

**APPLICATION OF MARK A. POWELL
FOR CIRCUIT JUDGE
31st CIRCUIT JUDICIAL COMMISSION
GREENE COUNTY, MISSOURI (as adopted June 8, 2009)**

RESPONSES TO THESE QUESTIONS WILL BE MADE PUBLIC IF THE APPLICANT IS NOMINATED.

NOTE – Please submit one (1) paper copy, with attachments, to each of the five (5) Commission members by mail.

1. Present principal occupation and title:
Associate Circuit Judge, Division 24, Thirty-First Judicial Circuit of Missouri.
2. What is your age? 55
3. (a) How many years have you been a citizen of the United States? 55
(b) How long have you been a Greene County resident? 55 years, except for 3 years spent attending law school in Des Moines, Iowa.
(c) How many consecutive years immediately preceding your application have you been a qualified voter of Missouri? 37
4. State the date you were admitted to The Missouri Bar and whether your license is in good standing. If not, explain in detail. 1985. My license is in good standing.
5. List any other states, courts, or agencies in which you are licensed as an attorney.
None. However, when I was practicing law, I was licensed to practice in the Federal District Court for the Western District of Missouri and licensed to practice in the Eighth Circuit Court of Appeals.
6. (a) State the name and address of all colleges and universities attended, other than law school, together with the dates and degrees received.
Southwest Missouri State University (now Missouri State University),
Springfield, Missouri. 1978-1982, B.A. degree in Psychology. Graduated cum laude.
(b) List/describe any college or university activities, scholastic achievements and other awards or honors you think are relevant to the commission's decision.
Member: Campus Judicial Board. Member: Phi Kappa Phi Academic Honor Society.
(c) Attach a certified copy of college, university and law school transcripts here, or have the institutions send transcripts direct to the contact person.
See attached.

7. (a) State the name and address of all law schools attended together with the dates and degrees received.
Drake University Law School, 2507 University Ave., Des Moines, Iowa 50311
1982-1985. Juris Doctor degree, with honors.
- (b) List/describe any law school activities, scholastic achievements and other awards or honors you think are relevant to the commission's decision.
Class rank 19 out of 148. Graduated with honors.
Research Assistant to Professor James A. Albert, 1984-1985.
Delta Theta Phi Law Fraternity. Moot Court finalist 1985.

8. State, in chronological order (starting with the earliest employment) (a) significant non-law-related employment prior to law school and (b) all employment from the beginning of law school to the present. To the extent reasonably available to you, include the name and address of each employer and the dates of employment, and, for legal employment, describe the positions you have held, e.g., associate, partner, law clerk, general counsel.

(a) While in college, 1978-1982, I was licensed by the Missouri State High School Activities Association as a basketball referee. During basketball season I refereed junior high, high school and limited college games three to four nights a week. I was considered self-employed.

During my last year of college, I was employed as a "runner" or intern for Bonacker and Reynolds P.C. Bonacker and Reynolds was a full service law firm. I ran errands, served subpoenas, interviewed witnesses, testified in court and outlined deposition testimony. The firm of Bonacker and Reynolds no longer exists. Don Bonacker is a retired circuit judge and Jerry Reynolds now practices law with the firm of Reynolds & Conway P.C. This firm is located at 1855 S. National Ave., Ste. A, Springfield, Missouri 65804.

(b) I worked in three different capacities during my second and third years of law school. First, I served as a law clerk to the Honorable Luther T. Glanton, District Court Judge, Des Moines, Iowa. This clerkship was a part of the law school curriculum providing me a small amount of pay and one credit hour toward my law degree. Judge Glanton was a trial court judge for the State of Iowa. I observed trials and worked with Judge Glanton writing simple opinions.

Second, I worked through Drake University's Legal Clinic providing legal representation to indigent clients. The matters I handled included small traffic matters, landlord/tenant cases and small claims cases.

Third, I was a law clerk for Professor James A. Albert during the school year of 1984-85. My responsibilities included research and drafting portions of the Iowa Bar Review materials. My official employer was Drake University Law School.

