



FBAnewsletter

Federal Bar Association - Eastern District of Michigan Chapter - 63 years of service to our Federal Bench and Bar



Professor
Alexander A. Reinert

SAVE THE DATE! April 5, 2024

**Section 1983 and
Qualified Immunity:
(Nearly) Everything There
is to Know**

By Robin Wagner

Save the Date: Friday, April 5, 2024, from 11:45 am to 5 pm (this program has been rescheduled from its original date of October 20, 2023).

"Section 1983 and Qualified Immunity: (Nearly) Everything There is to Know"

Featuring Guest Speaker: Professor Alexander A. Reinert, Max Freund Professor of Litigation and Advocacy at the Benjamin N. Cardozo School of Law in New York.

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Diversity Committee Hosts Classroom to Courtroom for Law Students

By Ki Lee Kilgore

On November 15, 2023, nearly 40 law students gathered at the Theodore Levin U.S. Courthouse in Detroit for the Chapter's Diversity Committee's annual "Classroom to Courtroom" event.

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President's Column

George Donnini

My first order of business is to sincerely thank our outgoing President, Jennifer Newby, who did an absolutely amazing job as our most recent

President. Just like her most recent predecessors (Dan Sharkey, Matthew Lund, Fred Hermann, etc.), she delivered quality and excellence to our Chapter and we are a better organization for her stewardship and leadership. Thank you. Thank you. Thank you.

With that first important item taken care of, let me next say that I am proud to be your President for the 2023-2024 year which runs from July 1, 2023 through June 30, 2024. I am honored to have the full support of Chief Judge Cox and the rest of the judges on the Eastern District of Michigan bench. We are truly blessed to have the active participation of our judges and I would like to thank each and every one of them for their past participation as well as their anticipated future participation (especially this year!). And, most importantly, thank you to our members. The members who are vital to our association continue to elevate our bench and our bar, and to increase the level of professionalism within the Eastern District of Michigan. I am personally very grateful to every one of our members and and, of course, to our Executive Director, Mindy Herrmann, who works tirelessly keeping all of our arrows pointed in the same direction. She has been the one true constant over these past several years and we are lucky to have her at the tip of the spear of our organization. Let's hope she continues in this role for many more years to come.

Please know that the Eastern District of Michigan

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**WINNER
20 YEARS**
National FBA
Outstanding
Newsletter
A W A R D

President's Column *(from page 1)*

Chapter is committed to its members first and foremost. That's right, each and every one of you. We want to help you grow and succeed as attorneys who practice – or in some way touch – our federal court. My fellow officers and I invite you to take full advantage of our organization and we truly believe that the best way to do that is to get involved – join or seek to lead one of our committees; show up to our lunches and dinners; and participate (as attendees or speakers) in the various programs we put on throughout the year. If you are unsure about how to get more involved, shoot me an email or better yet pick up the phone and call me. I promise you I will find a way to plug you in and give you a path to making meaningful contributions to our organization. And, trust me, the more you put into our local Chapter, the more you'll get out of it.

Our diversity committee is doing wonderful things. Our bankruptcy committee drives attendance to its programs that is quite impressive. Our pro bono committee is putting forth considerable effort to provide for more pro bono opportunities and representation on prisoner pro se cases (limited representation on such matters and the mediation program create even more opportunities for more of us to get involved). Those are just a few examples of the countless committees doing great things every day.

Due to the exceptional work by our Officers, Executive Board members, Executive Director, Committee chairs, and members, we are poised to have yet another successful and productive year. So, if you're already actively engaged, keep doing what you're doing. And if you feel like you can do and give more, please get involved. There is plenty to do. So please jump in. Many hands make light work. And, we do our best to try to have plenty of fun while we're doing it!

Our officers Andrew Lievense, Charissa Potts, Lauren Mandel, and Matthew Allen continue to do an amazing job and I know that our future is bright as each of them will have the opportunity to lead this fine organization as its President in the coming years.

We look forward to helping grow your career. We look forward to advancing the administration of justice in our Court. And we look forward to elevating the level of practice amongst the members of our Bar. It is sure to be a memorable year.

