

**APPLICATION OF MARK A. POWELL
TO THE APPELLATE JUDICIAL COMMISSION FOR THE
JUDGE PARRISH VACANCY
MISSOURI COURT OF APPEALS, SOUTHERN DISTRICT**

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

1. Present principal occupation or title:
Associate Circuit Judge, Division 24, Thirty-First Judicial Circuit of Missouri.
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? 49

(b) How many consecutive years immediately preceding your application have you been a qualified voter of Missouri? 31
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 Honorary Society.

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 in the firm of Reynolds and Conway P.C. Reynolds and Conway is located at 318 Park Central East, Ste 406 Springfield, Mo. 65802.

(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, in Des Moines, IA. This clerkship was a part of the law school curriculum that provided me with a small amount of pay and one credit hour toward my degree. Judge Glanton was a trial court judge for the State of Iowa. I observed trials and worked with the judge on writing simple opinions.

Second, I worked through Drake University's Legal Clinic program 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 1984-1985. My responsibilities included research and drafting portions of the Iowa Bar Review materials. My official employer would have been 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, Westbrooke and Tyndall in Springfield, Mo. My responsibilities included research and preparation of pretrial briefs, motions and legal memoranda involving a major products liability lawsuit (*Adams v. Cooper*) that was being tried in the Federal District Court in Springfield during that summer.

After graduating from law school in 1985, I was employed as an Associate with Miller, Sanford, Joyner, Westbrooke and Tyndall. 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. On March 22, 2000, I was appointed to my current position of Associate Circuit Judge.

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 these law firms can be verified by contacting Frank M. Evans III at Lathrop & Gage 1845 S. National Springfield, Mo. 65804.

On March 22, 2000, I was appointed 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. (*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 the 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. As a trial judge, I have had the opportunity to develop an expertise in the area of criminal law which I did not have as a practicing attorney. Being both a trial lawyer and a trial judge for a combined 25 years gives me the knowledge and experience necessary to evaluate and decide the issues that are brought before the court of appeals.

(a) Appellate Experience:

Ingram v. Horne and Heitz, 785 SW2d 735 (Mo. App. 1990). In this case, Frank Evans and I represented Mike Ingram, a property owner, over a boundary dispute with his neighbor. 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 that the trial court failed to award him attorney's fees. Mr. Heitz was represented by Craig Lowther. We were successful at the appellate level in keeping the same judgment as rendered by the trial court. My role involved preparing the record on appeal and writing the respondent's brief.

Abbott v. City of Crocker, Missouri, 30 F3d 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 that 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 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 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 a 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 appellants' 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 Western District of Missouri in May 1996. I represented Pulaski County and its employee who struck an underground LP gas pipeline owned by Conoco while operating his road grader. Conoco sued the county and its employee for damages to its 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 the company's Lear jet from Ponca City, OK. to Waynesville, Missouri. As I recall, the jury came back with a verdict of approximately \$45,000.00. The verdict was listed as one of the top ten defense verdicts of 1996 by *Missouri Lawyers 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 Wirken and Lou Accurso from Kansas City, Wayne Schoeneberg from St. Charles and Don Woody from Springfield filed separate actions in Joplin, Mo., the City of St. Louis and in Springfield over separate gas explosions that injured their respective clients. Plaintiff's theory was that the odorant (ethyl mercaptan)

that was injected into the odorless LP gas was defective in that the odor would fade over time or under certain conditions. Plaintiff's claimed that when each explosion took place, no one smelled the 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 client prior to trial.

Baseke v. Johnson. In this case, Craig Oliver and I represented Rudi Baseke in a lawsuit against his brother-in-law over the insurance proceeds that were paid as a result of a fire that destroyed the Stockton Cheese Factory. This case was tried in the Circuit Court of Cedar County sometime during the early 1990s by Judge David Darnold. Mr. Johnson was represented by Jeff Dull. A few months prior to the fire, the defendant, Mr. Johnson, had changed the cheese factory's insurance policy to name himself the sole beneficiary to any insurance proceeds that would be paid if there was damage to the factory. Mr. Baseke, who was also an owner of the cheese factory, was never made aware of this change until after the fire. We brought suit on behalf of Mr. Baseke claiming a constructive trust over the insurance money. We were successful at trial in obtaining a judgment for one half of the insurance 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 years of 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, crushing operations, highway construction and pipeline construction throughout Missouri and Arkansas. I negotiated leases and contracts for both clients. I also defended lawsuits and brought lawsuits on behalf of both. I had an extremely good working relationship with 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 case load includes approximately 4000 cases. My criminal docket ranges from minor traffic violations to capital murder. My civil docket ranges from cases involving a few thousand dollars to medical negligence and products liability lawsuits that have millions of dollars at issue. I am also responsible for signing the judgments and orders of Family Court Commissioner Scott Tinsley. Every seven weeks I am the "on call" judge which requires me to handle matters after regular business hours. These matters involve search warrants, arrest warrants, requests for orders of protection, and emergencies at the Greene County jail. During the "on call" week I am also responsible for

