

**APPLICATION OF ERWIN O. (ERV) SWITZER
TO THE APPELLATE JUDICIAL COMMISSION FOR THE
JUDGE DRAPER VACANCY
MISSOURI COURT OF APPEALS, EASTERN DISTRICT**

***RESPONSES TO THESE QUESTIONS WILL BE MADE PUBLIC IF THE
APPLICANT IS NOMINATED FOR THIS VACANCY***

A. PERSONAL INFORMATION

1. Present principal occupation or title:
Officer
Greensfelder, Hemker & Gale, P.C.
Co-Chair, Appellate Practice group
Co-Chair, Constitutional Law group

2. Are you at least 30 years of age? Yes (X) No ()

3. (a) How many years have you been a citizen of the United States?
55 years

(b) How many consecutive years immediately preceding your application have you been a qualified voter of Missouri?
37 years

4. State the date you were admitted to The Missouri Bar and whether your license is in good standing. If not, explain in detail.

September 19, 1981. My license is and has always been in good standing.

B. EDUCATIONAL BACKGROUND

5. (a) State the name and address of all colleges and universities attended, other than law school, together with the dates and degrees received.

Name	Address	Dates Attended	Degree
St. Louis University	221 North Grand Blvd.	1974-1978	Bachelor of Arts, <i>magna cum laude</i>

(b) List/describe any college or university activities, scholastic achievements and other awards or honors you think are relevant to the commission's decision.

- (1) *University News* student newspaper, 1975-78 (Editor-in-Chief, 1977-78)
- (2) Debate Team, 1974
- (3) Phi Beta Kappa
- (4) Academic Scholarship, four years

6. (a) State the name and address of all law schools attended together with the dates and degrees received.

Name	Address	Dates Attended	Degree
St. Louis University	3700 Lindell Blvd.	1978-1981	J.D., <i>cum laude</i>

(b) List/describe any law school activities, scholastic achievements and other awards or honors you think are relevant to the commission's decision.

- (1) Rank: Top 10%, including No. 1 in class for one semester.
- (2) Co-Founding Editor-in-Chief of the St. Louis University Public Law Review
- (3) Research Editor, St. Louis University Law Journal
- (4) Order of the Woolsack scholastic honor society
- (5) Alpha Sigma Nu honor society
- (6) Thomas J. White Family Fellowship of Public Law and Government
- (7) Richard J. Childress Law School Scholarship
- (8) Certificate of Achievement by the U.S. Office of Government Ethics
- (9) Paper for Professor Roger Goldman's Bill of Rights Seminar was revised and published as the lead article in a law review: "Applying Criticisms of the Warren Court to the Burger Court: A Case Study of *Richmond Newspapers v. Virginia*," 5 U. of Arkansas - Little Rock Law Journal 2003 (1982)

7. 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.

Not applicable.

C. PROFESSIONAL BACKGROUND AND EXPERIENCE

8. State, in chronological order (starting with the earliest employment), significant non-law-related employment prior to or since law school. To the extent reasonably available to you, include the name and address of each employer and the dates of employment.

Employer	Address	Dates of Employment
Various part-time and summer jobs including Teamster warehouseman, janitor, painter, roofer, landscaper, and Gateway Arch ranger/tour guide	St. Louis, MO	1972-78
U.S. Congress—Rep. Melvin Price (intern)	Rayburn House Office Building, Washington, DC	Summer 1977
Suburban Newspapers (local government reporter, part-time)	St. Louis, MO	1978

9. State, in chronological order (starting with the earliest employment), all employment from the beginning of law school to the present. For legal employment, describe the positions you have held, e.g., associate, partner, law clerk, general counsel.

Employer	Address	Dates of Employment	Position
Marvin Klamen	Clayton, MO	Summer 1979	Law Clerk
U.S. Dept. of Justice	Washington, DC	Summer 1980	Honors Law Clerk
U.S. Court of Appeals—8 th Circuit	Kansas City, MO	1981-1983	Law Clerk to Hon. Floyd R. Gibson
Bryan Cave LLP	211 North Broadway St. Louis, MO 63102	1983-1994	Partner, 1990-94 Associate, 1983-90
Missouri Attorney General's Office	Wainwright Building 111 North Seventh St. St. Louis, MO 63101	1994-2005	Chief Counsel- Eastern Region, 1994-2000; Special Chief Counsel, 2001-2005
Carmody MacDonald P.C.	120 South Central Clayton, MO 63105	2005-2007	Principal
Greensfelder, Hemker & Gale, P.C.	10 South Broadway St. Louis, MO 63102	2007-present	Officer, 2007- present; Co-Chair, Appellate and Constitutional Law Practices, 2008- present

10. List other states, courts or agencies in which you are licensed as an attorney.

Bar Admission	Date
United States Supreme Court	1992
United States Court of Appeals--8 th Cir.	1985
United States Court of Appeals--5 th Cir.	1992
United States Court of Appeals--6 th Cir.	2000
United States Court of Appeals--7 th Cir.	2011
U.S. Dist. Court, Eastern Dist. Missouri	1984
U.S. Dist. Court, Western Dist. Missouri	1995
U.S. Dist. Court, Eastern Dist. Michigan	2009

11. Describe the nature of your experience in trial and appellate courts and explain how they demonstrate the quality of your legal work. *(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). To the extent reasonably available to you:
- i. State the style, date, court and, if published, the citation;
 - ii. Identify the client(s) you represented and opposing counsel; and
 - iii. Give a one-paragraph description of the case and your role in it.
- 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). To the extent reasonably available to you:
- i. State the style, date and court;
 - ii. Identify who you represented and opposing counsel;
 - iii. State whether the case was disposed of following a jury trial, bench trial or at what other stage; and
 - iv. Give a one-paragraph description of the case and your role in it.
- c. **Judicial Experience:** If you are a judge, commissioner, or are serving or have served in another judicial capacity, please describe the nature and extent of your judicial responsibilities:
- i. Include the dates you have served at each level;
 - ii. Identify the types of dockets you have handled; and
 - iii. State any special expertise you have developed that you believe is relevant to your qualifications for the position for which you are applying.

