APPLICATION FOR NOMINATION TO JUDICIAL OFFICE

This original application, 16 double-sided copies and one (1) single-sided copy must be filed with the Human Resources Department, Administrative Office of the Courts, 1501 W. Washington, Suite 221, Phoenix, AZ, 85007, not later than 3:00 p.m. on August 8, 2016. Read the application instructions thoroughly before completing this application form. The fact that you have applied is not confidential, responses to Section I of this application are made available to the public, and the information provided may be verified by Commission members. The names of applicants, interviewees and nominees are made public, and Commission files pertaining to nominees are provided to the Governor for review. This entire application, including the confidential portion (Section II), is forwarded to the Governor upon nomination by the Commission.

SECTION I: PUBLIC INFORMATION (QUESTIONS 1 THROUGH 71)

PERSONAL INFORMATION

1. Full Name: **Thomas Andrew Gilson**

2. Have you ever used or been known by any other legal name? **No.** If so, state name:

3. Office Address: **Beus Gilbert PLLC, 701 N. 44th St., Phoenix AZ 85008**

4. When have you been a resident of Arizona? **Since 2002**

5. What is your county of residence and how long have you resided there? **Maricopa – since 2002.**

Filing Date: 8/8/2016

6. Age: **53**

(The Arizona Constitution, Article VI, §§ 22 and 37, require that judicial nominees be 30 years of age or older before taking office and younger than age 65 at the time the nomination is sent to the Governor.)

7. List your present and former political party registrations and approximate dates of each: **I am currently registered as an Independent. As far as I can recall, I have always been registered as an Independent.**

(The Arizona Constitution, Article VI, § 37, requires that not all nominees sent to the Governor be of the same political affiliation.)

8. Gender:

Race/Ethnicity:

[**X**] White
[ ] Hispanic or Latino (of any race)
[ ] Black or African American
[ ] American Indian or Alaska Native
[ ] Asian
[ ] Native Hawaiian/Pacific Islander
[ ] Other: _____

(The Arizona Constitution, Article VI, §§ 36 and 41, requires the Commission to consider the diversity of the state's or county's population in making its nominations. However, the primary consideration shall be merit.)

EDUCATIONAL BACKGROUND

9. List names and locations of schools attended (college, advanced degrees and law), dates attended and degrees.

Harvard College, AB *cum laude* (1981-85)
The Juilliard School, MM, piano performance (1985-87)
Rutgers University, candidate for Doctorate of Musical Arts degree (1987-88); no degree awarded
Northwestern University School of Law (now known as Pritzker School of Law), JD (1990-93)

10. List major and minor fields of study and extracurricular activities.

At Harvard, I studied the history and literature of England, and wrote my thesis about the novels of Thomas Hardy. My primary extracurricular activity was piano, including chamber music and jazz. I also wrote movie and theater reviews for the Harvard Independent and hosted a weekly jazz radio show on Harvard's radio station, WHRB.

At Juilliard, I studied piano performance with Abbey Simon, musical theater with Marvin Hamlisch, and music criticism with (then) New York Times music critic Tim Page. While there, I performed as a soloist and a chamber musician at Lincoln Center.

I was a member of Northwestern's Legal Clinic, representing high school students with disabilities. I also served as Coordinating Executive Editor of the Journal of Criminal Law and Criminology. My own article (about the Federal Sentencing Guidelines) received the Lowden-Wigmore prize for legal scholarship. I also participated in the Julius Miner Moot Court Competition, where I received the Adlai E. Stevenson II Award for Best Brief.

11. List scholarships, awards, honors, citations and any other factors (e.g., employment) you consider relevant to your performance during college and law school.

Northwestern University School of Law

- **Lowden-Wigmore prize for legal scholarship**
- **Adlai E. Stevenson II Award for Best Brief in the Julius Miner Moot Court Competition**
- **Coordinating Executive Editor, Journal of Criminal Law and Criminology**

Harvard College

- **John Harvard and Harvard College scholarships for academic achievement**
- **Horblitt Prize for outstanding chamber music performance (awarded by Harvard Club of Boston)**

PROFESSIONAL BACKGROUND AND EXPERIENCE

12. List all courts in which you have been admitted to the practice of law with dates of admission. Give the same information for administrative bodies, which require special admission to practice.

Illinois State Bar (November 4, 1993) (inactive status)
D.C. Bar (April 1, 1996) (inactive status)
U.S. Supreme Court (May 20, 2002)
Arizona Bar (December 16, 2003)
District of Arizona (March 15, 2004)

13. a. Have you ever been denied admission to the bar of any state due to failure to pass the character and fitness screening? **No.** If so, explain.

    b. Have you ever had to take a bar examination more than once in order to be admitted to the bar of any state? **No.** If so, explain.

14. Indicate your employment history since completing your formal education. List your current position first. If you have not been employed continuously since completing your formal education, describe what you did during any periods of unemployment or other professional inactivity in excess of three months. Do not attach a resume.

Beus Gilbert PLLC
Member (2012-present)
701 N. 44th Street
Phoenix, AZ 85018

Lewis and Roca LLP (now known as Lewis Roca Rothgerber Christie)
Of Counsel / Equity Partner (2003-2012)
201 E. Washington Street
Phoenix, AZ 85004

Skadden, Arps, Slate, Meagher & Flom LLP
Associate (1998-2003)
1440 New York Avenue, NW
Washington DC 20005

Hon. David B. Sentelle
Judicial Law Clerk (1997-98)
United States Court of Appeals for the D.C. Circuit
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, N.W. Washington, DC 20001

Hon. Thomas A. Flannery
Judicial Law Clerk (1995-97)
United States District Court for the District of Columbia
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Rudnick & Wolfe (now known as DLA Piper)
Associate (Summer, 1992; 1993-95)
203 N. La Salle Street
Chicago, IL 60601

15. List your current law partners and associates, if any. You may attach a firm letterhead or other printed list. Applicants who are judges should attach a list of judges currently on the bench in the court in which they serve.

Leo R. Beus
Paul E. Gilbert
Lee M. Andelin
Cassandra H. Ayres
Lubko B. Berezowsky
Steven W. Bienstock
Jeffrey M. Blilie
Thomas A. Connelly
Trevor D. Cox
Rodney Glassman
Adrianna Griego
Ashley Hale
Franklyn D. Jeans
Malcolm Loeb
Timothy J. Paris
Patrick E. Sovereign
Robert O. Stirling
Scot C. Stirling
Nishan J. Wilde
L. Richard Williams

16. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

I primarily represent plaintiffs in large-scale commercial cases, including professional malpractice, financial fraud, and insurance coverage disputes. I have also represented both borrowers and lenders in disputes involving mortgage loans, and employers in Fair Labor Standards Act cases.

17. List other areas of law in which you have practiced.

I have handled a number of class actions – on both the defense and plaintiffs' side – and I headed the class action practice group at Lewis and Roca.

I was Lewis and Roca's "E-Discovery partner," providing advice and support to clients and colleagues with e-discovery issues.

I have also advised clients on records retention and compliance, including inquiries from state regulators regarding securities issues.

In Washington, DC, my practice included both commercial litigation and white collar criminal matters. Principally, I handled internal investigations for Fortune 500 companies and coordinated a company's response to a two-year federal grand jury investigation. I was also part of a team of lawyers that represented President Clinton in the *Paula Jones* case.

18. Identify all areas of specialization for which you have applied or been granted certification by the State Bar of Arizona. **Not applicable.**

19. Describe your typical clients.

My clients have included financial services institutions, educational institutions, a Native American tribe, small businesses and individuals.

20. Have you served regularly in a fiduciary capacity other than as a lawyer representing clients? If so, give details. **No.**

21. Describe your experience as it relates to negotiating and drafting important legal documents, statutes and/or rules.

I have not drafted statutes or rules, but I have had extensive experience negotiating and drafting litigation-related documents such as settlement agreements and releases.

22. Have you practiced in adversary proceedings before administrative boards or commissions? **Yes.** If so, state:

    a. The agencies and the approximate number of adversary proceedings in which you appeared before each agency. **Arizona Corporation Commission (3) and the Corporation Commissions of Wisconsin (1) and South Dakota (1)**

    b. The approximate number of these matters in which you appeared as:

    Sole Counsel: _____

    Chief Counsel: **5**

    Associate Counsel: _____

23. Have you handled any matters that have been arbitrated or mediated? **Yes**
If so, state the approximate number of these matters in which you were involved as:

Sole Counsel:	**2**
Chief Counsel:	**5**
Associate Counsel:	**20**

24. List not more than three contested matters you negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the names, addresses (street and e-mail) and telephone numbers of all counsel involved and the party each represented; (3) a summary of the substance of each case: and (4) a statement of any particular significance of the case. You may reveal nonpublic, personal, identifying information relating to client or litigant names or similar information in the confidential portion of this application.