During the summer of 1983, I worked as a summer intern for the law firm of Bonacker and Reynolds P.C. in the same capacity as I have described above.

During the summer of 1984, I worked as a summer intern, or law clerk, for the law firm of Miller, Sanford, Joyner, Westbrook and Tyndall in Springfield, Missouri. My responsibilities included research and preparation of pre-trial briefs, motions, and legal memoranda, involving a major products liability lawsuit (*Adams v. Cooper*) being tried in

the Federal District Court during the summer.

After graduating from law school in 1985, I was employed as an Associate with Miller, Sanford, Joyner, Westbrook and Tyndall in Springfield, MO. The firm name was later changed to Miller and Sanford P.C. I was an Associate with the firm from August 1985 to December 31, 1991, at which time I became a Shareholder in the firm. I was a Shareholder until December 31, 1999, at which time the firm merged with Lathrop & Gage L.C. At the time of the merger, I became a Member of Lathrop & Gage.

As an attorney, my major practice emphasis was in general civil trial litigation, construction litigation, employment law, contract and business litigation, including products liability, personal injury, insurance defense and civil rights litigation. My employment with Miller & Sanford P.C. and with Lathrop & Gage L.C. can be verified by contacting Frank M. Evans III at Lathrop & Gage L.L.P. located at 910 East St. Louis Street, Ste.100, Springfield, MO. 65806.

On March 22, 2000, I was appointed by Governor Mel Carnahan to my current position of Associate Circuit Judge, Division 24, Thirty-First Judicial Circuit of Missouri (Greene County). My employer is the State of Missouri.

9. If you were a student at any school from which you were suspended, placed on probation, or expelled by school authorities, for any reason, describe the circumstances.
N/A.
10. Describe the nature of your experience in trial and appellate courts and explain how they demonstrate the quality of your legal work. **It is your responsibility to redact any information in your description that might be confidential; i.e. juvenile matters, etc.** (You either may take as much space as you need here or attach your response on separate sheets). Include in your response:
- (a) **Appellate Experience:** Please include a representative list of cases you have briefed and/or argued (if you are a judge, include representative cases from your practice prior to your judicial appointment) including, to the extent reasonably available to you, the style, date, and court and, if published, the citation; identify the client(s) you represented and opposing counsel; give a one-paragraph description of the case and your role.
 - (b) **Trial-Level Experience:** Please include a representative list of cases and/or administrative hearings you have handled (if you are a judge, include representative cases from your practice prior to your judicial appointment) including, to the extent reasonably available to you, the style, date, and court; identify who you represented and opposing counsel; state whether the case was disposed of following a jury trial, bench trial or at what other stage; give a one-paragraph description of the case and your role.
 - (c) **Judicial Experience:** If you are a judge, commissioner, or are serving or have served in other judicial capacity, please describe the nature and extent of your

judicial responsibilities, including the dates you have served as a judge at each level, the types of dockets you have handled, and any special expertise you have developed that you believe is relevant to your qualifications for the position for which you are applying.

I spent 15 years preparing and trying lawsuits in both state and federal court. Fortunately, only a few of these matters were appealed to either the Southern District Court of Appeals or the Eighth Circuit Court of Appeals. My experience as a lawyer was primarily representing clients who had been sued for money damages. On occasion, I represented an individual plaintiff in either a personal injury lawsuit or a business in pursuing its rights under a contract. I was also privileged to represent a number of local businesses and provide to them legal advice regarding contract negotiation, employment matters and litigation avoidance. I have spent the last 15 years as a trial judge. I have presided over countless misdemeanor trials, felony preliminary hearings, small claims trials, landlord/tenant trials, cases involving less than \$25,000.00 and for the past 5 years, Circuit Court matters involving over \$25,000.00. These cases included several large medical negligence jury trials involving millions of dollars in alleged damages.

