

Judicial Profile

JOSCELYN SMITH

Hon. Theodore A. McKee U.S. Circuit Judge, U.S. Court of Appeals for the Third Circuit

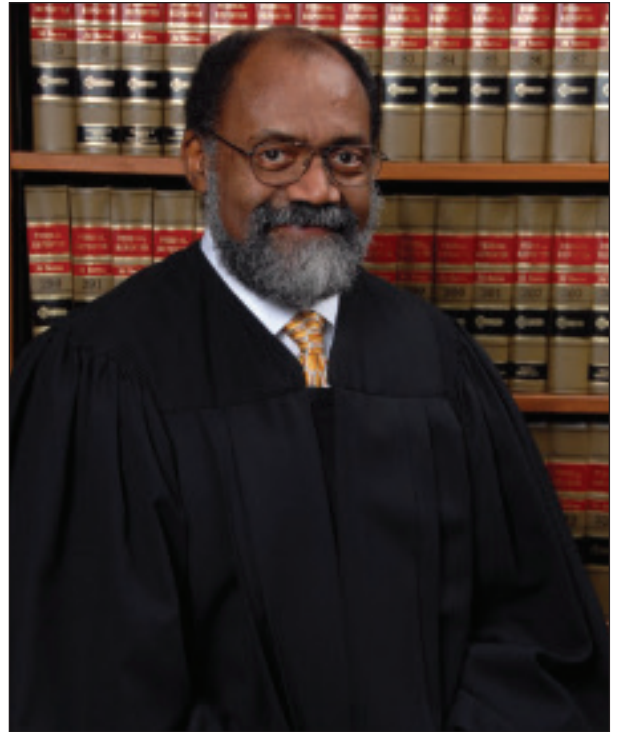
WHEN THEODORE MCKEE first arrived in Philadelphia, he interviewed with a few large law firms, finally accepting an offer from Wolf, Block, Schorr & Solis-Cohen. However, it was at an interview at another large firm that he had a moment of defining realization. During the interview, a partner asked Judge McKee, “Who has most influenced your life?” The answer was simple—his father, Clarence V. McKee.

The partner then asked, “What does your father do?” Judge McKee responded that his father was the waiter-in-charge on a train’s dining car, a position that today roughly correlates to that of a director of hospitality.

After giving that answer, Judge McKee recalls looking at the family pictures in the partner’s office, which made Judge McKee understand the bewildered look on the partner’s face: the portraits told stories of horseback riding, hunting excursions, and banquets with dignitaries. The partner, unable to hide his confusion, followed up the judge’s response with another question: “How has he influenced you?” Judge McKee explained that his father was the first black high school basketball player in the state of Indiana. However, instead of earning respect because of his athletic prowess, his father was forced to leave Indiana for his personal safety as a result of the wrath of white supremacists who did not want him to play for their team. At that time, there were only a handful of professions open to blacks; these included minister, barber, teacher, or server on a train car. The elder McKee’s choice and his ascent to waiter-in-charge landed him one of the highest levels of success for that time.

The interview crystallized the sacrifice, discipline, and hard work that the judge’s father had demonstrated to earn a living and to earn respect. These basic principles are the backbone of Judge McKee’s complex persona.

This year marks Judge McKee’s 24th year on the bench. He was first elected to the Philadelphia Court of Common Pleas, where he presided over major trials from 1984 until President Bill Clinton nominated him for a seat on the U.S. Court of Appeals for the Third Circuit in 1994. After so many years on the bench, Judge McKee has seen many changes, both political and legal. He relates that, when he took the bench in 1994,



the pendulum of politics was swinging toward more progressive legal thinking only to move to conservative legislation a few years later; now, in recent years, he feels that we are on the progressive path again.

As an example, Judge McKee discussed the disproportionate impact of criminal sentencing for cocaine and crack cocaine. Since 1988, there has been a sentencing disparity between trafficking powder cocaine and crack cocaine. Possession of five grams of crack cocaine carries a mandatory sentence of five years in prison, whereas a defendant must possess 500 grams of powder cocaine to receive a mandatory five-year sentence. Although a one-to-one ratio has not yet been reached, the judge sees recent changes and discussions on sentencing as an encouraging sign.

Judge McKee believes that it is only in recent years that it has been politically safe to discuss more realistic sentencing, and this is the case, because imprisonment is rapidly becoming cost-prohibitive; prisons are becoming geriatric wards and space is at a premium. He is on the board of the Vera Institute of Justice, which is committed to discussing and researching sentencing that enhances an offender’s possibility of successful reentry into society. Discussing sentencing and recidivism is a difficult

undertaking but it is certainly worth the effort, and the judge is not one to shy away from difficulties.