***Gans v. Leiserv,* (Circuit Court of St. Louis, MO).**

This was a complicated class action settlement that I negotiated and implemented over a period of months in 2004. The plaintiffs alleged violations of the Telephone Consumer Protection Act. On behalf of defendant Leiserv Corp., I negotiated procedures by which the class members would be notified of the settlement, appeared at the hearing where the settlement was approved, negotiated a mechanism for the resolution of individual class claims, interacted with a third-party claims administrator, and coordinated the review of individual class claims.

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dmoore@koreintillery.com
Counsel for Plaintiffs

***Tait v. RBS,* (D. Ariz.).**

In August 2015, on behalf of my client RBS Financial Products Inc., I negotiated the resolution of a lawsuit where a home mortgage borrower sought to enjoin a foreclosure sale of the subject property.

Kim R. Lepore
Wright, Finlay & Zak
18444 N. 25th Avenue, Suite 420
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(602) 845-8898
klepore@wrightlegal.net
Counsel for RoundPoint Mortgage Servicing Corporation

John L. Lohr, Jr.
Hymson Goldstein & Pantiliat, PLLC
16427 N. Scottsdale Road, Suite 300
Scottsdale, AZ 85254
(480) 991-9077
jll@hgplaw.com
Counsel for Plaintiffs Mory and Victoria Tait

Kuhse v. McDonald's Corporation, (Yavapai County Superior Court).

A local business claimed that it had suffered environmental damage caused by a neighboring McDonald's restaurant. I represented McDonald's in that lawsuit. Insurer CNA filed a related lawsuit, seeking a declaratory judgment that it need not defend or indemnify the McDonald's defendants in the original lawsuit. After an initial mediation failed, I was able to structure a settlement in 2009 that resolved both lawsuits.

G. Gregory Eagleburger
Peter Muthig
Sanders & Parks, P.C.
1300 Abacus Towers
3030 North Third Street
Phoenix, AZ 85012
(602) 532-5892
Counsel for Plaintiff Kuhse Properties, LLLP

Cody M. Hall
Schneider & Onofry, P.C.
3101 North Central Avenue, Suite 600
Phoenix, AZ 85012
(602) 200-1289
chall@soarizonalaw.com
Counsel for Defendant Greg Cook

Kevin Brownell
CNA Insurance
333 S. Wabash Ave. 19 South
Chicago, IL 60604

25. Have you represented clients in litigation in Federal or Arizona trial courts? **Yes.** If so, state:

The approximate number of cases in which you appeared before:

Federal Courts: **30**

State Courts of Record: **25**

Municipal/Justice Courts: _____

The approximate percentage of those cases which have been:

Civil: **95%**

Criminal: **5%**

The approximate number of those cases in which you were:

Sole Counsel: **20%**

Chief Counsel: **30%**

Associate Counsel: **50%**

The approximate percentage of those cases in which:

You conducted extensive discovery[1]: **30%**

You wrote and filed a motion for summary judgment: **10%**

You wrote and filed a motion to dismiss: **10%**

You argued a wholly or partially dispositive pre-trial, trial or post-trial motion (e.g., motion for summary judgment, motion for a directed verdict, motion for judgment notwithstanding the verdict): **10%**

You made a contested court appearance (other than as set forth in above response) **25%**

You negotiated a settlement: **30%**

The court rendered judgment after trial: **5%**

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[1]Extensive discovery is defined as discovery beyond standard interrogatories and depositions of the opposing party.

A jury rendered verdict: **5%**

Disposition occurred prior to any verdict: **35%**

The approximate number of cases you have taken to trial:

Court **1**

Note: If you approximate the number of cases taken to trial, explain why an exact count is not possible.

Jury **2**

26. Have you practiced in the Federal or Arizona appellate courts? **Yes** If so, state:

The approximate number of your appeals which have been:

Civil: **3**

Criminal: **0**

The approximate number of matters in which you appeared:

As counsel of record on the brief: AZ **3** U.S. _____

Personally in oral argument: AZ **0** U.S. _____

27. Have you served as a judicial law clerk or staff attorney to a court? Yes. If so, state the name of the court and dates of service, and describe your experience.

From 1995-97, I served as law clerk to the Honorable Thomas A. Flannery of the United States District Court for the District of Columbia. (Judge Flannery died in 2007.) I drafted bench memos and opinions and assisted with civil and criminal trials. I enjoyed the opportunity to discuss cases and lawyering with an experienced federal judge. Once, when I was having difficulty deciding how to resolve a motion for summary judgment, Judge Flannery suggested that I draft two opinions – one ruling for the plaintiff, and the other ruling for the defendant. This process informed my analysis of the issues and deepened my understanding of each side's position.

From 1997-98, I served as law clerk to the Honorable David B. Sentelle of the United States Circuit Court for the District of Columbia Circuit. I drafted bench memos and opinions for Judge Sentelle in both civil, criminal, and administrative cases. Because I served as a law clerk for three years, I had the opportunity to listen to oral arguments for cases I had worked on as a district court clerk. I also worked on a case involving Article III standing that was heard by the D.C. Circuit *en banc* – and drafted two different opinions in that case. I learned so much from Judge Sentelle, who asked

tough questions at oral argument, but always treated attorneys respectfully.

28. List not more than five cases you litigated or participated in as an attorney before mediators, arbitrators, administrative agencies, trial courts or appellate courts. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency and the name of the presiding judge or officer before whom the case was heard; (3) the names, addresses (street and e-mail) and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case. You may reveal nonpublic, personal, identifying information relating to client or litigant names or similar information in the confidential portion of this application.

***Bobbitt v. Milberg LLP*, No. CV 2009-00629 (D. Ariz., Zapata, J.; Guerin, M.J.)**

I represented a putative class in a major legal malpractice class action lawsuit. In this case, my clients – two law professors – alleged that the defendant law firm fell below the standard of care when representing a class of plaintiffs in a lawsuit alleging violations of federal securities law. I coordinated discovery, successfully opposed the defendants' motions to dismiss, and litigated class certification issues before Magistrate Judge Guerin and United States District Judge Zapata.

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Counsel for Lustigman Firm

In re Refco, Inc. Securities Litigation (*Krys v. Sugrue*, No. 08-CV-3065) (S.D.N.Y., Rakoff, J.).

I was extensively involved in litigation that arose after the collapse of commodities broker Refco, Inc. Among other things, I briefed and argued the Plaintiffs' response to Mayer Brown's Motion to Dismiss or for other sanctions for spoliation of evidence before Special Master Ronald Hedges and Judge Jed Rakoff.

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Counsel for Paul Koury

Kaman Aerospace Corp. v. Arizona Board of Regents, No. C2004-5114 (Pima County, Arizona Superior Court; Cornelio, J.) Decision on appeal, 171 P.3d 599, 2007 Ariz. App. LEXIS 162 (Ariz. Ct. App., 2007).

I second-chaired a six-week jury trial involving competing claims for breach of contract and the covenant of good faith and fair dealing relating to an eight-figure contract for a complex engineering project.

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Counsel for Kaman Aerospace Corp.

Morgan Stanley v. Mallett, No. CV2011 (Maricopa County, Arizona Superior Court, Mangum, J.)

My partner Jay Simpson and I represented Morgan Stanley in a five-day hearing in which our client sought pre-judgment remedies of garnishment and attachment from a former employee.

Alan Baskin
William Richards
Baskin Richards
80 East Rio Salado Parkway, Suite 511
Tempe, AZ 85281
Counsel for Defendant

Earth Tech v. City of Phoenix, No. CV2005-8647 (Maricopa County, Arizona Superior Court; Barton, J.)

I represented a construction company in a dispute involving construction of a wastewater treatment plant. In three lawsuits filed in Maricopa County Superior Court, the parties collectively sought damages of more than $200 million. During the course of this litigation, which was resolved through mediation, I was responsible for a number of cutting-edge electronic discovery issues, including the collection, processing and production of more than a terabyte of electronic data. I also litigated a number of issues before Special Master Christopher Skelly relating to discovery and a claimed joint defense / common interest between the owner and the engineer.

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Gilbert Medication Group
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Counsel for Defendant Malcolm Pirnie

Scott Anderson
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David O'Daniel
Gordon & Rees LLP
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Phoenix, AZ 85003
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dodaniel@gordonrees.com
Counsel for Defendant City of Phoenix

Brad Holm
Phoenix City Attorney
City Attorney's Office
200 W. Washington St.
Phoenix, AZ 85003
(602) 534-9866
Counsel for Defendant City of Phoenix

29. If you now serve or have previously served as a mediator, arbitrator, part-time or full-time judicial officer, or quasi-judicial officer (e.g., administrative law judge, hearing officer, member of state agency tribunal, member of State Bar professionalism tribunal, member of military tribunal, etc.), give dates and details, including the courts or agencies involved, whether elected or appointed, periods of service and a thorough description of your assignments at each court or agency. Include information about the number and kinds of cases or duties you handled at each court or agency (e.g., jury or court trials, settlement conferences, contested hearings, administrative duties, etc.).