Save the Date *(from page 1)*

Alexander A. Reinert returns to Detroit to share with us his groundbreaking new research on Qualified Immunity and the history of 42 U.S.C. § 1983, which is the primary statute for bringing civil rights claims. Professor Reinert made headlines in May of 2023, when his law review article, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201 (2023), featured prominently in an unusual concurrence on a fifth Circuit opinion. Professor Reinert's article argues that the entire doctrine of qualified immunity is based on an early transcription mistake, and his work has also made it into a recent sixth Circuit opinion, *Price v. Montgomery Cnty., Kentucky*, No. 21-6076, 2023 WL 4346954 (6th Cir. July 5, 2023). His research is part of larger conversations happening on the left and the right about the qualified immunity doctrine and its role in civil rights litigation.

Following Professor Reinert's talk, we will have a panel of judges and experienced litigators from both sides of the "v" discuss the "nuts and bolts" of Section 1983 litigation, with a particular emphasis on pro bono representation of incarcerated persons.

Our panel:

District Judge Terrence G. Berg
District Judge Judith E. Levy
Magistrate Judge Elizabeth A. Stafford
Adam R. de Bear, Assistant Attorney General
Michael Hanchett, Plunkett Cooney
Cary S. McGehee,
Pitt McGehee Palmer Bonanni & Rivers
Nolan J. Moody, Dickinson Wright

This program is part of the FBA's initiative to increase participation in the Court's pro bono program and is an excellent learning opportunity for new attorneys and supervising attorneys alike.

The program is free for all and is co-sponsored by the Federal Bar Association's Civil Rights Law Section and its *Étouffée on the Road* program. Learn more at <https://www.etouffeelaw.com/>

Read more and register here: <https://fbamich.org/event/nuts-and-bolts-on-section-1983-and-qualified-immunity-nearly-everything-there-is-to-know/>

Diversity Committee *(from page 1)*

The day began with a warm welcome addressed by Judge Parker, who discussed her legal career and shared candid practice advice. Next, the students attended a RICO trial before Judge Grey and a tax fraud trial before Judge Goldsmith. The students then observed plea hearings before Judge Friedman, as well as a supervised release violation hearing and a motion for attorney's fees hearing before Judge Lawson. After the proceedings, Judges Friedman and Lawson spoke with the students and gave tours of their chambers, providing valuable insights into the workings of the federal judiciary.

At lunch, career law clerk Aidan Maraachli moderated a panel featuring Celeste Kinney from the Federal Community Defender's Office, Jasmine Moore from the U.S. Attorney's Office, and Zainab Hazimi from Warner Norcross + Judd. As former judicial interns and law clerks in the Eastern District of Michigan, the panelists shared their advice for interning and clerking at the Court, pursuing a career in litigation, and navigating the legal field as diverse attorneys.

The Diversity Committee also distributed its new "Judicial Internship and Clerkship Guide" to attendees. Striving to make information about federal internships and clerkships more accessible to underrepresented and first-generation law students, the guide discusses the benefits of working for federal judges, gives advice for the application and interview process, and details minority bar associations and their programs.

The event was a resounding success, and many students expressed an interest in interning and clerking at the Court. The Diversity Committee thanks all participating judges, panelists, and students for another wonderful event!

during the week of November 13, 2023. Judge DeClercq filled a vacancy that resulted when Judge Stephanie Dawkins Davis was elevated to the Court of Appeals and Judge McMillion filled a vacancy when Judge Gershwin A. Drain took senior status last year. Generally, when a new judge is sworn in, a lot of work takes place behind the

scenes to get the judge up and running. With two new judges starting at the same time, the Court has been busy working to ensure a smooth transition.

Thankfully, the possibility of a shutdown of the Federal government was recently avoided. Although the Court does not really shut down during a lapse in appropriations, (the Court continues to hear matters and hold trials), there are always preparations that must take place in the event that a Continuing Resolution (CR) is not extended. Courts are

required to have a contingency plan in place regarding operations and designate staff that will be required to work without pay until the government is funded. Any staff not required to report during that time would be furloughed. Currently, the Federal Judiciary has carryover funding available that can be used to pay staff until a CR or final appropriations bill is passed. However, this funding is limited and will not last for an extended period of time. The recently approved CR is set to expire early next year. Chief Judge Cox, the Court's management team, and I will keep staff advised in the event we are again confronted with this possibility next year.

