries of the U.S. Supreme Court, Justices Ruth Bader Ginsburg and Antonin Scalia, although frequently on different sides of major cases, were the best of friends. Indeed, after Justice Scalia's passing, Justice Ginsburg penned a forward to a volume that collected many of his speeches and writings, "Scalia Speaks: Reflections on Law, Faith, and Life Well Lived," that was co-edited by Edward Wheelan and by one of Justice Scalia's sons, Christopher J. Scalia. On behalf of the *Federal Bar Council Quarterly*, I recently interviewed Christopher Scalia to find out more about the basis of Justice Ginsburg and Justice Scalia's intriguing friendship.

Close Friends

Scalia recounted to me that Justice Scalia and Justice Ginsburg were indeed close friends despite their many differences. It was while they were both sitting on the U.S. Court of Appeals for the District of Columbia Circuit in the early 1980s that they bonded, though they had met earlier. Scalia noted that his father and Justice Ginsburg were "both New Yorkers of more or less the same vintage," and shared a love of good opera, good wine, and good food. Their respective spouses were also very friendly, and the couples celebrated New Year's Eve together every year. The two justices appreciated each other's sense of humor; Justice Scalia was reportedly one of the few people who could make Justice Ginsburg laugh. They both had a lot of respect for each other's legal acumen and intellect. They shared a respect for the Court as an institution. And they both, Scalia pointed out, "loved a good argument."

In expanding on this, Scalia explained that his father understood that democracy "made room for differences," that "the democratic process necessarily involved debate and compromise," and that "compromise reached by democratic processes" was what democracy was supposed to be about. He observed tangentially that his father loved hunting because he loved the outdoors, but also because he loved the people he met, who were not from inside the Beltway, and who had different ideas and ways of thinking. Famously, too, Justice Scalia tended to hire a liberal law clerk; Scalia noted his father's perspective that "some of the worst" opinions could be unanimous ones and it was valuable to have a "skeptic pushing back at subtle flaws."

Interestingly, this idea was echoed in Justice Scalia's parenting around the Scalia family dinner table. Scalia described what he called "energetic conversation" growing up, in which "Dad would take our ideas seriously and push back on them," purely as an exercise, "to show us how fun this kind of argument could be." And occasionally his father could be persuaded, Scalia reminisced with remembered triumph. "Kids won arguments; he would not necessarily say 'you convinced me I was wrong,' but we could tell when we had persuaded him – we knew." Justice Ginsburg reflected similarly in her forward to "Scalia Speaks," writing that when she and Justice Scalia critiqued each other's drafts, her final opinion "was always clearer and more convincing than [her] initial circulation" and the process "energiz[ed] [her] to strengthen [her] presentation."

In fact, the reason that the justices first bonded when they were judges on the District of Columbia Circuit, related Scalia, was owing to the practice of critiquing each other's drafts of judicial opinions, something that the other judges on that bench were not at that time interested in doing. The draft-critique helped each to strengthen the other's arguments;

Scalia shared that his father had styled this a "mutual improvement society." This practice continued after they became justices; Scalia particularly remembered hearing about one draft dissent that his father had sent Justice Ginsburg unusually early, on a major case, which Scalia recounted (in Justice Ginsburg's own words) "kind of ruined her weekend." Whatever tension was engendered, however, soon dissipated. Both she and his father were "able to separate the argument from the person." Scalia made the same point to me that Justice Ginsburg had asserted in her panegyric about Justice Scalia in the forward: "Dad attacked ideas, and not people."

In articulating the basis of his father's friendship with Justice Ginsburg, Scalia observed that both justices recognized that "the differences between them were less significant than the many things that they had in common." He mentioned the "roses story," also told by one of his father's former law clerks, who had since joined the bench, Judge Jeffrey S. Sutton, in a book the latter co-edited, titled "Essential Scalia: On the Constitution, the Courts, and the Rule of Law." Justice Scalia was wont to bring two dozen roses to Justice Ginsburg every year for her birthday, and Judge Sutton, visiting when such annual bouquet was due to be delivered, asked Justice Scalia in exasperation something like, "When did Justice Ginsburg ever side with you in a close case?" Responded Justice Scalia (as his son retold it), "Jeff, there are some things that are more important than votes."

In that light, I found myself inspired by the thought with which Justice Ginsburg concluded her tribute to Justice Scalia and her description of their friendship. She wrote that she would "be overjoyed" if readers could appreciate that "some very good people have ideas with which we disagree" and that "despite differences, people of goodwill can pull together for the well-being of the institutions we serve and our country." Words to live by.