I am currently serving as a court-appointed mediator in a personal injury case, with a hearing scheduled for this September.

I have served as a court-appointed mediator approximately five times before my present appointment; each time, the parties reached a settlement prior to the scheduled hearing.

30. List not more than five cases you presided over or heard as a judicial or quasi-judicial officer, mediator or arbitrator. State as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) the names, addresses (street and e-mail) and telephone numbers of all counsel involved and the party each represented; (4) a summary of the substance of each case; and (5) a statement of any particular significance of the case. You may reveal nonpublic, personal, identifying information relating to client or litigant names or similar information in the confidential portion of this application. **See answer to No. 29, above.**

31. Describe any additional professional experience you would like to bring to the Commission's attention.

New American Library, New York, NY (1988)
Worked as editorial assistant to Editor-in-Chief of book publishing house; read and evaluated fiction and non-fiction manuscripts.

Bear Stearns, Chicago, IL (1989)
Worked as runner on the floor of the Chicago Board of Trade.

Northwestern University School of Law (summer 1991)
Research assistant for Professor Stephen B. Presser; assisted with Professor Presser's treatise, "Piercing the Corporate Veil."

BUSINESS AND FINANCIAL INFORMATION

32. Have you ever been engaged in any occupation, business or profession other than the practice of law or holding judicial or other public office, other than as described at question 14? **No.** If so, give details, including dates.

33. Are you now an officer, director or majority stockholder, or otherwise engaged in the management, of any business enterprise? **No.** If so, give details, including the name of the enterprise, the nature of the business, the title or other description of your position, the nature of your duties and the term of your service.

Is it your intention to resign such positions and withdraw from any participation in the management of any such enterprises if you are nominated and appointed? **Not applicable.** If not, give reasons.

34. Have you filed your state or federal income tax returns for all years you were legally required to file them? **Yes.** If not, explain.

35. Have you paid all state, federal and local taxes when due? **Yes.** If not, explain.

36. Are there currently any judgments or tax liens outstanding against you? **No.** If so, explain.

37. Have you ever violated a court order, including but not limited to an order for payment of child or spousal support? **No.** If so, explain.

38. Have you ever been a party to a lawsuit, including bankruptcy but excluding divorce? **No.** If so, identify the nature of the case, your role, the court, and the ultimate disposition.

39. Do you have any financial interests, investments or retainers that might conflict with the performance of your judicial duties? **No.** If so, explain.

CONDUCT AND ETHICS

40. Have you ever been terminated, expelled, or suspended from employment or any school or course of learning on account of dishonesty, plagiarism, cheating, or any other "cause" that might reflect in any way on your integrity? **No.** If so, give details.

41. a. Have you ever been charged with, arrested for, or convicted of any felony, misdemeanor, or violation of the Uniform Code of Military Justice? **No.** If so, identify the nature of the offense, the court, and the ultimate disposition.

    b. Have you, within the last 5 years, been charged with or cited for any traffic-related violations, criminal or civil, that are not identified in response to question 41(a)? If so, identify the nature of the violation, the court, and the ultimate disposition. **No.**

42. If you performed military service, please indicate the date and type of discharge. If other than honorable discharge, explain. **Not applicable.**

43. List and describe any litigation (including mediation, arbitration, negotiated settlement and/or malpractice claim you referred to your insurance carrier) concerning your practice of law. **Not applicable.**

44. List and describe any litigation involving an allegation of fraud in which you were or are a defendant. **Not applicable.**

45. List and describe any sanctions imposed upon you by any court for violation of any rule or procedure, or for any other professional impropriety. **Not applicable.**

46. To your knowledge, has any formal charge of professional misconduct ever been filed against you by the State Bar or any other official attorney disciplinary body in any jurisdiction? **No.** If so, when? How was it resolved?

47. Have you received a notice of formal charges, cautionary letter, private admonition or other conditional sanction from the Commission on Judicial Conduct or any other official judicial disciplinary body in any jurisdiction? **No.** If so, in each case, state in detail the circumstances and the outcome.

48. During the last 10 years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by Federal and State laws? **No.** If your answer is "Yes," explain in detail. (Unlawful use includes the use of one or more drugs and/or the unlawful possession or distribution of drugs. It does not include the use of drugs taken under supervision of a licensed health care professional or other uses authorized by Federal law provisions.)

49. In the past year, have you ever been reprimanded, demoted, disciplined, placed on probation, suspended, cautioned or terminated by an employer as a result of your alleged consumption of alcohol, prescription drugs or illegal use of drugs? **No.** If so, state the circumstances under which such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

50. Within the last five years, have you ever been formally reprimanded, demoted, disciplined, cautioned, placed on probation, suspended or terminated by an employer? **No.** If so, state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) of any persons who took such action, and the back ground and resolution of such action.

51. Have any of your current or former co-workers, subordinates, supervisors, customers or clients ever filed a complaint or accusation of misconduct against you with any regulatory or investigatory agency, or with your employer? **No.** If so, state the date(s) of such accusation(s), the specific accusation(s) made, and the background and resolution of such action(s).

52. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? **No.** If so, state the date you were requested to submit to such a test, type of test requested, the name of the entity requesting that you submit to the test, the outcome of your refusal and the reason why you refused to submit to such a test.

53. Within the last five years, have you failed to meet any deadline imposed by a court order or received notice that you have not complied with the substantive requirements of any business or contractual arrangement? **No.** If so, explain in full.

54. Have you ever been a party to litigation alleging that you failed to comply with the substantive requirements of any business or contractual arrangement, including but not limited to bankruptcy proceedings? **No.** If so, explain in full.

PROFESSIONAL AND PUBLIC SERVICE

55. Have you published any legal or non-legal books or articles? **Yes.** If so, list with the citations and dates.

Author, "Updating Federal Procedures for Removal and Venue," American Bar Association, Business Torts Litigation Newsletter, Spring 2012, Vol. 19 No. 3

Co-Author, "Ninth Circuit Approves Preliminary Denial of Class Certification," American Bar Association, Class Actions and Derivative Suits Website, March 2010

Co-Author, "Seek and Ye Shall Find?" American Lawyer (E-Discovery Supplement), December 2008

Co-Author, "Internal Investigations: Ten Ways to Avoid Inadvertent Disclosure of Confidential Information," American Bar Association, Criminal Litigation Committee Website, October 2008

Co-Author, "Notes from Co-Chairs," appeared quarterly in American Bar Association, Criminal Litigation Newsletter, 2006-08

Author, "Federal Rule of Criminal Procedure 32(h): R.I.P.," American Bar Association, Criminal Litigation Committee Website, October 2008

Author, "Understanding the New E-Discovery Rules," prepared for National Business Institute seminar, November 2007

Author, "Unpacking the Act of Production Doctrine," American Bar Association, Criminal Litigation Newsletter, Winter 2005

Author, "Making Sense of Booker/Fanfan," American Bar Association, Litigation Section Website; Criminal Litigation Newsletter, Spring 2005

Author, "Federal Sentencing Guidelines: The Requirement of Notice for Upward Departure," published in Volume 82 of the Journal of Criminal Law and Criminology (1992)

56. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge? **Yes.** If not, explain.

57. Have you taught any courses on law or lectured at bar associations, conferences, law school forums or continuing legal education seminars? **Yes.** If so, describe.

National Institute for Trial Advocacy (NITA), Arizona Deposition Training Program, Faculty member (November, 2011)

I also have spoken about e-discovery and class action topics at conferences, CLE teleconferences, and in-house seminars at Lewis and Roca.

58. List memberships and activities in professional organizations, including offices held and dates.

American Bar Association, Section of Litigation

- **Member of the Editorial Board for the Section of Litigation's Criminal Litigation Committee (2004-06)**
- **Editor-in-Chief of the Criminal Litigation Newsletter (2006-08)**
- **Co-chair of the Criminal Litigation Committee (2007-10)**

- **Member of Advanced Planning Leadership Committee (assisting Section of Litigation Committees in sharpening and achieving their goals) (2010-12)**
- **Member of Roundtable Committee (assisting Section of Litigation Committees in providing legal education programming for their members) (2012-2015)**
- **Member of Regional Meetings Committee (assisting Section of Litigation Committees in providing legal education programming for their members) (2015-present)**

Phoenix Symphony. Board member, 2007-09

Harvard Club of Phoenix. Board member, 2007-2012. I serve on the Club's schools committee, interviewing and evaluating applicants to Harvard College. I also have coordinated charity and other community events on behalf of the Club

Have you served on any committees of any bar association (local, state or national) or have you performed any other significant service to the bar? **Yes – see above.**

List offices held in bar associations or on bar committees. Provide information about any activities in connection with pro bono legal services (defined as services to the indigent for no fee), legal related volunteer community activities or the like.