APPELLATE EXPERIENCE

As an appellate law clerk, I was involved writing approximately half of the opinions for Judge Floyd Gibson. Thereafter, I have had an active appellate practice, having a major role in dozens of appeals. As a Chief Counsel in the Attorney General's Office and as Co-Chair of the Appellate Practice at Greensfelder, I have reviewed, edited, and/or consulted on dozens of other appellate filings without being identified as counsel of record. I have listed a sample of my more notable appellate matters below which resulted in an opinion being issued. A list of additional appellate matters for which I was counsel of record is attached as Exhibit A.

- (1) *Kiesel Co. v. J&B Properties, Inc.*, 241 S.W.3d 868 (Mo. App. E.D. 2008). I represented the Plaintiff/Respondent Kiesel Company. Opposing counsel was Michael Gross. The plaintiff, an environmental remediation company, sued multiple defendants for breach of contract after not being paid the agreed amount. Judgment was for our client, and a remittitur was granted. Defendants appealed. I was involved in briefing matters related to procedural issues, including those on the proper order/judgment from which an appeal would lie, preservation of alleged error, and the standards for awarding new trials. The appellate court unanimously affirmed the lower court decision.

- (2) *Virginia v. Hicks*, 539 U.S. 113 (2003). I wrote an Amicus Curiae brief on behalf of 16 states in support of Petitioner, the State of Virginia. Opposing counsel was Steven Benjamin of Richmond, Virginia. The defendant was convicted of trespassing onto public housing property for low-income residents after having been barred from the property for prior trespassing violations. The Virginia Supreme Court declared the anti-trespassing rules unconstitutional, and the State of Virginia appealed. The United States Supreme Court ruled in favor of the party we supported, 9-0. Justice Ginsburg made statements at oral argument that expressed a central theme of our brief: low-income persons should be able to live in gated communities that restrict access to non-residents, just as wealthier persons are able to do.

- (3) *Ford Motor Co. v. Director of Revenue*, 97 S.W.3d 458 (Mo. banc 2003). I briefed and argued the appeal of the Missouri Department of Revenue to the Missouri Supreme Court. Opposing counsel was James Owen of McCarthy, Leonard, Kaemmerer, Owen. The issue was whether Ford had timely applied for a refund of allegedly overpaid taxes. The Supreme Court unanimously reversed the ruling of the Administrative Hearing Commission and found the refund application was not timely.

- (4) *Nixon v. Wentzville Park Associates, L.P.*, 77 S.W.3d 659 (Mo. App. E.D. 2002). I briefed and argued the appeal on behalf of the Plaintiff-Appellant Attorney General Nixon. We appealed the Circuit Court's dismissal of an injunction action brought against a nursing home following the death of a resident who strangled on a physical restraint. Opposing counsel was Terrence O'Toole of Bryan Cave. The Court unanimously ruled in our favor and held that the Attorney General's suit stated a cause of action. The Court also addressed issues regarding the finality of the circuit court's decision.
- (5) *Walls v. Allen Cab Co.*, 903 S.W.2d 937 (Mo. App. E.D. 1995). I briefed and argued this case on behalf of the State Treasurer as Custodian of the Second Injury Fund, the Respondent-Cross-appellant. Opposing counsel was J. Bradley Young of Roberts, Perryman, Bomkamp & Meives. The Court unanimously agreed with the Fund's and claimant's position that a bank was liable as the alter ego of a cab driver's nominal employer in light of the involvement of the bank in the taxicab operations. The Court also agreed that the Fund was not liable.

TRIAL-LEVEL EXPERIENCE

My employment has always been devoted primarily to litigation in state and federal courts in Missouri. The bulk of my practice has been in civil litigation, and I have been involved in criminal cases as a prosecutor and defense attorney as well. I brought numerous civil consumer protection cases on behalf of the State Attorney General as plaintiff. I have represented both plaintiffs and defendants in my commercial litigation cases. Following is a list of some of my trial-level cases.

- (1) *Union Electric Co. d/b/a Ameren Missouri v. Director of Revenue* (Mo. Administrative Hearing Commission, No. 11-0427 RS). This is a review of an administrative determination regarding a tax refund being sought by Ameren Missouri on behalf of the ultimate taxpayer Schnuck Markets, Inc. The issue relates to a recently-enacted Missouri statute exempting certain energy use from taxation. A hearing was conducted on July 27 and August 4, 2011, before the Administrative Hearing Commission. I presented the opening statement and shared witnesses with a colleague on the first day of the hearing, and was the sole attorney for my client on the second day of the hearing. Post-hearing brief has not been completed. Opposing counsel is Kati Kiefer, Missouri Department of Revenue.
- (2) *Garozzo v. Missouri Division of Finance* (St. Louis County Circuit Court, No. 10SL-CC04997). I served as lead counsel in this review of a decision of the Missouri Division of Finance denying a mortgage loan originator's

license to my client based on an suspended imposition of sentence that occurred prior to the enactment of the statute at issue. On September 15, 2011, the Circuit Court entered judgment in my client's favor, ruling that the statutory provisions calling for denial of a license to my client are unconstitutional as applied to my client. The Division of Finance has appealed that decision, and the appeal is pending. Opposing counsel is James W. Gallaher, IV, Missouri Division of Finance.