(a) Appellate Experience:

Ingram v. Horne and Heitz, 785 S.W.2d 735 (Mo. App. 1990). In this case, Frank Evans and I represented Mike Ingram, a property owner, over a boundary dispute with his neighbor John Heitz. It was tried by Circuit Judge Clifford Crouch in Greene County. Unfortunately, we were unsuccessful at trial. The matter was appealed by defendant John Heitz on the issue of attorney's fees. Mr. Heitz was represented by Craig Lowther. We were successful at the appellate court in keeping the same judgment as was rendered by the trial court. Our client was not responsible for paying Mr. Heitz' attorney's fees.

Abbott v. City of Crocker, Missouri, 30 F.3d 994 (8th Cir. 1994). In this case, Frank Evans and I represented the City of Crocker, Missouri and one of its police officers. Mr. Abbott claimed the police officer had violated his civil rights through a false arrest and by the use of excessive force. The case was tried in the Federal District Court for the Western District of Missouri, Southern Division, by a jury. The trial judge directed a verdict for the plaintiff at the conclusion of all the evidence. A verdict of approximately \$80,000.00 was rendered by the jury against the City and the officer. An appeal was filed and we were successful in having the verdict overturned and the case remanded for new trial. The case was ultimately settled for a much smaller amount with the settlement money going toward the plaintiff's past due child support. On appeal, my responsibilities included preparing the record on appeal and writing the appellant's brief. I do not recall the name of opposing counsel.

(b) Trial-Level Experience:

Conoco v. Pulaski County: This case was tried in the Federal District Court for the Western District of Missouri, Southern Division in May 1996. I represented Pulaski County and its employee who struck an underground LP gas pipeline owned by Conoco while he was operating his road grader. Conoco sued the County and its employee for damages, including the cost to repair the underground pipeline. The plaintiff's counsel was from Kansas City, and I do not recall his name. He asked the jury to award his client \$400,000.00 as damages including the value of flying Conoco's Lear jet from Ponca City, OK. to Waynesville, MO. As I recall, the jury returned a verdict of approximately \$45,000.00. The verdict was listed as one of the top ten defense verdicts of 1996 by *Missouri Lawyer's Weekly*.

Helmerich and Payne; Conoco: Over the course of my practice I represented these two companies in lawsuits involving LP gas explosions (Conoco after the Pulaski County verdict). I do not recall the names of the plaintiffs, but Jim Wirkin and Lou Accurso from Kansas City, Wayne Schoeneberg from St. Charles, and Don Woody from Springfield, filed separate actions in Joplin, the City of St. Louis, and in Springfield, over separate gas explosions that injured their respective clients. Plaintiffs' theory of recovery was the odorant (ethyl mercaptan) which was injected into the odorless LP gas was defective in that the odor would fade over time or under certain conditions. Plaintiffs' claimed when each explosion took place, no one smelled the "rotten egg" odor of gas. The defendants in each lawsuit included every company in the chain of manufacture and delivery of the odorant and of the LP gas. All of these cases were ultimately settled with my clients prior to trial.

Baseke v. Johnson: In this case, Craig Oliver and I represented Rudi Baseke in a lawsuit against his brother-in-law, Calvin Johnson, over the insurance proceeds paid as a result of a fire that destroyed the Stockton Cheese Factory. The case was tried to Judge David Darnold in the Circuit Court of Cedar County, Missouri sometime during the early 1990s. Mr. Johnson was represented by Jeff Dull. A few months prior to the fire, Mr. Johnson changed the cheese factory's insurance policy to name himself as the sole beneficiary to any funds that might be paid by the insurance company if there was damage to the factory. Mr. Baseke, who was a co-owner in the cheese factory, was never made aware of this policy change until after the fire. We brought suit on behalf of Mr. Baseke claiming a constructive trust over one-half of the insurance proceeds. We were successful at trial in obtaining a judgment for one-half of the money.

Penmac Personnel Services; Journagan Construction Company:

I had the pleasure of representing both Penmac and Journagan in a variety of different matters over the course of my practice. I was in weekly contact with representatives of both companies. Penmac provides temporary employees to companies in a number of states. It has had the distinction of being recognized as one of the fastest growing companies in America several years in a row. Journagan is, and was, involved in limestone mining and crushing operations. It is involved in highway construction and pipeline construction throughout Missouri and Arkansas. I regularly negotiated leases and contracts for both

clients. I also defended lawsuits and filed lawsuits for both clients. I had an extremely rewarding relationship with the officers and employees of both companies.