See above. As a member of leadership of the ABA's Section of Litigation since 2007, I have assisted the Section in articulating policy positions relating to criminal justice issues and assisted ABA Committees with diversity issues. I have also written and spoken about criminal justice issues and coordinated programs at ABA Section of Litigation Annual Conferences about issues relating to equal justice, such as prosecutorial misconduct. Also, I represented a high school student in connection with an assault charge, leading an investigation of the facts and litigating a variety of constitutional issues before the court.

59. Describe the nature and dates of any community or public service you have performed that you consider relevant.

For the last nine years, I have interviewed and evaluated applicants to Harvard College. As indicated above, I have also served as a member of the Harvard Club board and the Phoenix Symphony board.

60. List any professional or civic honors, prizes, awards or other forms of recognition you have received.

American Bar Association, Section of Litigation

- **Outstanding Subcommittee Chair, 2006**
- **Outstanding Newsletter Editor, 2008**

Martindale-Hubbell. rated "AV/Preeminent Attorney"

American Bar Foundation, Fellow, 2009-present

61. List any elected or appointed offices you have held and/or for which you have been a candidate, and the dates. **Not applicable.**

Have you been registered to vote for the last 10 years? **Yes.**

Have you voted in all general elections held during those years? **Yes.** If not, explain.

62. Describe any interests outside the practice of law that you would like to bring to the Commission's attention.

I play keyboards in a band called "Twice Baked." (The band's name is a play on the name of the band's founder, Adam Zweiback, whose last name means "twice baked" in German.) We play jazz, pop, and rock at parties, receptions, and special events.

HEALTH

63. Are you physically and mentally able to perform the essential duties of a judge in the court for which you are applying? **Yes.**

ADDITIONAL INFORMATION

64. The Arizona Constitution requires that the Commission consider the diversity of the state's or county's population in making its nominations. Provide any information about yourself (your heritage, background, experience, etc.) that may be relevant to this requirement. **Not applicable.**

65. Provide any additional information relative to your application or qualifications you would like to bring to the Commission's attention at this time.

In 2012, I was a finalist for a position as a United States Magistrate Judge in the District of Arizona, having been approved by the merit selection panel.

66. If you were selected by this Commission and appointed by the Governor to serve, are you aware of any reason why you would be unable or unwilling to serve a full term? **No.** If so, explain.

67. If selected for this position, do you intend to serve fully, including acceptance of rotation to areas outside your areas of practice or interest? **Yes.** If not, explain.

68. Attach a brief statement explaining why you are seeking this position. **See Exhibit A.**

69. Attach three professional writing samples, which you personally drafted (e.g., brief or motion). The samples should be no more than a few pages in length. **See Exhibits B-D.**

You may excerpt a portion of a larger document to provide the writing samples. Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website.

70. If you have ever served as a judicial or quasi-judicial officer, mediator or arbitrator, attach sample copies of not more than two written orders, findings or opinions (whether reported or not) which you personally drafted. The writing sample(s) should be no more than a few pages in length. You may excerpt a portion of a larger document to provide the writing sample(s). Please redact any personal, identifying information regarding the case at issue, unless it is a published opinion, bearing in mind that the writing sample may be made available to the public on the commission's website. **N/A.**

71. If you are currently serving as a judicial officer in any court and are subject to a system of judicial performance review, please attach the public data reports and commission vote reports from your last two performance reviews. **N/A.**

EXHIBIT A

When I was twelve years old, my father gave me a book called "You Be the Judge." The book gave the facts of famous cases and asked the reader how the cases should be decided.

One of these cases was the *Palsgraf* case. A man carrying a package hurries towards a train in a train station. Two employees of a railroad company try to help the passenger onto the train. In doing so, they jostle him, causing him to drop the package. As it turns out, the package contains two sticks of dynamite which detonate when they hit the ground. The explosion causes a scale at the opposite end of the platform to topple, injuring Mrs. Palsgraf. Is the railroad company responsible for Mrs. Palsgraf's injuries?

Hmm, I thought. That injury would never have happened if the employees hadn't caused the passenger to drop his package. But the employees were only trying to help -- and they could not have known that the package contained dynamite. And Mrs. Palsgraf was injured far away from the explosion, the result of a bizarre and unexpected chain of events. Who really was responsible?

This was my introduction to what judges do, and I found it fascinating.

After graduating from law school, I had the chance to work as a law clerk for two experienced federal judges, and to see them in action. I asked them as many questions as I could, especially about how they decided hard cases. Both of my judges were humble and even-handed. They were intensely aware that their role was to interpret the law, and not to inject their own political beliefs into their rulings. Judge Flannery and Judge Sentelle would be my role models should I have the honor of being selected for this position.

As I wrestled with difficult legal issues as a law clerk, I tried to follow the lead of my judges, approaching each case without any preconceptions about what the outcome should be, and drafting opinions that clearly explained how I arrived at my conclusion. I enjoyed this process, always keeping in mind that my judges' rulings had practical, real-world consequences.

Since my clerkship, I have seen the law from many sides: as a defense lawyer, as a plaintiffs' lawyer, and as a criminal lawyer. Throughout the years, I

always have tried to anticipate how judges think, and have tried to address what their concerns might be in my written and oral advocacy.

It has been a long journey since "You Be the Judge," and my fascination with judging has only increased since then.

If I were selected, I would aspire to the humility, the thoroughness, and the fairness of Judge Flannery and Judge Sentelle. After all of my years in private practice, I would relish the opportunity to contribute to the development of Arizona law, and to serve the people of our state.

EXHIBIT B

Business Torts Litigation
FROM THE SECTION OF LITIGATION BUSINESS TORTS LITIGATION COMMITTEE
Spring 2012, Vol. 19 No. 3

ARTICLES

Updating Federal Procedures for Removal and Venue

By Thomas A. Gilson – May 8, 2012

For years, federal courts have clashed over the interpretation of procedures for removal, jurisdiction, and venue. In the Federal Courts Jurisdiction and Venue Clarification Act of 2011, H.R. 394, P.L. 112–63, a new law that took effect in January 2012, Congress resolved many of these disagreements and clarified lingering ambiguities.

The Act Clarifies Procedures for Removal

A defendant that is sued in state court may remove the lawsuit to federal district court if there is federal-question or diversity jurisdiction. 28 U.S.C. §§ 1331–32. To initiate removal, a defendant must file a notice of removal with the federal district court within 30 days after it is served or otherwise receives a copy of the complaint. The procedures for removal are set forth in 28 U.S.C. §§ 1441, *et seq.*

Timing of Removal in Cases Involving Multiple Defendants

Before the act went into effect, the removal statute stated that the defendant had 30 days to remove an action after receiving a copy of the complaint. *See* 28 U.S.C. § 1446(b) (2010). The statute, however, did not specify how deadlines would be calculated if multiple defendants were served separately at different times.

Resolving a split in authority, the act now gives each defendant an opportunity to remove within 30 days after being served. 28 U.S.C. § 1446(b)(2)(B)–(C). To illustrate how this new provision works, suppose a complaint names two defendants: A and B. The plaintiff serves A first, but A does not file a timely notice of removal. The plaintiff then serves B. Under the act, B still has 30 days from the time it is served to file a notice of removal, even though A's deadline has expired.

Stated differently, a plaintiff may not deprive a defendant of its opportunity to remove the case to federal court by serving one defendant first, and then waiting more than 30 days to serve a second defendant. The act also clarifies that an earlier-served defendant may join a later-served defendant's notice of removal, even though the earlier-served defendant's own 30-day time period has expired. 28 U.S.C. § 1446(b)(2)(C).

Notably, this provision comes into play only when multiple defendants are served at different times. If multiple defendants are served on the same day, of course, all of them will have the same removal deadline.

Codifying the Rule of Unanimity

The act addresses another issue relating to the removal of multi-defendant cases—it codifies the long-established "rule of unanimity," under which all defendants that have been properly joined and served must consent to removal. 28 U.S.C. § 1446(b)(2)(A).

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Is the Complaint Removable?: When Federal Jurisdiction Is Unclear
Assume that a state-court complaint specifically asserts claims under a federal statute. There is no question that the 30-day time period for filing a notice of removal starts to run when a defendant receives a copy of such a complaint. But what if it is unclear that there is federal jurisdiction over the state-court complaint?