If you have any questions, suggestions or comments please contact me at: kinikia_essix@mied.uscourts.gov.



Classroom to Courtroom Attendees.

Photo by Amir El-Aswad, Foley & Lardner.

Bankruptcy Community Comes Together to Support Access to Bankruptcy Court

By Paul Hage

Nearly one hundred members of the bankruptcy bench and bar in the Eastern District of Michigan came together on the evening of September 28, 2023, for the Hon. Marci B. McIvor Annual Fundraiser for Access to Bankruptcy Court. The annual fundraiser event, named in honor of Hon. Marci B. McIvor (Bankr. E.D. Mich.) (ret.), was hosted by Warner Norcross + Judd at the firm's Detroit office. The event raised approximately \$35,000 for Access to Bankruptcy Court ("ABC").

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Court Administrator/ Clerk of Court

By Kinikia Essix

I am excited to announce that Eastern District of Michigan will have two new District Judges! I would like to welcome Judges

Susan K. DeClercq and Brandy R. McMillion! Chief Judge Sean F. Cox administered the oath of office to both judges

Bankruptcy *(from page 3)*

ABC was founded in 2010 by Judge McIvor and other leaders of the local bankruptcy bar. ABC is a unique access to the justice program based in the Eastern District of Michigan. It raises funds to provide experienced consumer bankruptcy counsel, free of charge, to low-income individuals and families in the district who otherwise might have no choice but to seek relief under the Bankruptcy Code without counsel, or pro se.

Bankruptcy is a complex process. A pro se debtor is significantly less likely to receive the benefits of bankruptcy than a debtor with counsel. The Eastern District of Michigan has one of the heaviest consumer bankruptcy dockets in the country. On average, the District has had approximately 1,500 pro se chapter 7 filings per year. The discharge rate in pro se chapter 7 cases in our District is an alarmingly low 48%. Moreover, pro se debtors are often worse off after an unsuccessful bankruptcy filing. ABC's goal is to help provide experienced counsel to as many qualified applicants as possible.

An individual whose household income is at or below 150% of the poverty level (based on guidelines prepared by the U.S. Department of Health and Human Services) can apply for a free bankruptcy attorney through ABC. ABC then reviews the individual's application to ensure that he or she qualifies. If the applicant qualifies, ABC matches them with a volunteer panel attorney. More than 40 highly experienced members of the local bankruptcy bar serve as panel attorneys for ABC and agree to handle cases for a substantially reduced rate (\$450), which is paid by ABC. The individual receives high-quality bankruptcy representation, free of charge. The discharge rate in cases assigned by ABC is approximately 95%.

The McIvor Fundraiser serves as the primary fundraising event for ABC. It has become the social event of the year for the local bankruptcy community. This year's event featured great food and drinks and provided ample opportunities for networking and reconnecting with old friends. Speeches were given by Paul R. Hage, President of ABC, and Judge McIvor, who flew back from Florida to attend. The event also featured a live band and other activities. Warner Norcross's beautiful new office, adjacent to Little Caesars Arena, served as the venue for the event. The \$35,000 raised at the event will help support ABC's operations in the coming years.

Sponsors for the McIvor Fundraiser included Warner Norcross, Taft Stettinius & Hollister, Bodman, Dickinson

Wright, Hon. Steven W. Rhodes, Kerr Russell, Riveron, Alix Partners, Butler Rowse-Oberle, Butzel Long, Foley & Lardner, Freedom Law, Fredo & Associates, JAMS, Kaminski Law, Karen Evangelista, Maddin Hauser, McDonald Hopkins, Miller Canfield, O'Keefe, Plunkett Cooney, Stevenson & Bullock, Strobl, The Taunt Law Firm, Varnum, Wolfson Bolton Kochis and the Bankruptcy Judges for the Eastern District of Michigan.

If you have questions about Access to Bankruptcy Court please contact Paul R. Hage at phage@taftlaw.com.

Proposed Sentencing Guidelines Amendments on Criminal History to Be Retroactive

By Amanda Bashi and Benton Martin

For the first time in nearly a decade, we anticipate an amendment to section 1B1.10 of the U.S. Sentencing Guidelines (USSG) will make retroactive changes to the guidelines' criminal history rules. The amendment calls for two retroactive changes, set out in Amendment 821, Subpart 1, Parts A and B.