(c) Judicial Experience:

I have served as an Associate Circuit Judge in Greene County since March of 2000. At any one time, my active docket includes approximately 2500 cases. My criminal docket ranges from minor traffic offenses to capital murder. My civil docket includes cases in which damages are alleged to be in excess of \$25,000.00. I am also responsible for signing the judgments and orders of Family Court Commissioner, Scott Tinsley. Every seven to eight weeks I am the "on call" judge which requires me to handle matters after regular business hours. The matters involve search warrants, arrest warrants, requests for orders of protection, and emergencies at the Greene County jail. During this "on call" week I am also responsible for conducting order of protection hearings and reviewing all petitions for dissolution of marriage electronically filed by affidavit. My jury trial calendar is scheduled through 2016. I schedule one to two jury weeks per month. During a typical non-jury week, it is not unusual for me to see 40 to 70 cases in a day. I schedule up to 15 preliminary hearings on both Monday and Tuesday, and up to 10 misdemeanor bench trials on Monday and on Tuesday. Wednesdays and Thursdays are usually reserved for civil bench trials and civil motion hearings. Fridays are when I hear probation violations, department of revenue cases, and more criminal appearances.

11. (a) Describe any additional legal experience that you believe may be relevant to the commission's decision, including clients by category that you have represented.

As a judge, I have had the opportunity to be a speaker at a number of seminars. I have been a panel member with other judges at several trial practice seminars including those sponsored by The Missouri Organization of Defense Lawyers and the Missouri Association of Trial Attorneys. I have also had the privilege to be a presenter at the Probate and Associate Circuit Judges' Conference, Missouri's Trial College, and the Municipal Judges' Conference.

- (b) Describe any non-legal experience that you believe may be relevant to the commission's decision. See answers to #13 and #14 below.

12. List all bar associations and other professional societies of which you are a member, with any offices held and dates.

Missouri Bar Association, 1985 to present.
Springfield Metropolitan Bar Association, 1985 to present.
Missouri Association of Probate and Associate Circuit Judges, 2000 to present.

13. (a) List any professional articles or books authored by you that have been published or any special recognition or award of a professional nature you have received.

As a research assistant to Professor James Albert at Drake University Law School, I researched and drafted portions of the Iowa Bar review materials. I do not know to what extent these materials were ever published. As a Shareholder at Miller & Sanford P.C., I had a number of articles published by the *Springfield Business Journal*. I recall published articles on creditor and debtor rights, the Fair Debt Collection Practices Act, and on covenants not to compete.

I received the Red Cross Everyday Hero Award, and the Council of Churches Gift of Time Award for my work in establishing a Truancy Court at Reed Middle School in Springfield, MO. I have also received the O. Franklin Kenworthy Award for outstanding leadership from my peers who have graduated from Leadership Springfield.

- (b) List any other articles, reports, letters to the editor, editorial pieces, or other material authored by you that have been published within the last five (5) years.

I do not recall any other than those listed above.

14. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations in which you have significantly participated. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

After law school, I served eight years on the Board of Directors of the Springfield Boys' and Girls' Clubs. As a member of that board, I also served as Secretary and as Vice-President. I served as counsel to the History Museum for Springfield-Greene County and served as counsel to the Mary E. Wilson Home, a retirement home for elderly ladies. I am a past board member and past President of Court Appointed Special Advocates. Prior to law school, I was an ordained elder and a deacon of First and Calvary Presbyterian Church. After law school, while practicing law, I graduated from Leadership Springfield and have twice been a member of the board of directors. After becoming a judge, I was a board member of Community Partnership of the Ozarks. In 2002, I established a Truancy Court program at Reed Middle School and also helped establish Truancy Courts at Pipkin, Study and Jarrett Middle Schools.

In 1997, I was appointed by the Missouri Supreme Court to the Thirty-First Circuit Regional Bar Committee. This committee took complaints and investigated complaints against lawyers in Southwest Missouri. In 1998, this committee discontinued meeting as a result of the Office of Chief Disciplinary Counsel taking over the committee's responsibilities. The committee was reestablished in 2006, but I am no longer a member.