Pete's Corner

The Quest for Justice for Emmett Till Continues

By Pete Eikenberry

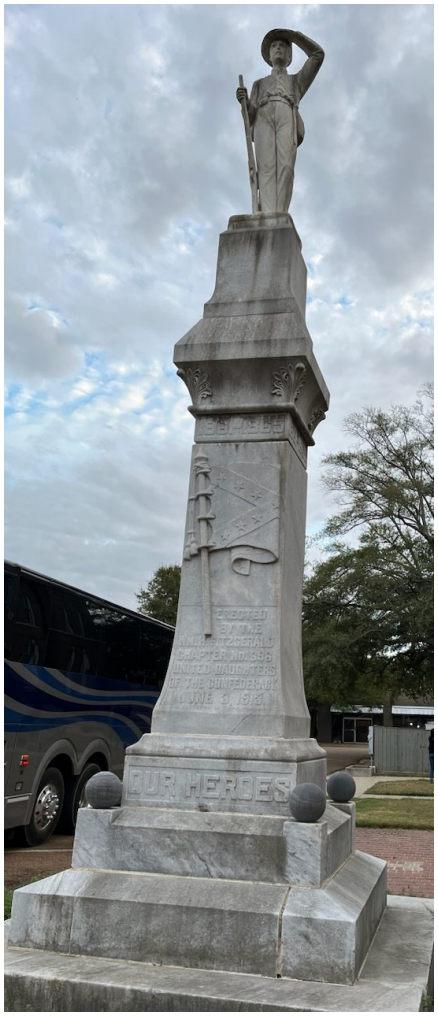
In both 2018 and 2023, I took the annual Civil Rights Bus Tour sponsored by the Mississippi Justice Center. In 2018, the morning after I arrived in Jackson, Mississippi, I went for breakfast at the hotel. I happened to speak with a man who was at the buffet. He said he was in town to visit relatives, and I asked him how often he came. He said every year, and we had a pleasant exchange. Later, on the bus tour, we stopped at the Tallahatchie County courthouse. In the courtroom, the man whom I met at breakfast stood up and introduced himself as Reverend Wheeler Parker Jr., first cousin of Emmett Till. He told in graphic detail the circumstances leading to the murder of his cousin. The murderers were tried and acquitted in the very courtroom where we sat.

Some details of the event are set forth on a plaque outside the courthouse that reads as follows:

EMMETT TILL
MURDER TRIAL

In August 1955 the body of Emmett Till, a 14 year old black youth from Chicago, was found in the Tallahatchie River. On September 23, in a five day trial held in this courthouse, an all-white jury acquitted two white men, Roy Bryant and J.W. Milam, of the murder. Both later confessed to the murder in a magazine interview. Till's murder, coupled with the trial and acquittal of these two men, drew international attention and galvanized the Civil Rights Movement in Mississippi and the nation.

Reverend Parker chatted with me and our group in both 2019 and 2023 at different points during our visits to the relevant geographic locations. He was born in 1939 in "Slaughter" Mississippi (a nickname used by the Black community) He had two brothers and three sisters. In



The confederate memorial adjacent to the courthouse door in Tallahatchie County, Mississippi.

1944, the family moved to Money, Mississippi where Wheeler's dad found work as a sharecropper on a cotton plantation. Although sharecroppers were paid for each bag of cotton they picked, the overseers count was often manipulated so that the sharecroppers never had more than enough to pay for the items they really needed. The life of a sharecropper was not much better than that of a slave.

Everything changed for the family in 1947, when Wheeler's mother took her five children by train to Argo, Illinois. Wheeler's father had left Money to work for the Argo Starch Corporation in 1946. After the end of World War II, there was a great Black migration to the North. In Argo, Wheeler came to live next door to his first cousin Emmett Till, ("Bobo" as he was called). They were in and out of each other's homes every day and became best friends. Wheeler described Emmett as a bit of a spoiled only child. He was charismatic and had survived polio well, but it left him with a stutter.

In August 1955, Wheeler and Bobo returned to Money for a summer vacation with his grandfather, Mose Wright "Papa," and picked cotton with his uncles who were about the same age. Wheeler was 16 years old, and Emmett was 14. Emmett did not last long picking cotton. After three days of picking, Wheeler and his young uncles went to Bryant's Grocery and Meat Market with Emmett where he allegedly whistled at a young white woman. The group left the store and drove away in haste but were followed by another car. They pulled over to the side of the road and ran into the cotton fields for cover. That night, as Wheeler, Emmett, and the young uncles slept in their grandfather's four-bedroom home, two white men came into the house. They walked through the bedroom where Wheeler slept – asking for the location of that "fat boy from Chicago." Wheeler told me he was desperately afraid and made a promise to God that he would become a minister.

The men then found Emmett, who protested without effect that he could not leave until he put on his socks before putting on his shoes. Papa begged the men as they left the house that he would send Emmett back to Chicago, but the men were adamant. They took Emmett to a building on a farm in another county where they tortured and beat him to death before throwing his body into the Tallahatchie River. His mother insisted that his battered body not be buried in Mississippi but be returned to Chicago. She had an open casket funeral so the world could see evidence of the terrible carnage. The men who committed the murder were soon arrested and tried in Tallahatchie County where the murder had occurred. Papa bravely testified against them, but they were acquitted.

Wheeler, who has been a pastor in Argo for 30 years, and his wife Dr. Marvel Parker, a Village of Summit trustee and executive director of the Emmett Till and Mamie Till Mobley Institute, have spent their lives seeking justice for Emmett's murder. In 2023, Wheeler published a book entitled "A Few Days Full of Trouble: Revelations on the Journey to Justice for My Cousin and Best Friend, Emmett Till." Recently, Dr. Parker secured a grant award of $2,918,000.00 from the Mellon Foundation for the restoration of Roberts Temple Church of God In Christ in Chicago, the site of Emmett's funeral.

After each of the two bus tours, we emerged from the courthouse after Wheeler's account of the murder and trial to confront the large confederate memorial adjacent to the courthouse door. As you can see from the photo accompanying this article, it bears the notation: "Our Heroes." Perhaps, lawyers can approach the Mississippi Bar Association about removing the statue from its location next to a courthouse. Especially this courthouse.

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