- (3) *State v. Gallagher* (St. Louis County Circuit Court, No. 2103R-02321). I prosecuted a consumer fraud criminal case as lead counsel for the Attorney General against a person who solicited donations of automobiles claiming to operate a charity, but there was no charity. After a bench trial in May 2004, the defendant was found guilty on all five counts and sentenced to one year in prison. Opposing counsel was Brad Kessler.
- (4) *State of Missouri v. Roussin, et al.* (United States District Court, Eastern District of Missouri, No. 4:93-cv-02633-DJS). I was the co-lead attorney in a civil RICO case on a team of at least seven lawyers against 11 defendants associated with the Second Injury Fund. The State alleged fraud and corruption in the administration of the Fund. Opposing counsel included David Capes of Capes Sokol, Joshua Schindler, Barry Short of Lewis Rice, Mark (now Judge) Neill, Ronald Jenkins of Jenkins & Kling, and James Leonard of Devereaux and Stokes. Settlements were reached with all defendants except one, against whom a default judgment was entered. The final settlement was reached the day before trial, in June 1997, after three years of litigation. The State recovered \$1.3 million dollars from the settlements, in addition to \$240,000 obtained in restitution in prior criminal cases against some of the defendants for the same acts. The St. Louis Post-Dispatch identified the Second Injury Fund matter as one of the 125 biggest stories in its 125 year history (St. Louis Post-Dispatch, 12/14/03).
- (5) *Nixon v. MuscleTech Research and Development* (St. Louis City Circuit Court, No. 22034-00889). I was the lead attorney in a suit filed on behalf of the Attorney General in March 2003 against the manufacturer of a diet supplement and purported "fat-burner" containing ephedra. The suit alleged that (a) safety risks associated with ephedra were not properly disclosed, (b) claims of efficacy of the product were not substantiated, and (c) the marketing was misleading, such as failing to disclose that a "before" picture in a before/after photo-set depicted the woman shortly after giving birth. Opposing counsel was Clark Cole of Armstrong Teasdale. The case was settled in May 2004 with an agreement by the manufacturer to pay \$100,000 and to never sell products containing ephedra in the State of Missouri in the future. See <http://en.wikipedia.org/wiki/Hydroxycut>.

- (6) *American Society of Appraisers v. Rate Search, Inc., et al.* (St. Louis County Circuit Court, No. 07CC-002580). I represented the plaintiff in a case filed in June 2007 against four defendants purporting to broker purchases of certificates of deposit, but money was not so invested. Opposing counsel included Albert Watkins of Kodner Watkins and William Lawson of the Lowenbaum Partnership. An injunction and judgment was obtained against one defendant. The individual defendants were sentenced to prison time and ordered to pay more restitution.
- (7) *Nixon v. Draine*, (St. Charles County Circuit Court, No. 02CV-128435). In August 2002, I represented the Attorney General in a suit to obtain an injunction against the defendant and obtain restitution for low-income Section 8 applicants who had paid defendant a referral fee to find Section 8 housing but the defendant failed to find housing. Opposing counsel was Steven Dioneda. A preliminary injunction was obtained after a hearing, and the matter was finalized in January 2003 with a consent judgment for restitution and a permanent injunction.
- (8) *Nixon v. Triad Discount Buying Service* (St. Louis City Circuit Court, 22004-02673). I represented the Attorney General as lead attorney in a case against eight telemarketing defendants, alleging that, without proper disclosures, the defendants caused add-on charges or “upsells” to be charged to consumer’s credit cards when the consumer purchased another product. The case was filed in 2000 based on an investigation that began with a staff inquiry about an unexplained charge on her credit card statement. Thomas Rosenfeld was opposing counsel. I became one of the lead attorneys in a multi-state litigation effort in cooperation with the Federal Trade Commission. I was also involved in related bankruptcy proceedings in Florida for this matter. The end result was a nationwide settlement with the payment of \$9 million plus injunctive relief.
- (9) *Nixon v. Jeffrey Wolfson* (St. Louis County Circuit Court, Nos. 2199CC01509 and 2100R-01365-01). From 1999 to 2000, I prosecuted civil and criminal cases, including contempt proceedings, against a home remodeler who failed to complete projects as promised. Defendant was sentenced to five years in prison.
- (10) *State of Missouri and City of St. Louis v. St. Louis Regional Health Care Corp.* (St. Louis City Circuit Court, No. 22974-01151). In 1997, I represented the State in a effort joined by the City of St. Louis against operators of a public hospital in St. Louis. Terrence O’Toole of Bryan Cave represented the defendant. The suit sought to prevent closing of indigent health care facilities or direct assets in the event of a closure. After

a preliminary injunction hearing and subsequent negotiations, the matter was resolved in 1999 partially through an agreement on the transfer of assets and the court ruling that defendant's counterclaim against the State be dismissed.

- (11) *Uram v. Larimore Associates* (St. Louis County Circuit Court, No. 618736) (8/13/1992). I represented the plaintiff, a minority shareholder, in a claim for payment after being merged out of ownership. Opposing counsel was John Kinsella, now of Bryan Cave. The jury returned a verdict for payment to my client in the amount of \$50,000.