The retroactivity decision means that thousands of people currently incarcerated in federal prisons across the country will be eligible to receive sentence reductions. The amendment took effect on November 1, 2023, but orders granting sentence reductions

will not become effective until February 1, 2024. The last guideline amendment made retroactive by the Sentencing Commission was Amendment 782 ("drugs minus two") in 2014, which lowered the sentencing ranges for people convicted of federal drug trafficking.

Part A of Amendment 821 eliminates the two "status points" added to the criminal history score for people "under a criminal justice sentence at the time of the offense." USSG § 4A1.1(d). Anyone with six or fewer criminal history points will now get no additional points. Anyone with seven or more criminal history points will get only one point, instead of the previous two points. The amendment will only change the person's guideline range if the reduction in points is enough to change their Criminal History Category.

Research by the Sentencing Commission prompted this change - in a study, only 15 out of 10,000 people sentenced for federal offenses could be linked to "status points" improving "the criminal history score's successful prediction of rearrest."



Honorable Marci B. McIvor (ret.) speaking at the McIvor Fundraiser.

Photo by Melinda Herrmann

Part B of Amendment 821, titled the “adjustment for certain zero-point offenders,” reduces some people’s offense level by two when they have zero criminal history points. USSG § 4C1.1. There are multiple exclusions, such as when:

- the individual “used violence or credible threats of violence in connection with the offense,”
- the offense resulted “in death or serious bodily injury,”
- the offense is a sex offense, the individual personally caused “substantial financial hardship,” or
- the individual possessed a firearm or other dangerous weapon in connection with the offense, among others.

Some of the exclusions use language that is new to the guidelines and may lead to litigation about interpretation.

As reported in Law360, “[t]he prospect of applying both changes retroactively drew fierce opposition from some commissioners, the Department of Justice and others, who criticized the burden retroactivity would place on the court system.”² But U.S. District Judge Carlton W. Reeves, Chair of the Commission, commented, “What is unjustified in the future, was unjustified in the past, and must be rectified now.”³

Leslie Scott, a member of the Federal Defender Sentencing Resource Counsel stationed in Detroit, expressed why these amendments represent an important step: “Defenders are thrilled the Commission chose to make Parts A and B of Amendment 821 retroactive. Both

parts reflect that certain groups of predominantly Black and Latino individuals are serving unjustifiably long sentences. Access to fairer sentencing should not be left to the fortuity of timing. The average sentence reduction for both groups of eligible people will be well over one year, giving them an earlier opportunity to reunite with loved ones and rebuild their lives. That’s a good thing.”

In announcing the amendments, Judge Reeves stated: “Our decision today is one that brings hope to thousands of currently incarcerated people and their families. We listened to a *full* spectrum of views and considered the *full* costs associated with incarceration balanced with the time needed to review petitions and prepare for successful reentry.”⁴ He added, “These prospective changes to the criminal history rules made by the Commission in April reflect evidence-based policy determinations that apply with equal force to previously sentenced individuals. Applying these changes retroactively will increase fairness in sentencing. At the same time, the 3-month delay will help ensure that individuals released based on our decision today receive the benefit of reentry programs and transitional services essential to support their successful reentry to society, which at the same time promotes public safety.”⁵

In our district, the Sentencing Commission estimates that there are 157 people eligible for retroactive application of the “status points” reduction, and 60 people eligible for retroactive application of the “zero-point” reduction.⁶ The Federal Community Defender will work to review eligibility for reductions and will work with the U.S. Attorney’s Office to present eligible motions to the courts.

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Guidelines Amendments *(from page 5)*

Application of these amendments will be governed by 18 U.S.C. § 3582(c)(2) and USSG § 1B1.10. Under § 1B1.10, no reduction is permitted unless the amendment actually lowers the individual's applicable guideline range. *Id.* § 1B1.10(a)(2). These proceedings are not "a full resentencing." *Id.* § 1B1.10(a)(3). The new sentence generally cannot go below the low end of the new range, with an important exception - when a person received a below-guidelines sentence because of a government motion based on substantial assistance, "a reduction comparably less" than the amended range "may be appropriate." *Id.* § 1B1.10(b)(2)(A)-(B). Also, the retroactive amendment "does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release." *Id.*, cmt. n.8(A).