Between 2007 and 2010 I served as a member of The Springfield Metropolitan Bar's Bench and Bar Committee. This committee is made up of lawyers and judges who meet once a month to discuss, in private, matters that are a concern to the bench and to the bar.

In 2013, I was elected to the Board of Directors of Twin Oaks Country Club in Springfield, MO. I served the last two years as chair of the Long Range Planning Committee. Last year I also served as Vice-President. This year I am serving as President of the Board.

In December, 2007, I was appointed by the Missouri Supreme Court to fill the unexpired term of Circuit Judge J. Miles Sweeney on the Circuit Court Budget Committee. In December of 2008, I was reappointed to the Budget Committee for a term of office expiring December 31, 2011. I have been reappointed by the Supreme Court to this committee as recently as February, 2015. The Circuit Court Budget Committee (CCBC) meets approximately six times a year. It works closely with the Supreme Court and the Office of the State Court Administrator in overseeing the expenditures of budgeted money allocated by Missouri's legislature to Missouri's trial courts. The CCBC is also tasked with the job of hearing the appeals of grievances brought by state court employees.

As a member of the CCBC, I have also served on several other statewide committees. I have served on the judicial time standards committee. This committee helps to establish time standards and goals for disposing of cases filed in Missouri's trial courts. I am currently serving on the Judge Transfer Work Group. The primary goal of this Work Group is to oversee the "judicial officer sharing" programs, which seek to maximize the efficient use of judicial staff to promote the disposition of cases in circuits where judicial workload markedly exceeds staffing. In addition, I serve on the 21st Century Workforce Work Group. This group of judicial officers and circuit clerks, along with the Office of the State Court Administrator, has undertaken a comprehensive review of the classification and compensation plan for selected circuit court positions. Our goal is to reclassify certain state court employees with new job titles, pay ranges and job responsibilities in an effort to better recruit and retain our workforce.

15. Do you now hold or have you ever held an elective or an appointive public office or position? If yes, provide details.

Yes. I was appointed Associate Circuit Judge by Governor Mel Carnahan in March, 2000. I was elected to the same position in a partisan contested election in November,

2000. I was again elected in an uncontested election in November, 2002. I was again elected in an uncontested election in November, 2006. In 2008, Greene County voters adopted Missouri's non-partisan court plan. I was retained in office by the voters in November, 2010. I was again retained in office by the voters in November, 2014.

16. Please list any client(s) or organization(s) for which you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organization(s). None.
17. Provide the branches and dates of (a) military service or (b) other public service not otherwise disclosed in this application. If discharged from the military, state whether the discharge was other than honorable. N/A.
18. State whether you are able, with or without a reasonable accommodation, to perform the essential functions of being a trial judge. Yes.
19. Were you ever refused admission to the bar of Missouri or the bar of another state or the federal courts? If yes, provide details. No.
20. Have you ever been disciplined, admonished or cited for breach of ethics or professional conduct by the Supreme Court of Missouri or by any court or bar association or committee thereof? If yes, provide details. No.
21. If you are or were a member of the judiciary of the State of Missouri, please state:
 - (a) Whether an order of discipline ever has been entered against you by the Supreme Court of Missouri for breach of the Code of Judicial Conduct or the Canons of Judicial Conduct. If yes, provide details. No.
 - (b) Whether a reprimand or admonition ever has been entered against you by the Commission on Retirement, Removal and Discipline for any of the causes specified in Supreme Court Rule 12.07. If yes, provide details. No.
22. Have you have ever been held in contempt of court? If yes, provide details. No.

23. Have you ever been sued by a client or been a party to any other litigation, other than as guardian ad litem, plaintiff ad litem, or defendant ad litem? Yes.

If your answer is yes, state the style of the case, where it was filed, and explain in detail. If you are a judge and you have been sued in your judicial capacity, list only those cases where you are or were other than a nominal party.