OTHER LITIGATION-RELATED EXPERIENCE

Following is a description of litigation-related matters, including some cases in which matters were investigated and resolved prior to the filing of a lawsuit:

- (1) In 2008, I was asked to represent the operator of day care center serving a "welfare-to-work" population that was subjected to an attachment lawsuit. If the suit were successful in its attachment of the center's assets, it could have shut down the center in a matter of days, to the detriment of clients, their children, and the employees. I negotiated a resolution that kept the business open, even though the center was not able to pay for my services.
- (2) I was part of the Attorney General's legal team that was prepared to sue the National Football League for antitrust violations for voting to block the relocation of the Rams to St. Louis during 1995. The NFL took a second vote and agreed to allow the move to St. Louis. The NFL Commissioner acknowledged that the Attorney General's action was a significant factor in the change in the vote of the league. I believe this was the first time an Attorney General became involved in a sports franchise relocation dispute.
- (3) In connection with the merger of Conoco and Phillips, I negotiated on behalf of the State additional relief that was not covered in settlements made by the United States government or by other states. *Nixon v. Conoco, Inc. et al.* (United States District Court, Western District of Missouri, 2:02-cv-04190-NKL, entering consent judgment on 10/2/2002).
- (4) While I worked at the Attorney General's Office, many investigations involving consumer protection issues or compliance with accessibility-for-the-disabled laws were resolved with pre-suit agreements. One situation involved an elderly woman who gave a large deposit to a person who promised her new guttering, and never returned to do the job. With the assistance of a diligent investigator, within 30 days the perpetrator was located, arrested on outstanding warrants, and the victim received a full

refund. In another case a home mortgage company was foreclosing on the home of an elderly woman who was induced by a caregiver to take out the loan and then took the money. The payments on the new loan exceeded the victim's income. After I became involved on behalf of the Attorney General, the lender cancelled the note and stopped the foreclosure.

- (5) While in private practice after leaving the Attorney General's Office, I have assisted numerous clients in responding to government investigations and inquiries and in complying with government regulations.
 - (6) I was a witness in an election dispute in November 1992. I was observing the tabulating of ballots at the St. Louis Election Board and noticed that absentee ballots of persons who identified themselves as disabled were not being counted if they were not notarized. A suit was filed challenging that practice and I testified for the interests of the disabled. The Election Board later counted the disputed ballots and the result of one race was changed.
12. Describe any additional legal experience that you believe may be relevant to the decision of the commission (e.g., work as a law professor, in government, as corporate or other legal counsel).

I am a frequent speaker and organizer of seminars. I have two engagements scheduled for 2012 at this time. Prior engagements include the following:

- (1) Effective Oral Advocacy in Trial and Appellate Courts: Showstoppers or Case-stoppers?, Co-presenter with Hon. Duane Benton, Bench & Bar Conference, sponsored by BAMSL, 6/4/11
- (2) Consumer Protection Update, sponsored by the American Bar Association (telephonic), 11/3/2010
- (3) Appellate Judges Roundtable, Moderator, Mo Bar Annual Meeting, 9/30/10
- (4) Lawyer as Public Citizen/Public Servant, Moderator of presentation by Hon. Duane Benton, Bench & Bar Conference, sponsored by BAMSL, 6/4/10
- (5) Tips from the Appellate Bench: What Your Opponent Does Not Know About the Appellate Process (Moderator), sponsored by the Missouri Bar, 9/24/2009
- (6) Trial Masters: Expert Witnesses (Moderator), sponsored by BAMSL, 5/29/2009
- (7) State and Federal Appeals: Adapting to the Differences and Tips for Maximizing Your Effectiveness (assisted presenter Judge Duane Benton of the U.S. Court of Appeals for the Eighth Circuit), Bench & Bar Conference, sponsored by BAMSL, 5/30/2009
- (8) Missouri Bar 2009 Annual Meeting, Planning Committee, 2009
- (9) Don't Take Chances : What You Need to Know to Navigate the Pitfalls of Sweepstakes, Contests and Promotions, sponsored by BAMSL, 1/9/09

- (10) Consumer Protection Update, sponsored by the American Bar Association (telephonic), 12/8/2008
- (11) Preventing Lawsuits and Violations in Advertising and Promotions, sponsored by National Business Institute, 7/30/08
- (12) St. Louis Bankruptcy Conference (Program Co-Chair), sponsored by BAMSL and Bankruptcy Practice Memorial Fund, 5/16/08
- (13) How to Respond to a Government Investigation, sponsored by Association of Corporate Counsel and BAMSL, 5/8/08
- (14) Antitrust and the Roberts Supreme Court, sponsored by BAMSL, 1/18/2008
- (15) Antitrust Enforcement, sponsored by BAMSL, 12/9/2005
- (16) Housing Discrimination, sponsored by Missouri Bar (moderator), 7/8/2005
- (17) Telemarketing Fraud–Unsolicited Faxes and No-Call Laws, sponsored by National Association of Attorneys General, 11/16/2004
- (18) Consumer Fraud/Predatory Lending, sponsored by BAMSL, 5/26/04
- (19) Appellate Practice, sponsored by BAMSL (moderator), 2/22/04
- (20) Affirmative Action/Drafting Diversity Policies, sponsored by the Women Lawyers Association and the Mound City Bar Association, 11/6/03
- (21) Predatory Lending, sponsored by the Urban Land Institute and Professional Housing Resources, Inc., 10/23/03
- (22) Consumer Protection, sponsored by St. Louis County Bar Assn., 5/9/03
- (23) Predatory Lending, sponsored by HUD, part of St. Louis Regional Fair Housing Summit, 4/29/03
- (24) Consumer Protection, sponsored by the Cape Girardeau Bar Association, 3/28/03
- (25) Appellate Practice, sponsored by BAMSL (moderator), 2/27/03
- (26) Sunshine Law and High Profile Cases, sponsored by BAMSL, 11/7/02
- (27) Appellate Forum–Participant in panel discussion at retreat for Missouri intermediate appellate court judges, 4/15/02
- (28) Bioterrorism Fraud–Exploitation of Fears, sponsored by BAMSL, 3/1/02
- (29) Appellate Practice, sponsored by BAMSL (moderator), 2/22/02
- (30) U.S. Court of Appeals–8th Circuit Planning Committee for 2001 Judicial Conference
- (31) Legal Ethics: Rule 4.2 of Code of Professional Responsibility, sponsored by U.S. Judge Advocate General’s Office, 5/01
- (32) Effective Legal Writing, sponsored by BAMSL, 4/01
- (33) State Appellate Practice Seminar, sponsored by BAMSL, 3/01 (moderator)
- (34) Public Sector Lawyers, sponsored by BAMSL, Moderator on ethics issues discussions and Planning Committee, 12/00
- (35) State Appellate Practice Seminar, sponsored by BAMSL, 5/00, 1/99 (Planning Committees)