The act provides guidance to defendants who are served with complaints that do not explicitly reveal that federal jurisdiction exists—in particular, when a complaint does not clearly indicate an amount in controversy. 28 U.S.C. § 1332 (to establish diversity jurisdiction, the amount in controversy must exceed $75,000). When a complaint in state court does not specify the amount of damages it seeks, a defendant may attempt to persuade the federal district court judge that the $75,000 amount-in-controversy requirement has been satisfied. This is often a challenging process, as the defendant may not yet have any meaningful evidence about the plaintiff's damages. Moreover, federal courts have disagreed about the standards a defendant must meet to establish that the amount-in-controversy requirement has been met.

Under the act, a defendant may simply allege in its notice of removal that the amount in controversy exceeds $75,000. 28 U.S.C. § 1446(c)(2). The defendant must persuade the federal district court judge that the amount-in-controversy requirement has been satisfied under a preponderance of the evidence standard—not the more demanding "legal certainty" standard previously used by some courts. *See Pratt Cent. Park Ltd. v. Dames & Moore*, 60 F.3d 350, 351 (7th Cir. 1995); *Columbia Gas Transmission Corp. v. Tarbuck*, 62 F.3d 538, 541 (3d Cir. 1995). Thus, if the district court judge is convinced, and the other diversity jurisdiction requirements have been met, the defendant has met its burden of establishing that removal is proper.

If the defendant learns during the course of proceedings in state court that there is a basis for federal jurisdiction—for example, the plaintiff files an amended complaint that raises a federal claim—the defendant will have 30 days to file a notice of removal. 28 U.S.C. § 1446(b)(2)(B). Likewise, if the defendant learns for the first time through state-court discovery that the amount in controversy exceeds $75,000, the defendant has 30 days to file a notice of removal based on diversity jurisdiction after learning that fact. 28 U.S.C. § 1446(c)(3)(A).

Extending the One-Year Time Limit for Removal
The removal statute sets forth an outside time limit for state-court defendants that want to remove a lawsuit on diversity grounds: one year from the commencement of the lawsuit. 28 U.S.C. § 1446(b). Congress recognized that some state-court plaintiffs were using delay tactics and concealing facts that would support diversity jurisdiction until after the one-year period had expired. The act, therefore, now provides that the one-year time period may be extended if the court concludes that a plaintiff has acted in bad faith to prevent removal. 28 U.S.C. § 1446(c)(1).

The Removal of State-Law Claims
The act also addresses the removal of state-court lawsuits that include both federal claims and unrelated state-law claims. Before the act went into effect, federal courts had discretion to accept

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jurisdiction over unrelated state claims when a complaint was removed on federal-question grounds. 28 U.S.C. § 1441(c) (2010). Many courts and commentators viewed this procedure as constitutionally suspect because it appeared to afford federal courts the right to hear state-law claims they would have lacked jurisdiction to hear initially. *See, e.g., Salei v. Boardwalk Regency Corp.*, 913 F. Supp. 993, 1007 (E.D. Mich. 1996); Charles A. Wright and Mary K. Kane, *Law of Federal Courts* § 39 at 235 (6th ed. 2002). In response to these critiques, the act now requires federal district courts to sever unrelated state-law claims and remand them to state court. 28 U.S.C. § 1441(c)(2).

To be clear, district courts need not sever *all* state-law claims in a removed complaint, as federal courts have supplemental jurisdiction to hear state-law claims that are substantially related to federal claims.

Diversity Jurisdiction: Defining the Citizenship of Corporations

The act clarifies how corporations with foreign contacts should be treated in diversity cases. Before the act went into effect, the diversity statute stated that a corporation was a citizen of any "State" where it was incorporated and of the state where it has its "principal place of business" or its headquarters. *See* 28 U.S.C. § 1332(c)(1) (2010). The federal appellate courts treated this provision inconsistently, with some interpreting the term "State" to include foreign states, and some concluding the contrary. *Compare, e.g., Torres v. Southern Peru Copper Corp.*, 113 F.3d 540, 543 (11th Cir. 1997) (statutory term "State" does not refer to foreign states) *with Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A.*, 20 F.3d 987, 990 (9th Cir. 1994) ("State" applies to both foreign countries and states of the United States). This led to confusion in determining the citizenship of foreign and domestic corporations with a presence in the United States and abroad.

Resolving this circuit split, the act clarifies that a corporation is a citizen of both the state or country in which it was incorporated and the state or country where its "principal place of business" is located. 28 U.S.C. § 1332 (c)(1). For example, it is now clear that there will be no diversity jurisdiction in a lawsuit between a citizen of New York and a Chinese corporation whose principal place of business is in New York. In that instance, the Chinese corporation would be considered a citizen of New York, thus destroying diversity.

The Act Updates Procedures for Venue

The act also makes several tweaks to the laws governing venue. First, there were formerly two statutory provisions for venue: one for diversity cases, 28 U.S.C. § 1391(a) (2010), and another for federal-question cases, 28 U.S.C. § 1391(b) (2010). The act abolishes this distinction and establishes a new, unitary provision, 28 U.S.C. § 1391(b), that covers venue for both types of cases.

Second, venue was formerly proper in "a judicial district where any defendant resides, if all defendants reside in the same state." *See* 28 U.S.C. § 1391(a)(1) & (b)(1) (2010). Congress recognized that this language was problematic in cases involving corporate defendants. To

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illustrate the problem, suppose a complaint names two defendants: an Arizona resident and a corporation that does substantial business in every state, including Arizona. The corporation is treated as a resident of every state, including Arizona. 28 U.S.C. § 1391(c). Under the former language of the statute, because the corporation and the individual are deemed to both "reside" in Arizona, venue would seem to be proper in any other district where the corporation resides (the District of Maine, for example). The act clarifies that venue should not be treated so expansively. Now, in multi-defendant cases, venue is limited to a district of the state where all the defendants reside. 28 U.S.C. § 1391(b)(1). In our example, venue would be proper in the District of Arizona, but would not be proper in the District of Maine.

Finally, the act addresses the standards for transferring venue from one federal district to another. Civil actions may be transferred from one federal district to another for the convenience of parties and witnesses and in the interest of justice. 28 U.S.C. § 1404(a). Before the act was passed, there was one important caveat: A lawsuit could only be transferred to a district where the lawsuit could have been filed initially—that is, where venue and personal jurisdiction would have been proper. The act eliminates this restriction, permitting federal lawsuits to be transferred to almost any district as long as all parties agree, even if the lawsuit could not have been brought in that district originally. *Id.* Such a transfer will be permitted only if the court agrees that it would be in the interest of justice and that it would be convenient for the parties and witnesses.

Conclusion

The act makes significant changes to the federal jurisdictional statutes. These changes are worthy of careful consideration, as they could affect your clients' rights to defend themselves in federal court.

Keywords: litigation, business torts, Federal Courts Jurisdiction and Venue Clarification Act, jurisdiction, federal district court

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EXHIBIT C

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Dennis Kravetz, Plaintiff, vs. Paul Revere Life Insurance Company and Unum Group, f.k.a. UnumProvident Corporation, Defendants.	No. CV08-01060-PHX-FJM **MOTION FOR SUMMARY DISPOSITION DUE TO SPOLIATION OF EVIDENCE BY PLAINTIFF**

Under Federal Rule of Civil Procedure 37(b) and the Court's inherent power to impose sanctions for abusive litigation practices, defendants move that judgment be entered against plaintiff Dennis Kravetz due to his use of a "wiping" program to destroy critical electronic evidence after the Court ordered him to produce it.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

After the Court ordered Kravetz to produce his hard drive for forensic analysis, Kravetz downloaded an electronic "wiping program" and then ran it seven times on his hard drive over a period of two days. This permanently eliminated over 42,000 files and folders. Next, using a "registry cleaner" program, Kravetz attempted to remove all traces of the wiping program from his hard drive. Despite Kravetz's efforts to hide what he had done, defendants' forensic expert uncovered overwhelming evidence of his destruction of data.

The data that Kravetz destroyed was critically important to the defendants. This case involves Kravetz's claim for disability benefits from defendant Paul Revere. Kravetz alleges that his job as a human resources consultant required him to type on his computer 10-12 hours a day. He claims that as of March 23, 2007, an elbow condition prevented him from typing for extended periods. Kravetz therefore alleges that he is totally disabled and entitled to disability insurance benefits from Paul Revere.

This raises two important issues. First, did his job *actually* require him to type 10 - 12 hours per day? Second, did his computer usage change after March 23, 2007, when he allegedly became disabled?

The best — and really only — evidence of this was on his computer hard drive. The metadata on Kravetz's computer shows (among other things) the time certain files were open on his computer, the edits that he made, and his history visiting web sites. There is no other source of information. Kravetz worked alone in his home. He had no supervisor, coworker, employee, family member, or any other person who could verify or refute his claims about his typing on the computer.