The procedure is familiar for anyone who dealt with the "drugs minus two" amendment. Courts first determine the amended guideline range. USSG § 1B1.10(b)(1). Courts must then consider the sentencing factors, "to the extent that they are applicable," in determining the extent of reduction. See 18 U.S.C. § 3582(c)(2). In making that determination, courts "may consider post-sentencing conduct." USSG § 1B1.10, cmt. n.1(B)(iii).

Walter Pavlo, writing for Forbes, estimates that "[t]he release of prisoners under these amendments will save the Bureau of Prisons hundreds of millions in the coming years."⁷

Sentencing Commissioner John Gleeson, a former federal district judge, also praised the decision on retroactivity for helping right historic wrongs. He explained that people of color have been affected by the criminal justice system at "disproportionately high rates for decades, and not for justifiable reasons."⁸ He added, "There's no such thing as fully remedying a racial disparity that's been baked into our criminal justice system for so long. . . . But making these amendments retroactive will have a tangible effect on thousands of people of color."⁹

¹ U.S. Sent. Comm., *Revisiting Status Points*, at 18, June 2022, <https://perma.cc/3HRY-YPQT>.

² Stewart Bishop, *Sentencing Commission Backs Retroactive Cuts For 1st Timers*, Law360, Aug. 25, 2023, <https://perma.cc/M8SV-LKKL>.

³ *Id.*

⁴ U.S. Sent. Comm., News Release, *U.S. Sentencing Commission Votes to Allow Retroactive Sentence Reductions and Announces its Next Set of Policy Priorities*, Aug. 24, 2023, <https://perma.cc/7FZW-3DVU>.

⁵ *Id.*

⁶ U.S. Sent. Comm., Office of General Counsel, Letter to Commissioners, *Retroactivity Impact Analysis of Parts A and B of the 2023 Criminal History Amendment*, May 15, 2023, at 12, 20, <https://perma.cc/9C9W-VW6L>.

⁷ Walter Pavlo, *Sentencing Commission OKs Retroactive Reduction For Many Inmates*, Forbes, Aug. 25, 2023, <https://www.forbes.com/sites/walterpavlo/2023/08/25/sentencing-commission-oks-retroactive-reduction-for-many-inmates/?sh=55f3a38a1c8c>.

⁸ Bishop, *supra* note 2, <https://perma.cc/M8SV-LKKL>.

⁹ *Id.*

Sixth Judicial Family Reunion

By Brittney Kohn

The Law Clerk Committee hosted its sixth Judicial Family Reunion event on October 19 at Miller Canfield's Detroit office. More than seventy-five current and former law clerks from the Sixth Circuit and the federal courts in the Eastern District joined a number of the courts' judges to reunite and forge new connections among the law clerk family.

Judge Stephen Murphy welcomed the crowd and recognized the judges in attendance. He noted how the event provided a wonderful opportunity for him to reconnect with his former law clerks, as well as those of other judges with whom he became acquainted during their clerkships. Also in attendance were Judges Paul Borman, Robert Cleland, Susan DeClercq, David Lawson, and Laurie Michelson, and Magistrate Judges Kimberly Altman and Elizabeth Stafford.

The Law Clerk Committee also extends its special thanks to Christina Farinola for capturing the spirit of the event with her fantastic photographs.





Calendar of Events

December

December 13
Annual FBA Holiday Party
 Athenia Hotel, Beaubian Room
 4:30 pm - 7:30 pm

January

January 23-24
New Lawyers' Seminar
 Levin U.S. District Courthouse

February

February 7
Wade H. McCree, Jr.
Luncheon for Social Justice
 Venue TBD
 12:00 pm - 1:00 pm

April

April 5
Special Presentation
"Section 1983 and Qualified Immunity: (Nearly) Everything There is to Know"
 Featuring Guest Speaker: Professor Alexander A. Reinert, Max Freund Professor of Litigation and Advocacy at the Benjamin N. Cardozo School of Law in New York.
 11:45 am - 5:00 pm

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