- (36) Consumer Fraud Litigation, sponsored by BAMSL, 11/99
- (37) Geriatric Fraud and Abuse, sponsored by SLU Medical School, 6/99
- (38) Elder Law Symposium: Fraud Upon Seniors), sponsored by BAMSL, 3/99
- (39) Appellate Practice, sponsored by BAMSL, 2/99
- (40) Appellate Advocacy, sponsored by University of Missouri - Kansas City Law School, 6/95

I also spoke at the following in-house seminars for the Attorney General's Office:

- (1) Alternative Dispute Resolution, sponsored by Attorney General's Office, 10/01 (moderator)
- (2) Legal Writing--Issues/Points Relied On, sponsored by Attorney General's Office, 10/00
- (3) Litigation Practice, sponsored by Attorney General, 12/98 (moderator)
- (4) Deposition Techniques, sponsored by NITA/Attorney General, 7/99, 4/95
- (5) Trial Advocacy, sponsored by NITA/Attorney General, 5/98
- (6) Discovery, sponsored by Attorney General's Office, 5/96, 5/95
- (7) Appellate Brief Writing, sponsored by Attorney General's Office, 2/95

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

- (1) Award of Honor Selection Committee for The Lawyers Association of St. Louis, 2011-12
- (2) Appellate Judicial Evaluation Committee (appointed by Missouri Bar and elected by Committee as Secretary in 2008)
- (3) Bar Association of Metropolitan St. Louis (BAMSL)
 - Co-Chair, Appellate Practice Committee (1998-2004, 2009-2010)
 - Board of Governors, Member-at-large (2003-2009)
 - Wills for Heroes Task Force (free wills for police and firefighters) (2007-2009)
 - Elections Task Force and Committee (2008-2009)
 - Chair, Public Policy Positions Task Force (2007)
 - Chair, Amicus Appellate Briefs Review Committee (2007)
 - Co-Chair, Appellate Practice Committee (1998-2004, 2009-2010)
 - Chair, Task Force and Steering Committee on BAMSL Headquarters Location (2001-03)
 - Government Lawyers Committee, Steering Committee
 - Former member of the following committees: Consumer Law, Bench and Bar, Federal Practice, Media Relations, and Judicial Facilities Committees
- (4) American Bar Association, Consumer Protection Committee, Antitrust Section; Business Torts Committee, Litigation Section
- (5) St. Louis Bar Foundation, Board of Directors (2003-06)
- (6) Bankruptcy Practice Memorial Fund, Governing Board (2006-2010)

- (7) Differentiated Case Management Task Force, appointed by Chief Judge Jean Hamilton of the United States District Court, Eastern District of Missouri (1999-2000)
 - (8) The Lawyers Association of St. Louis, member
 - (9) Women Lawyers' Association, member
 - (10) Mound City Bar Association, member
 - (11) Eighth Circuit Court of Appeals Bar Association, member
14. 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.
- (a) Recognitions:
 - (1) *Missouri-Kansas Super Lawyers* in Appellate Practice.
 - (2) *The Best Lawyers in America*® in Appellate Law and Government Relations Law (Woodward/White, Inc.)
 - (3) President's Award, Bar Association of Metropolitan St. Louis, 2008
 - (4) President's Award, Bar Association of Metropolitan St. Louis, 2002
 - (5) Martindale-Hubbell -- "AV" rating
 - (6) Threw ceremonial "First Pitch," Busch Stadium, Cardinals v. Pirates, 8/23/00, caught by now-Cardinals Manager Mike Matheny
 - (b) Publications:
 - (1) Editor/Vice Chair, *Consumer Protection Law Developments Update*, to be published by American Bar Association, 2013 (editing a 50-state survey of recent developments in consumer protection law written by authors from all states)
 - (2) Co-Chair, ABA Business Torts Eighth Circuit Casenotes (multiple summaries of key recent cases published on ABA website), 2011
 - (3) *Consumer Protection Law Developments Update*, Contributor, American Bar Association, 2011
 - (4) "Appellate Practice – What Can The Court Do," *St. Louis Bar Journal*, 7/2009 (co-author)
 - (5) *Consumer Protection Law Developments*, Contributor, American Bar Association, 3/2009
 - (6) "How to Respond to Government Investigations," *Missouri Lawyers Weekly*, 6/2008
 - (7) "Top Court Opinions of 2005," *St. Louis Daily Record/Countian*, 1/2006
 - (8) "To Win in Mediation, Don't Think Like a Litigator," *Missouri Lawyers Weekly*, 12/2005
 - (9) Contributing author, *Eighth Circuit Bar Assn Newsletter*, 2/2005
 - (10) "Top Court Opinions of 2004," *St. Louis Daily Record/Countian*, 1/2005
 - (11) "Speaking to Students About the Law—and Life," *St. Louis Lawyer*, 9/2004