conducting order of protection hearings and reviewing all petitions for dissolution of marriage that are filed by affidavit. My trial calendar is scheduled through 2010. I schedule one jury week per month as a result of a recent change in case assignments. Associate Circuit Judges in Greene County are now being assigned a percentage of cases that would normally be assigned to the Circuit Court divisions. Being a trial judge gives me a unique perspective as it relates to a position on the court of appeals. I understand the pressure a trial judge faces to make quick decisions during a trial. I have judged the credibility of witnesses that is sometimes not revealed in a typed transcript. These insights, I believe, would benefit an appellate judge.

11. 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).

As a judge, I have had the opportunity to be a speaker at a number of seminars. Two years ago I was asked to speak at the state judge trial college by the trial judge education committee. I was asked to speak along with two other judges on the subject of summary judgments. I was humbled by the invitation because the trial judge education committee is very selective about the speakers they use at the trial college.

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. 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 and Sanford P.C., I had a number of articles published by the *Springfield Business Journal*. I recall published articles on creditor and debtor rights, on the Fair Debt Collection Practices Act, and on covenants not to compete.

I have been privileged to receive 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.

14. Describe your community activities, including any organizations not listed elsewhere with which you are affiliated.

I served eight years on the board of directors of the Springfield Boys and Girls Club. As a member of the 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 in Greene County. I am an ordained elder and a deacon of First and Calvary Presbyterian Church. I am a graduate and former two time board member of Leadership Springfield. I am a former board member of Community Partnership of the Ozarks. I established a truancy court program at Reed Middle School and also helped develop truancy courts at Pipkin, Study and Jarrett Middle Schools in Springfield, Mo.

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 to my current position of Associate Circuit Judge March 22, 2000. I was elected to the same position in a partisan contested election November 7, 2000. I was again elected in an uncontested election November 5, 2002. I was again elected in an uncontested election November 7, 2006. I will stand for retention election (Greene County is now under the non-partisan court plan) in November 2010.

16. 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

17. 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.

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. 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.
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? 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 is the elected Circuit Clerk of the Twenty-Second Judicial Circuit of Missouri (The city of St. Louis). Mr. Favazza and two citizens, Ms. Francis Rankin and Ms. Ellen De Vasto, have filed suit against all of the members of the Circuit Court Budget Committee (13 Judges). I am one of the members of this committee as appointed by the Supreme Court of Missouri. Mr. Favazza seeks an order declaring that a decision of the Circuit Court Budget Committee is void and in excess of its authority. He also seeks an injunction prohibiting the CCBC's decision from being implemented. The lawsuit is a result of the Supreme Court's order to consolidate the circuit clerk's offices in each county in Missouri and for each to name one appointing authority. Each county, or circuit, in the state, submitted to the CCBC a plan to appoint a single appointing authority for their respective circuit clerk's office. The only circuit that could not agree on a plan was the Twenty-Second Judicial Circuit. Mr. Favazza submitted his proposed plan to the CCBC. The judges of the Twenty-Second Circuit submitted a different plan. The CCBC voted to approve the plan submitted by the judges naming the Presiding Judge, David L. Dowd, as the single appointing authority in the Twenty-Second Circuit. Mr. Favazza believes that the law requires that he be named the single appointing authority. Therefore, he filed the lawsuit.

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.

25. 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. See attached.

26. 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.

I was appointed by the Missouri Supreme Court in 1997 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 its meetings as a result of the Office of Chief Disciplinary Counsel taking over the committee's responsibilities. The local committee was reestablished in 2006, but I am no longer a member.

In December of 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 by the Supreme Court for a term of office expiring on December 31, 2011. The Circuit Court Budget Committee 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 monies allocated to the trial courts of Missouri. The committee also is tasked with the job of hearing the appeals of grievances brought by state court employees. This committee's work is very rewarding, but over the last two years has also been very challenging due to state budget shortfalls. As a member of the CCBC, I have also served on the judicial time standards committee.

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**, 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 SDjudgevacancy@courts.mo.gov, by the date indicated in the Instructions to Applicants.

- 1) The Honorable John C. Crow
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- 2) Ms. Morey Mechlin
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