Mark A. Powell v. Cristen W. Powell: Action for dissolution of marriage. Filed in Phelps County, Missouri, September, 2005. Judgment entered and matter concluded November, 2005.

Favazza et.al. v. The Honorable Steven R. Ohmer et.al.: Filed in Cole County, Missouri, December 28, 2009. Mr. Favazza was the elected Circuit Clerk of the Twenty-Second Judicial Circuit of Missouri (City of St. Louis). Mr. Favazza and two citizens, Ms. Francis Rankin and Ms. Ellen De Vasto, filed suit against all of the members of the Circuit Court Budget Committee (13 judges). I am a member of that committee. Mr. Favazza sought an order declaring a decision of the CCBC void and in excess of its authority. He also sought an injunction prohibiting the CCBC's decision from being implemented. Mr. Favazza took issue with the CCBC's decision to approve a plan submitted by the circuit judges of the 22d Circuit naming the Presiding Judge, David Dowd, as the single appointing authority. Mr. Favazza failed to convince the trial court of his position. He appealed. While the appeal was pending, Mr. Favazza was defeated in his re-election campaign and the new circuit clerk for the 22d Circuit dismissed the appeal.

Sherri Rider v. State of Missouri et.al.: Ms. Rider was the Drug Court Administrator in the First Judicial Circuit of Missouri. She was terminated from her employment on June 30, 2014, by Judge Gary Dial. Ms. Rider appealed Judge Dial's decision to Judge Dial, and then to a three judge committee and then to the Circuit Court Budget Committee. Judge Dial's decision to terminate Ms. Rider was upheld. The CCBC made a determination not to review the decisions already made by Judge Dial and the three judge appeal committee. Ms. Rider has filed suit in the Circuit Court of Cole County naming the State of Missouri, the First Judicial Circuit, Judge Dial, the judges who made up the appeal panel and the members of the CCBC as defendants. Ms. Rider seeks review of the administrative decisions made to terminate her. The case is currently pending on a motion to dismiss filed by Missouri's Attorney General's Office for and on behalf of the Defendants.

24. Have you ever been convicted or received a suspended imposition of sentence for a felony or misdemeanor in state, federal or military court? (Note that this question does not require that traffic offenses or other infractions be listed.) No.

If your answer is yes, state the style of the case, where it was filed, and explain in detail.

25. Are you delinquent in the payment of any federal, state, county or city taxes? If yes, provide details. No.
26. You must attach to this application one writing sample of your choice. The only rule, limitation or instruction is that you must indicate whether it was edited by anyone else, and if so, to what degree. See attached.
27. List/describe any additional honors or awards you have received, activities you have performed, or any other information not set out above that demonstrates the quality of your work as an attorney or that you otherwise believe is relevant to the commission's decision.

As indicated above, during the past five years, I have handled the civil cases normally assigned to a Circuit Judge. I have gladly accepted this assignment because I enjoy the work. Knowing what this job involves, I am confident I can take on its responsibilities. I would direct the commission's attention to the Memorandum issued by the Southern District Court of Appeals in the case of *Creach v. Lester E. Cox Medical Centers*, No. SD31214. I was privileged to preside over this very contentious medical malpractice case in 2011. After a jury trial, the case was appealed. In its Memorandum opinion, the Southern District stated, "Plaintiffs agree that we review all points for abuse of discretion....In light of this standard, a broad observation is in order. What we found in reviewing the relevant motion hearings and trial proceedings was the antithesis of arbitrary rulings or any lack of careful judicial consideration. To the contrary, the trial court consistently modeled patience, courtesy, attention, and a willingness to fairly hear and consider (and sometimes reconsider) all views and arguments in reaching decisions on the matters now before us. This is no case for mere lip service to our standard of review."

28. Please list the names of *five* persons whom you will ask to provide letters of reference for you with respect to your judicial qualifications. Do **not** list as a reference a judge of the court involved. As to each of the (5) references, **please provide name, title, mailing address, telephone and e-mail address.** *Please note that it is your responsibility to contact your references* and to see that they send the requested letters in a timely manner and in accordance with the Guidelines for References. See page 13.

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