- (12) "Consumer Protection in the 21st Century: The Success of the Missouri Model--Aggressive Litigation at the State Level Protects Consumers and Prevents Unfair Trade Practices," Antitrust magazine, published by the American Bar Association, 7/2004 (co-author with Attorney General Nixon), reprinted in ABA State Antitrust Committee Newsletter, 10/2004; ABA Unfair Trade Practices Magazine, 11/2004; and ABA Business Torts Journal, Spring 2005
- (13) "Preventing Telemarketing Fraud," St. Louis Argus (Black Weekly), 4/1/2004
- (14) "Top Court Opinions of 2003," St. Louis Daily Record/Countian, 1/2004
- (15) "Protecting Senior Citizens from Consumer Fraud," Missouri Lawyers Weekly, 3/31/2003
- (16) "A Dream Deferred: A Primer on Predatory Lending," St. Louis Bar Journal, 4/2002 (co-author)
- (17) "Appeals and the Internet: The Effect of a Worldwide Audience on Appellate Practice," Missouri Lawyers Weekly, 2/25/2002 [cited in Missouri Lawyers Weekly 3/10/2003 as an "excellent article"]
- (18) "Internet Gambling: An End Run Around Missouri's Gambling Laws?" St. Louis Lawyer, 12/2000 (co-author)
- (19) "Appellate Briefs: Summarize and Get to the Point," Missouri Lawyers Weekly, 4/3/2000
- (20) "Net Laws: Privacy or Disclosure?" Cahners Library Journal--Net Connect, 10/15/1999
- (21) "Applying Criticisms of the Warren Court to the Burger Court: A Case Study of *Richmond Newspapers v. Virginia*," 5 U. of Ark., Little Rock Law Journal 2003 (1982) (lead article)
- (22) "First Amendment Obstacles to Stopping the 'Revolving Door,'" published by Office of Government Ethics, *Proceedings from the First and Second Annual Conferences, 1980-81* [awarded Citation of Merit from Office of Government Ethics]

D. PUBLIC SERVICE

15. Describe your community activities, including any organizations not listed elsewhere with which you are affiliated.
- (1) Governor's Council on Disability (2009-present); projects include by-law and policy reviews and encouragement of Universal Design
 - (2) FOCUS St. Louis, Board of Directors (2003-2009); Community Policy Committee member (2003-present); member of Task Force that produced the report "Racial Equality in the St. Louis Region: A Community Call to Action" (July 2001), a critical examination of the state of race relations in the St. Louis region (core working group member and civic leadership subcommittee chair of the Task Force)
 - (3) Fundraising activities for St. Louis University High School, including serving on the Alumni Board, Annual Appeal solicitations, chairing Lawyer Alumni appeal, making reunion committee solicitations, and serving on the 35-year reunion committee
 - (4) St. Louis University Law School alumni and reunion activities
 - (5) Nerinx Hall High School: active in Fathers Club and solicitations (committee chair, drafted Club by-laws, Club President's Award 2011)
 - (6) Paraquad (disability advocacy organization), Board of Directors (1995-2007)
 - (7) St. Louis Public Library Foundation (fundraising support group), Director (2002-06)
 - (8) Leadership St. Louis, Class of 1996-97
 - (9) Leadership St. Louis 25th Anniversary Celebration Committee (2001)
 - (10) U.S. Attorneys' Hate Crimes Task Force (former member)
 - (11) Better Business Bureau Consumer Fraud Task Force (former member)
 - (12) Martha Rounds Academy for Children, Advisory Board and Executive Director search/selection committee (former member)
 - (13) St. Louis 2004, speaker at Community Forums (conducted 1997)
 - (14) Resident Assistance Corporation (not-for-profit for public housing residents), Executive Committee, (1990-94)

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

Yes. I currently hold an appointed position from the federal government, and I have received Board appointments from the last four Mayors of the City of St. Louis.

- (1) The Federal Trade Commission appointed me in August 2008 to serve as a Monitor and Administrator of the Consent Decree in *Federal Trade Commission v. TALX Corp.*, Docket No. (2008). In that position I serve in a fiduciary capacity to the FTC to monitor compliance of a decree that resolved an antitrust complaint by the FTC. That activity is ongoing.
- (2) St. Louis Housing Authority, Commissioner, October 1989 to September 1994 (Chair, 1991 to 1993). I was appointed by Mayor Vincent Schoemehl to the Board of Commissioners. A Post-Dispatch editorial recognized me and others for “implementing better management policies” and removing the Authority from “troubled” status, leading to a greatly improved rating from the Department of Housing and Urban Development. See *HUD Is Sold on St. Louis*, 5/16/93.
- (3) St. Louis Public Library: I was appointed to the Board by Mayor Freeman Bosley in 1994, re-appointed by Mayor Clarence Harmon and Mayor Francis Slay, and served until statutory term limits barred further re-appointment. I served the maximum of two terms as Board President (1998-2002). Important actions included (a) sponsoring and drafting a Library diversity policy, (b) eliminating the policy of providing immunity for members of the Board of Directors from fines for overdue books, and (c) overseeing as Board President and as a Director the renovation and property acquisition for many of the branch libraries in the system.

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.

Not applicable.

E. PROFESSIONAL CONDUCT AND ETHICS

18. 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.

19. 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.

20. 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.
- 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.

Not applicable.

21. Have you have ever been held in contempt of court? If yes, provide details.

No.

22. 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?
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.

I have never been sued by a client. I have been a party to one case. Near the end of my term as a member of the Board of Commissioners of the St. Louis Housing Authority, a suit against the Authority named all the Commissioners as defendants. *Grice Group Architects v. St. Louis Housing Authority*, St. Louis City Circuit Court, No. 22944-00014. According to case.net, the case was mutually dismissed June 16, 1997, several years after I left the Board. I had no direct involvement in the litigation.

23. 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.*)
If your answer is yes, state the style of the case, where it was filed and explain in detail.

No.

24. Are you delinquent in the payment of any federal, state, county or city taxes? If yes, provide details.

No.

F. MISCELLANEOUS

25. State whether you are able, with or without a reasonable accommodation, to perform the essential functions of being an appellate judge, including participating in oral argument; performing legal research; communicating clearly and effectively, both orally and in writing; supervising the lower courts, serving on court committees and performing other administrative functions; and expeditiously deciding issues coming before the court.

Yes.