As the Court will recall, defendants sent Kravetz a preservation letter and requested that he produce the hard drive. Kravetz refused. Defendants filed a motion to compel, which Kravetz vigorously opposed. After the Court ordered him to make this evidence available, he took matters into his own hands and permanently deleted a substantial portion of it. He ran a wiping program **seven** times, permanently deleting over **42,000** computer files and folders, all in violation of this Court's order.

Because of Kravetz's destruction of data, the electronic evidence he produced does not present an accurate picture of his computer usage. Thus, defendants can no longer use the hard drive to reach any conclusion about Kravetz's typing activities. The permanent loss of this electronic data is particularly significant because there is no other independent evidence of Kravetz's computer usage. Without **all of** the electronic evidence from Kravetz's hard drive, defendants cannot challenge Kravetz's assertions about his typing. *See Computer Assoc. Int'l, Inc. v. Am. Fundware, Inc.*, 133 F.R.D. 166, 170 (D. Co. 1990)

("Destroying the best evidence relating to the core issue in the case inflicts the ultimate prejudice upon the opposing party.")

Faced with situations just like this, the courts have dismissed lawsuits under both Rule 37(b) and the court's inherent power to impose sanctions for abusive litigation practices. *See Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006) (affirming dismissal of complaint and monetary sanctions where plaintiff used a "wiping" program to delete more than 2,200 files from his laptop computer); *In re Krause,* 367 B.R. 740, 770-71 (Bankr. D. Kan. 2007) (a party's "running of [a] wiping program after being ordered to produce electronic evidence and before turnover of his computers is simply inexcusable"). This Court should dismiss this lawsuit and order Kravetz to pay the defendants the costs they incurred in (1) preparing and litigating this motion, and (2) preparing and litigating their motion to compel Kravetz to produce his hard drive.

II. Background.

A. Kravetz Claims that a Disability Rendered Him Unable to Type for Ten Hours a Day.

This case involves Kravetz's claim for monthly disability benefits from defendant Paul Revere. One requirement for benefits under the policy is that Kravetz must be "unable to perform the important duties of [his] Occupation."

Kravetz worked as a human resources consultant. He testified at his deposition that, on a typical day, his job required him to spend 10-12 hours typing on his computer.[1] Kravetz worked by himself and typed on a Compaq desktop computer at his home. He claims that, as of March 23, 2007, he became totally disabled (and therefore entitled to benefits) because of an elbow condition that, he claims, prevents him from typing more than 2 or 3 hours in a day.

B. Defendants Seek to Analyze Kravetz's Hard Drive.

To assess Kravetz's claim that his work required him to type for approximately 10-

[1] Kravetz testified: "There are some days [prior to his claimed disability] where I'd work [at the computer]14, 16 hours a day to meet a deadline for a client. But most days it's between 10-12 hours a day." Kravetz Dep. Tr. at 74, attached at Tab A.

12 hours each day, as well as his claim that his typing activity dropped off after March 23, 2007, defendants requested that he produce his Compaq hard drive, as well as any other computer or storage media he used for the two years leading up to the start of his alleged disability. *See* Defendants' Third Request for Production of Documents and Things (dated January 2, 2009), attached hereto at Tab B.[2]

When they made this request, defendants specifically reminded Kravetz of his obligation to preserve electronically stored information relating to this dispute:

> Finally, we remind you and your client of the continuing obligation to preserve evidence, *including electronically stored information*, relating to this dispute. This obligation, which arose when your client reasonably anticipated this dispute, requires that all relevant documents and files must be preserved in their electronic format even if paper copies exist.

See letter from Stephen Bressler to Steven Dawson dated January 2, 2009 (emphasis added), attached hereto at Tab C.

Kravetz refused to produce the hard drive. Among other things, he cited concerns that it might contain privileged materials. *See* Plaintiff's Response to Defendants' Third Request for Production of Documents and Things (dated Feb. 4, 2009), attached at Tab D.

On March 25, 2009, defendants filed a Motion to Compel Production of Computer Hard Drives and Computer Storage Media (the "Motion"). The Motion sought the production of Kravetz's Compaq hard drive. In the Motion, defendants explained that they intended to provide the hard drive to a forensic expert to determine "how much time Kravetz spent typing on a typical day prior to March 23, 2007." Motion at 2. "The evidence," defendants explained, "is absolutely critical, as it will permit defendants to evaluate Kravetz's claim that he typed on a computer keyboard for 10 hours a day." *Id.* Defendants also stated that Kravetz's hard drive "likely contains many relevant types of electronic data, including the total amount of time that Kravetz spent revising a document, visiting websites or using other programs on his computer." *See* Reply in Support of

[2] The defendants' request described the term "hard drive" as "the mechanism that reads and writes data on a hard disk." The defendants further defined the term "hard drive" to mean "the primary hardware that a computer uses to store information, typically magnetized media on rotating disks." Tab B at 1.

Motion to Compel (filed April 27, 2009) at 2.

In opposing the Motion, Kravetz submitted a five-page declaration. *See* Tab E. The declaration establishes that Kravetz personally knew that defendants had requested the production of electronic evidence on his hard drive, and that defendants further intended to make that evidence available to a forensic expert for analysis.

C. The Court Orders Production of the Hard Drive and Allows Defendants to Analyze Non-Substantive Electronic Information.

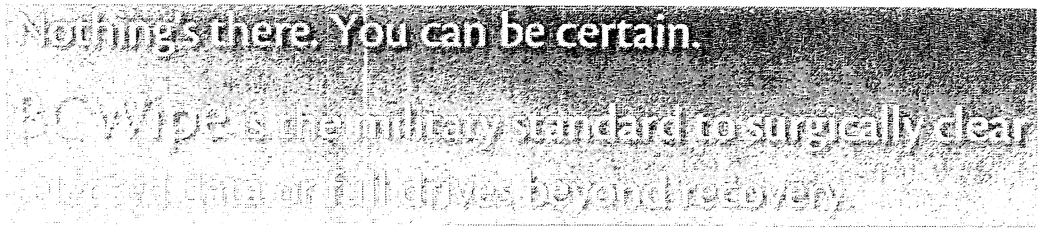
On June 10, 2009, the Court granted the defendants' Motion. Rejecting Kravetz's argument that the hard drive would not yield any relevant evidence about his typing activities, the Court concluded that "[d]efendants have properly explained why the metadata on Kravetz's hard drives and storage devices may be relevant to the number of hours Kravetz worked prior to and after his injury." Tab F. The Court ordered Kravetz to make his hard drive available to defendants "with the limitation that defendants may only extract metadata and other necessary electronic information regarding the amount of time spent on documents, but not the substance of the documents themselves." *Id.*

D. Kravetz Installs and Repeatedly Uses a "Military Grade" Wiping Program to Purge Electronic Evidence.

Kravetz did not readily produce the hard drive. On July 1 -- three weeks **after** the Court entered its order -- Kravetz's counsel and defendants' counsel had a telephone conference. During that conference, Kravetz's counsel indicated that he had not yet advised Kravetz of the Court's ruling on the hard drive, but said that he would be doing so that day. *See* Letter from Stephen Bressler to Steven Dawson, dated August 21, 2009, attached at Tab G. Counsel scheduled another conference call for July 7 to discuss a number of issues, including the production of the hard drive.

On July 5 -- four days after Kravetz's counsel said he would inform Kravetz about the Court's order to produce the hard drive -- Kravetz downloaded a program called "BCWipe" on his Compaq desktop computer. *See* Tab H, Declaration of L. Aaron Philipp at ¶ 8.

BC Wipe is a software program that permanently erases files and other electronic data so they never can be recovered or undeleted:



http://www.jetico.com/.

"Wiping" is "a term used to describe a process of shredding contents of a file or disk space." *See* Tab I ("Introduction" from BCWipe "Help"; download from jetico.com web site). "It is impossible to restore any data that has been properly wiped."[3] *Id.* A user of BCWipe may select individual files, groups of files, or folders for permanent deletion. Likewise, a user may "wipe" the so-called "unallocated space" on the hard drive, thereby removing all traces of documents that have been conventionally deleted. *See* Tab J ("Main Functions" from BCWipe "Help"; from jetico.com web site).

Kravetz ran BCWipe seven times between July 5 and July 6. *See* Tab H at ¶ 10. Because BCWipe is designed to eliminate all traces of computer files, it is difficult to identify with precision how much data was wiped by Kravetz. However, according to forensic expert L. Aaron Philipp, who reviewed the electronic data from Kravetz's hard drive, at least 42,000 files and folders were wiped from July 5 to July 6, 2009. *Id.*

E. Defendants' Expert Reviews Data from the Hard Drive -- and Discovers Data Wiping.

During the same period when Kravetz was wiping electronic data from his hard drive, his counsel insisted on a protocol for the collection and processing of electronic data

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[3] As explained on BCWipe's web site, *see* Tab I, conventional deletion of a document does not truly erase the contents of the document:

> When you delete sensitive files from a disk on your computer, the operating system does not erase contents of these files from the disk -- it only deletes 'references' on those files from filesystem tables. Contents of the deleted file (or file's body) continue to be stored on the disk and can be easily recovered using any disk tool utility.