In fact, Judge McKee is drawn to complex projects. His favorite leisure reading is material on nonqualitative quantum mechanics. He is currently reading *The Emergence of Everything: How the World Became Complex* by Harold J. Morowitz. The spark was lit after the judge conducted research on nuclear physics while working on the opinion *In re TMI Litig.*, 193 F.3d 613 (3d Cir. 1999). This opinion came years into extensive litigation surrounding the infamous nuclear reactor accident that occurred on March 28, 1979, at Three Mile Island in Pennsylvania. The court's opinion spans more than 200 pages and four volumes of a slip opinion. The incident at Three Mile Island only whet the judge's appetite for more scientific knowledge.

Another opinion that stays with the judge is *Zubdea v. Ashcroft*, 333 F.3d 463 (3d Cir. 2003), in which a unanimous panel held that rape can constitute torture under the Convention Against Torture. The panel also discussed the specific intent required for torture, opining that "the Convention does not require that the persecutor actually intend to cause the threatened result."

Attorney Nancy Winkleman, co-founder and president of the Third Federal Circuit Bar Association, describes Judge McKee as a person who "views his contribution and responsibility as far greater than writing opinions and takes great care in his work." She goes on to say that "the bar tremendously respects Judge McKee as the epitome of an outstanding jurist—smart and hardworking. He cares, listens, and takes the time to serve the bar and community always with humor and wit."

Judge McKee's commitment to justice and public service is unwavering. In addition to numerous other positions, he currently sits on the Board of Trustees of Temple University and Syracuse University, where he attended law school. Even with his busy schedule, Judge McKee says that it is "hard to imagine getting so engrossed in the law that we lose touch with the fabric of society." Since the 1960s, when he decided to pursue a legal education, the judge has held the belief that the purpose of the legal system is to help people. When asked if he felt that he was achieving this goal in his current position, Judge McKee stated that, during his time on the Common Pleas Court, he felt the most immediate sense of justice—that he was making a difference for the victim or the defendant. However, he is a man that takes nothing for granted and appreciates the opportunity the federal bench gives him to have his legal viewpoint heard.

Among his mentors, Judge McKee credits his undergraduate anthropology professor, John Gwaltner, with introducing him to the world via shortwave radio. Much like his father, the judge's professor was a man who overcame adversity—in Gwaltner's case, blindness since birth—and developed a wealth of knowledge through reading; he was also an accomplished wood-carver. Judge McKee has studied karate

for the past 35 years and attributes his focus, discipline, and physical and mental strength to the teachings and guidance of Sensei Hidy Ochiai.

In speaking with Judge McKee, it is evident that he is a man of great and varied interests, but he always remains humble, honest, and human. His passion is really related to people. James Robinson has been Judge McKee's law clerk for 14 years and says that the judge "is the best guy in the world to work for; he realizes that people have a life outside of law that sometimes transcends duties." As evidence, Judge McKee holds regular online chess games with his law clerks and likes to reserve their skills for researching the harder cases and polishing opinions. His judicial secretary, Yvette Childs, who has also been with the judge for 14 years, relates that she knows that the judge is getting down to business when she hears jazz coming from his office. "He is a unique individual, with a unique sense of humor, who always looks out for his people." It is clear that, after 14 years together, Judge McKee has as much respect for his staff as they have for him.

Judge McKee is next in line for the position of chief judge of the U.S. Court of Appeals for the Third Circuit. When asked if retirement is in his future his initial response was "no"; however, after a little deliberation, he changed his mind, indicating that there are many other interests he would like to pursue, including reading more quantum mechanics, leather tooling, music, and woodworking. The judge built his dining room table and both of his daughters' beds by hand; each bed has an integrated music box that plays when a drawer is opened. Admitting that he works all the time, senior status would be a perfect balance of work and travel with his wife, Dr. Ana Pujols-McKee.

During research for this article, I was impressed by the consistent praise heard for Judge McKee, who is described as a wonderful person before his work on the bench is discussed. Co-founder and president-elect of the Third Circuit Bar Association James Martin says that Judge McKee is "like his opinions in person—straightforward, balanced, and fair. Judge McKee says what he needs to say—no more, no less—and always gives useful information."

What legacy does Judge McKee want to leave behind? He wants to be remembered as a conscientious jurist who did a good job and made the right decisions, even if justice was not always achieved. Most of all, he wants to instill the same values of discipline, rigor, and work ethic in his children that his father demonstrated for him. He pursues this goal the same way he pursues justice—always recognizing that he may not achieve the end, but never giving up the effort. **TFL**

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