26. You must attach to this application at least one, but not more than three, writing samples that comply with the requirements set out in the instructions for applicants.

The following three writing samples are attached:

- (1) A proposed Order in a 2011 case that resulted in the St. Louis County Circuit Court ruling in favor of my client and finding Missouri statutes restricting the ability to obtain a mortgage loan originator's license to be unconstitutional as applied to my client.
- (2) A brief filed in the United States Supreme Court on behalf of 16 states as Amicus Curiae. The Supreme Court ruled in favor of the party we supported, 9-0, adopting the reasoning in the enclosed brief.
- (3) An article on consumer protection printed and re-printed in several American Bar Association publications: "Consumer Protection in the 21st Century: The Success of the Missouri Model--Aggressive Litigation at the State Level Protects Consumers and Prevents Unfair Trade Practices," Antitrust magazine, published by the American Bar Association, 7/2004 (co-author with Attorney General Nixon), reprinted in ABA State Antitrust Committee Newsletter, 10/2004; ABA Unfair Trade Practices Magazine, 11/2004; and ABA Business Torts Journal, Spring 2005.

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.

(1) I was part of the first generation in my family to attend college. My parents put a great value on education and public service. My siblings (three sisters) and I paid for college through part-time jobs and financial aid. My sisters engaged in public service as educators, serving as (a) a teacher in schools serving children from low-income families and as a university professor, (b) a principal at a U.S. Department of Education "Blue Ribbon" public school in north St. Louis county, and (c) an elementary school teacher in Springfield, Missouri.

(2) Largely as a result of my work at the Attorney General's Office and in serving on governmental boards, I have had the opportunity to work with citizen groups, elected officials, and the media. I drafted legislation, worked with elected officials on policy matters, and spoke at legislators' town hall meetings. I have spoken to school groups (elementary through high school), senior citizen groups, and other community groups on citizenship and consumer protection. I worked with community groups on various matters, including the Better Business Bureau and the St. Louis Coalition to Promote Reputable Lending (an anti-predatory-lending group).

(3) When I was chief administrator for the Attorney General in St. Louis, I assisted the Attorney General in his efforts to increase diversity in the Attorney General's St. Louis Office. There were significant increases in the number of minority and female lawyers in supervisory positions during Attorney General Nixon's administration in all offices.

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 five references, **please provide name, title, mailing address, telephone and e-mail address.** *Please note that it is your responsibility to contact your references,* although if you intend to use as a reference a federal judge or other individual who only can provide a reference upon a specific request by the interviewing authority, please advise the commission and it will send that reference such a request. As to all references, it is your responsibility to see that they send the requested letters in a timely manner.

Provide your references with the attached Guidelines for References. The commission must receive your letters of reference, **via e-mail**, to EDJudgeVacancy@courts.mo.gov, by the date indicated in the Instructions to Applicants.

- (1) David J. Newburger
Commissioner, Office of the Disabled
Department of Human Services
City of St. Louis
City Hall, Room 30
St. Louis, MO 63103
(314) 622-3686
NewburgerD@stlouiscity.com

- (2) Hon. J. Dale Youngs
Circuit Judge
Circuit Court of Jackson County
415 E. 12th Street
Kansas City, MO 64106
(816) 881-3606
div6.cir16@courts.mo.gov

- (3) Nicole Colbert-Botchway
Unit Leader, Financial Services Division
Office of the Missouri Attorney General
Old Post Office, Suite 200
St. Louis, MO 63101
(314) 340-4748
nicole-colbert@sbcglobal.net

(4) Matthew J. Devoti
Past President, The Lawyers Association of St. Louis
Casey & Devoti, P.C.
10 South Broadway, Suite 825
St. Louis, MO 63102
(314) 421-0763
mjd@caseydevoti.com

(5) Lisa A. Herder, Esq.
Director of Business Development
Midwest Litigation Services
711 N. 11th Street
St. Louis, MO 63101
(314) 64-2191
lherder@midwestlitigation.com

EXHIBIT A – APPELLATE MATTERS

Following is a representative list of cases I briefed or argued before an appellate court, with the case name, citation, a general description of the subject matter, the party I represented, and whether or not my client prevailed. I both briefed and argued all cases unless otherwise indicated.

- (1) *Kiesel Co. v. J&B Properties, Inc.*, 241 S.W.3d 868 (Mo. App. E.D. 1/2/2008). Contract dispute. Respondent. Wrote part of brief. Prevailed and attorneys fees awarded.
- (2) *Monsanto Co. v. Garst Seed Co.*, 241 S.W.3d 401 (Mo. App. E.D. 12/18/2007). Contract dispute. Appellant. Wrote part of brief. Prevailed.
- (3) *State of Indiana v. Kimco of Evansville*, 881 N.E.2d 987 (Ind. App. 10/31/2007). Eminent domain. Respondent. Wrote part of brief. Prevailed.
- (4) *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. banc 2007). Nuisance lead paint case. Wrote part of Amicus Curiae brief. Prevailed.
- (5) *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177 (Mo. banc 2006). Telecommunications. Wrote part of Amicus Curiae brief for National Conference of State Legislatures. Did not prevail.
- (6) *Centene Plaza Redevelopment Corp. v. Mint Properties*, 225 S.W.3d 431 (Mo. banc 2007). Eminent domain. Appellants. Wrote part of brief. Prevailed.
- (7) *Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d 238 (Mo. App. E.D. 2006). Employment discrimination. Respondents. Wrote part of brief. Prevailed in part.
- (8) *THF Hanley Maplewood Redevelopment Corp. v. Carter*, 191 S.W.3d 680 (Mo. App. E.D. 2006). Eminent domain. Respondent. Wrote brief. Prevailed.
- (9) *THF Hanley Maplewood Redevelopment Corp. v. Mann*, 191 S.W.3d 681 (Mo. App. E.D. 2006). Eminent domain. Respondent. Wrote brief. Prevailed.