Id.

from the hard drive.[4] *See* letter from Thomas Gilson to Aaron Philipp, dated July 10, 2009, attached at Tab K. These negotiations further delayed production of the hard drive.

Pursuant to a protocol negotiated by Kravetz's lawyers, a forensic consultant made a mirror image of the hard drive at Kravetz's home on July 30, 2009. At Kravetz's request, the hard drive was shipped to Mr. Philipp (who is based in Austin, TX) in a locked box. Kravetz provided the key to David Penrod, a forensic consultant his lawyers hired, who is based in Denver. Mr. Penrod traveled from Denver to Austin, where he used the key to open the box. Mr. Penrod watched as Mr. Philipp extracted data from the mirror image pursuant to the protocol. *See* Tab H at ¶ 6.

Mr. Philipp initially noted "anomalous patterns" in the metadata he reviewed. *Id.* at ¶ 7. Knowing that these patterns could indicate that a wiping program was used, Mr. Philipp then examined "activity files" on the hard drive. He found that BCWipe had in fact been downloaded and installed on July 5, 2009, and that the program was run seven times from July 5 to July 6. *Id.*

Mr. Philipp was able to identify the web pages that Kravetz viewed before downloading BCWipe. These web pages show each step that Kravetz took before downloading the program. Significantly, the web sites that Kravetz visited make it absolutely clear that the program was downloaded intentionally. For example, in the course of downloading BCWipe, he initially visited the website for a separate program designed to wipe the entire contents of a hard drive. Apparently realizing that he did not want to wipe his entire hard drive, he then clicked on a link that stated:

> To surgically clear selected data, such as wiping free space on an active workstation, see BCWipe.

Id., Ex. B, Figure 4. He then downloaded and ran BCWipe. *Id.*, Ex. B.

[4] Under this protocol, the parties agreed that (i) defendants' local vendor would make a "mirror image" of the hard drive; (ii) the mirror image would be sent to defendants' expert L. Aaron Philipp in Austin, Texas; (iii) certain categories of metadata would be extracted from the mirror image; (iii) Mr. Philipp would perform his analysis on the extracted data. *Id.* The parties also agreed that a representative of Kravetz could be present when Mr. Philipp extracted data from the mirror image. *Id.*

On July 7, after the files and folders were wiped, Kravetz removed BCWipe from his hard drive by using an "add/remove program" on his computer. Tab H at ¶ 11. One minute after doing so, Kravetz ran "Ace Utilities," a program that cleans the hard drive's "system registry" in order to remove entries from software that is no longer on the system.[5] *Id.* at ¶ 12. Kravetz ran Ace Utilities again on July 13, 2009 -- three days after the parties memorialized their protocol for the collection and review of the data on the hard drive. *Id.*[6] The apparent purpose of running Ace Utilities was to eliminate the evidence that Kravetz had run BCWipe. But Kravetz was not successful.

In light of the forensic evidence he reviewed, Mr. Philipp concluded that at least 42,000 files and folders were wiped from July 5-6, 2009. *Id.* at ¶ 13. After reaching this conclusion, he said that this wiping of data "prevent[s] me from quantifying the computer usage of Mr. Kravetz." *Id.* "As such," he continued, "I am unable to render an opinion regarding the usage over time of this computer." *Id.* In other words, the "wiped" hard drive does not represent a true picture of Kravetz's computer usage. Any analysis performed on the metadata Kravetz provided would necessarily lead to inaccurate and unreliable conclusions.

F. Kravetz Refuses to Comment.

On August 21, 2009, defendants' counsel informed Kravetz's counsel that Mr. Philipp had discovered that BCWipe and Ace Utilities were installed and run on Kravetz's hard drive. *See* Letter from Stephen Bressler to Steven Dawson, dated August 21, 2009, attached at Tab G. On August 27, Kravetz's counsel responded that Kravetz's consultant, Mr. Penrod, "did not see where Mr. Philipp is getting the information" set forth in the August 21 letter, and asked if Mr. Phillip could speak to Mr. Penrod and explain his conclusions. In response, on August 28, defendants' counsel asked whether Kravetz acknowledges that he downloaded and ran BCWipe and Ace Utilities in July 2009. *See* e-mail correspondence between counsel, attached at Tab L. Kravetz's counsel refused to

[5] A "system registry" is part of the computer's operating system that keeps track of all programs and settings.

[6] According to Mr. Philipp, Kravetz used Ace Utilities only twice on his computer: on July 7 and July 13, 2009. *Id.*

answer, citing the attorney-client privilege.

III. Analysis

Spoliation exists "when a party (1) destroys (2) discoverable matter (3) which the party knew or should have known, (4) was relevant to pending, imminent, or reasonably foreseeable litigation." *Gates Rubbers Co. v. Bando Chem. Indus., Ltd.*, 167 F.R.D. 90, 101 (D. Colo. 1996). Kravetz's destruction of electronic evidence in this case flagrantly violates the Court's June 10, 2009 discovery order and makes it impossible for the true facts ever to be known. The only appropriate sanction for Kravetz's extreme misconduct is the dismissal of his complaint with prejudice. *See Leon v. IDX Sys. Corp.*, 464 F.3d at 958 (affirming dismissal of complaint and imposition of monetary sanctions where plaintiff used a "wiping" program to delete more than 2,200 files from his laptop computer); *In re Krause*, 367 B.R. at 770-71 (a party's "running of [a] wiping program after being ordered to produce electronic evidence and before turnover of his computers is simply inexcusable").

A. The Court Has the Authority to Dismiss this Action Due to Kravetz's Discovery Abuses.

District courts may impose sanctions as part of their inherent power "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991). This power includes the "broad discretion to make . . . evidentiary rulings conducive to the conduct of a fair and orderly trial." *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992) (citation and internal punctuation omitted). District courts are also empowered to impose sanctions for discovery abuse under Rule 37 under which sanctions are available against a party "who fails to obey an order to provide or permit discovery." *See* Fed. R. Civ. P. 37(b)(2)(C).

"Dismissal is an available sanction when a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings." *Leon*, 464 F.3d at 958; *see also Anheuser-Busch, Inc. v. National Bev. Distribs.*, 69 F.3d 337, 348 (9th Cir.

EXHIBIT D

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

FORT McDOWELL ENTERPRISES, LLC, a limited liability company organized under the laws of the Fort McDowell Yavapai Nation; and WE-KA-JASSA INVESTMENT FUND, LLC, a limited liability company organized under the laws of the Fort McDowell Yavapai Nation, Plaintiffs, vs. GREAT AMERICAN INSURANCE COMPANY, an Ohio corporation; JOHN DOES 1-30; ABC CORPORATIONS 1-5; DEF PARTNERSHIPS 1-5; GHI LIMITED PARTNERSHIPS 1-5, and JKL LIMITED LIABILITY COMPANIES 1-5, Defendants.	Case No.: CV2010-081530 **RESPONSE TO GAIC'S MOTION IN LIMINE NO. 6: TO EXCLUDE EXPERT TESTIMONY BY STANLEY FELDMAN** (Assigned to the Honorable David Cunanan) **Oral Argument Requested**

As the Court knows, Great American's policies provide coverage when an employee fails to faithfully perform duties "as prescribed by law." Plaintiffs maintain that Tribal attorneys Drew Ryce ("Ryce") and Pearline Kirk ("Kirk") failed to comply with their ethical and fiduciary duties, thereby triggering coverage under the policies.

Great American disputes that Ryce and Kirk violated duties "as prescribed by law." Their claims adjuster testified during his deposition that *statutes* were prescribed by law, but denied that other sources – common law duties, other legal rules – could qualify. To address this issue, Plaintiffs have designated Justice Stanley Feldman to provide background testimony about the ethical and fiduciary duties that applied to Ryce and Kirk. Such testimony will help the jury understand key issues at trial – whether these sources of law should be considered under the policy, and the scope of the applicable legal duties.