- (10) *Schatz Family v. Franklin County, Mo., Div. of Family Services*, 422 F.3d 655 (8th Cir. 2005). Child abuse/parental custody § 1983 claim. Appellees. Prevailed.
- (11) *State v. Gill*, 167 S.W.3d 184 (Mo. banc 2005). First degree murder/death penalty. Respondent. Prevailed.
- (12) *Rahn v. Robb* (U.S. Supreme Court Docket No. 04-629). Petition for Certiorari on First Amendment case re KKK effort to “adopt a highway.” Petitioner. Petition denied.
- (13) *In re Carter*, 147 S.W.3d 872 (Mo. App. W.D. 2004). Sexually violent predator appeal. Respondent. Prevailed.
- (14) *Virginia v. Hicks*, 539 U.S. 113 (2003). First Amendment Public Housing case. Amicus Curiae on behalf of 16 states in support of Petitioner. Supreme Court ruled in favor of the party we supported, 9-0, adopting reasoning in the amicus brief.
- (15) *Ford Motor Co. v. Director of Revenue*, 97 S.W.3d 458 (Mo. banc 2003). State tax. Appellant. Prevailed.
- (16) *Nixon v. Wentzville Park Associates, L.P.*, 77 S.W.3d 659 (Mo. App. E.D. 2002). Nursing home death. Appellant. Prevailed.
- (17) *Mary S. Riethmann Trust v. Director of Revenue*, 62 S.W.3d 46 (Mo. banc 2001). State estate tax. Respondent. Did not prevail.
- (18) *State ex rel. Nixon v. Jovcev d/b/a Hugo Cab*, 49 S.W.3d 827 (Mo. App. E.D. 7/17/2001). Consumer protection—cab overcharges. Respondent. Prevailed.
- (19) *Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001), *cert. denied*, 535 U.S. 986 (2002). First Amendment/hate-speech. Cross-appellant. Did not prevail.
- (20) *Smith v. State of Missouri*, 63 S.W.3d 218 (Mo. banc 2001). State liability for St. Louis City police officers. Appellant. Wrote brief. Prevailed in Western District Court of Appeals, transfer granted to Missouri Supreme Court and dismissed for lack of appellate jurisdiction.
- (21) *Daleure v. State of Missouri*, 269 F.3d 540 (6th Cir. 2001). Antitrust/immunity/appellate jurisdiction relating to telephone charges for inmates. Appellee. Wrote brief, argument waived. Dismissed at our suggestion for lack of appellate jurisdiction.

- (22) *State ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102 (8th Cir. 1999). Internet gambling and civil procedure. Appellant. Wrote brief. Prevailed in part.
- (23) *State v. DeGonia*, 978 S.W.2d 351 (Mo. App. E.D. 1998). Criminal spousal abuse. Respondent. Prevailed (conviction affirmed).
- (24) *Johnson v. Missouri*, 142 F.3d 1087 (8th Cir. 1998). Standing/constitutionality of frivolous prisoner lawsuit statute. Appellee. Prevailed.
- (25) *Akin v. Mo. Gaming Commission*, 956 S.W.2d 261 (Mo. banc 1997). "Boat in a moat" casino. Respondent. Did not prevail.
- (26) *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996). Constitutional claim-prisoner religion claim. Appellant. Prevailed.
- (27) *In Re Grass*, 926 S.W.2d 67 (Mo. App. E.D. 1996). Confinement due to mental incapacity defense. Appellant. Prevailed.
- (28) *Walsworth Publishing Co. v. Director of Revenue*, 935 S.W.2d 39 (Mo. banc 1996). Sales tax. Appellant. Prevailed.
- (29) *Seltz v. Director of Revenue*, 934 S.W.2d 293 (Mo. banc 1996). State income tax. Respondent. Prevailed. Assisted on brief.
- (30) *Walls v. Allen Cab Co.*, 903 S.W.2d 937 (Mo. App. E.D. 1995). Workers' compensation/pierce corporate veil. Respondent-Cross-appellant. Prevailed in most respects.
- (31) *Edgington v. Missouri Department of Corrections*, 52 F.3d 777 (8th Cir. 1995). Prisoner claim. Appellant. Prevailed.
- (32) *In re Impeachment of Judith Moriarty*, 902 S.W.2d 273 (Mo. banc 1994). Secretary of State impeached. Amicus. Assisted on brief. Prevailed.
- (33) *J.S. DeWeese Co. v. Hughes-Treitler Mfg. Corp.*, 881 S.W.2d 638 (Mo. App. E.D. 1994). Franchise dispute. Respondent. Prevailed.
- (34) *Gutierrez v. United Foods*, 11 F.3d 556 (5th Cir. 1994). Standing/collective bargaining agreements. Appellee. Wrote brief. Prevailed.

- (35) *Kemp v. Moore*, 946 F.2d 588 (8th Cir. 1991). Prisoner First Amendment claim. Appellee. Prevailed.
- (36) *Scher v. Engelke*, 943 F.3d 921 (8th Cir. 1991). Prisoner Eighth Amendment case. Appellant. Did not prevail.
- (37) *Iron Eyes v. Henry*, 907 F.2d 810 (8th Cir. 1990). Prisoner First Amendment claim. Appellant. Prevailed.
- (38) *Philips Industrial Components v. Kerr-Hunt & Assoc. Ltd.*, 902 F.2d 1572 (8th Cir. 1990). Breach of contract. Appellee. Prevailed.
- (39) *Autoquip Corp. v. Nicholson & Assoc.*, 740 S.W.2d 664 (Mo. App. E.D. 1987). Promissory note guaranty. Appellant. Did not prevail.