Before issuing his expert opinions, Justice Feldman reviewed the allegations of the Complaint. Based on these allegations, Justice Feldman concluded that Ryce and Kirk failed to live up to their fiduciary and ethical obligations as attorneys.[1]

Great American argues that Justice Feldman's testimony should be excluded as based on "insufficient facts" and "insufficient experience." Any challenge to the factual basis for Justice Feldman's opinions should be raised on cross-examination – not by excluding his testimony. *See Pipher v. Loo*, 221 Ariz. 399, 404, 212 P.3d 91, 96 (Ct. App. 2009) ("Questions about the accuracy and reliability of a witness' *factual basis*, data, and methods go to the weight and credibility of the witness' testimony and are questions of fact ... [that do] not turn on the judge's preliminary assessment of testimonial reliability. It is the jury's function to determine accuracy, weight, or credibility.") (quoting *Logerquist v. McVey*, 196 Ariz. 470, 488, 1 P.3d 113, 131 (2000)) (emphasis added).

Great American's challenge to Justice Feldman's expertise is meritless. It claims Justice Feldman may not opine on claim practices because he has not been a claim investigator

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[1] Justice Feldman was entitled to rely upon the allegations in the Complaint, as "the facts or data underlying an expert's testimony may include inadmissible evidence, hypothetical facts, and other experts' opinions." Fed. R. Evid. 702, advisory committee's notes, 2000 amendments.

himself. As the Rules do not mandate any particular training or expertise to opine on any given topic, this argument goes nowhere. As Justice Feldman testified at his deposition, "I've simply seen thousands of claims being handled over the years." Deposition of S. Feldman, 10 Mar. 14 at 103:13-14, attached as Ex. A. Justice Feldman is entitled to opine on Great American's sub-standard claims handling in this case.

Great American also says Justice Feldman is not competent to testify about the meaning of the contractual term "duties as prescribed by law" because he was not familiar with this term before being retained in this lawsuit. This argument is a non-starter as well. Justice Feldman need not be an expert in a particular term, or type of policy, to offer an opinion on its meaning. Even if the Court does not permit Justice Feldman to testify about the meaning of this term, he should be permitted to testify that the ethical rules and common law have the force of law in Arizona – without regard to this particular term. .

Finally, Great American claims that Plaintiffs "designated Justice Feldman to instruct the jury on the applicable law" and tell it how to decide the case. Motion at 15. Not so. Justice Feldman will help the jury understand the nature and the scope of the duties that govern attorneys – a key issue in this case, and one that is likely to be unfamiliar to the jurors. *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991) ("expert testimony may help a jury understand unfamiliar terms and concepts").

<u>The Standard for Admissibility of Expert Testimony</u>

Arizona Rule of Evidence 702 governs the admissibility of expert testimony. *See State ex rel. Montgomery v. Miller*, 234 Ariz. 289, 298-99, 321 P.3d 454, 463-64 (Ct. App. 2014). Under that rule, which mirrors Federal Rule of Evidence 702, an expert's opinion must help the trier of fact to understand the evidence or determine a fact in issue; the expert must be qualified by "knowledge, skill, experience, training, or education," and the proposed testimony must be based "on a reliable foundation." *See Pension Committee v. Banc of America Securities, LLC*, 691 F. Supp. 2d 448 (S.D.N.Y. 2010). The Rule "is intended to ensure that the expert testimony is 'helpful to the jury in comprehending and deciding issues beyond the

understanding of a layperson.'" *Feinberg v. Katz*, 2001 U.S. Dist. LEXIS 94967 (S.D.N.Y. Dec. 21, 2007), quoting *DiBella v. Hopkins*, 403 F.3d 102, 121 (2d Cir. 2005).

When ruling on motions to exclude expert testimony, trial courts "should remember that they are ruling on the admissibility of evidence, and not its weight or credibility." *Pension Committee*, 691 F. Supp. 2d at 459. "As the Supreme Court has explained, "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Amorgianos v. Ntl. R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993)) (citation and internal punctuation omitted).

Although the proponent of expert testimony must establish its admissibility by a preponderance of the evidence, *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987), "the rejection of expert testimony is the exception rather than the rule." Advisory Committee Notes to the 2000 Amendments to Fed. R. Evid. 702; *see also Nimely v. City of New York*, 414 F.3d 381, 395 (2d Cir. 2005) ("It is a well accepted principle that Rule 702 embodies a liberal standard of admissibility for expert opinions").

"[E]xpert witnesses are often uniquely qualified in guiding the trier of the fact through a complicated morass of obscure terms and concepts." *Id.* However, "the use of expert testimony is not permitted if it will usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying the law to the facts before it." *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994). Thus, although "an expert may opine on an issue of fact within the jury's province, he may not give testimony stating ultimate legal conclusions based on those facts." *Bilzerian*, 926 F.2d at 1294.

For example, in *Russo*, the Second Circuit affirmed the trial court's admission of a government expert's testimony because "it focused solely on factual considerations and did not involve any legal characterizations. [The expert] gave no opinion as to whether the appellants had violated the securities laws and did not make any statements about their intent; he simply described certain stock transactions and his opinion of their effect on the market." 74 F.3d at

1395; *see also Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 508 (2d Cir. 1977) (disapproving expert testimony that "did not concern practices in securities business, on which [the witness] was qualified as an expert, but were rather legal opinions as to the meaning of the contract terms at issue").

Justice Feldman's Testimony Will Help the Trier of Fact Understand Unfamiliar Terms and Concepts

Justice Feldman's testimony is admissible because it will help the jury "understand unfamiliar terms and concepts." *Bilzerian*, 926 F.2d at 1294. The jurors need expert guidance to understand that attorneys have ethical obligations and owe fiduciary duties to their clients. They also need an expert to explain the scope of these duties. Justice Feldman should be permitted to provide this testimony. *See Daubert*, 509 U.S. at 589 ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, an expert may testify thereto") (quoting Fed. R. Evid. 702).[2]

Justice Feldman's Testimony Will Not Intrude on the Role of the Judge or Jury

Great American's central argument is that Justice Feldman's testimony would intrude on the role of the judge and jury. To begin, Great American ignores Justice Feldman's analysis and explanation of the ethical rules and fiduciary obligations – and the manner in which they are codified. As discussed above such testimony does not even arguably amount to a legal conclusion and is clearly admissible.

Justice Feldman should be permitted to testify about the scope of the laws at issue, and the obligations they impose on attorneys like Ryce and Kirk. Such testimony will provide

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[2] It is clear that "expert testimony describing relevant background information, such as customary and industry practice in a given field, is frequently admissible if it will be helpful to the jury." *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 508-509 (2d Cir. 1977) (testimony about "step-by-step practices ordinarily followed . . . in shepherding a registration statement through the SEC" is admissible "under the same theory as testimony concerning the ordinary practices of physicians or concerning other trade customs: to enable the jury to evaluate the conduct of the parties against the standards of ordinary practice in the industry"); *CIT Group v. Graco Fishing*, 815 F. Supp. 2d 673 (S.D.N.Y. Sept. 23, 2011) ("[P]roposed testimony to establish prevailing customs and practices in the commercial lending industry is relevant and reliable and would be admissible for that purpose . . . .").

valuable context to the jury; it will not suggest to the jury that they ought to reach any particular result in the case.

Under Rule 704(a), "[a]n opinion is not objectionable just because it embraces an ultimate issue." Ariz. R. Evid. 704. Great American argues that Justice Feldman's testimony is inadmissible because it would be "couched in legal conclusions" that instruct the jury on how to decide the case. *Webb v. Omni Block, Inc.*, 216 Ariz. 349, 353, 166 P.3d 140, 144 (Ct. App. 2007). In support of this assertion, it summarizes Justice Feldman's expert disclosure (inaccurately), and concludes that he "purports to tell the jury how to decide the case." Motion at 6-7.

Great American is wrong. This is testimony about an unfamiliar subject matter that will *help* the jury decide the ultimate issue of coverage. It is certainly not "couched in legal conclusion," or instructing the jury how to decide the case. *Webb*, 216 Ariz. at 353, 166 P.3d at 144 ("opinion testimony by an expert witness that encompasses an ultimate issue is generally admissible when it alludes to an inference that the trier of fact should make.").[3] Moreover, its claim that Justice Feldman would be "usurping the Court's role" is simply incorrect; although the Court is charged with deciding issues of fact, it would be inappropriate for the Court to somehow testify about the scope of a lawyer's duties and explain them to the jury.[4]

Even if the Court concludes that Justice Feldman would express both permissible and impermissible opinions, the Court should disallow any impermissible opinions, but permit him to testify to the rest. In the *Webb* case cited by Great American, the Court concluded that the expert went too far when he attempted to apportion fault among the parties, but allowed him to

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[3] See *Dunham v. Pima Cnty.*, 161 Ariz. 304, 307, 778 P.2d 1200, 1203 (1989) (barring an expert witness from testifying regarding the dangerousness of an intersection was an abuse of discretion as it would have been helpful to the jury); *see also State v. Gentry*, 123 Ariz. 135, 137, 598 P.2d 113, 115 (Ct. App. 1979) (allowing an expert witness to give conclusion that he drew from the circumstances of the accident was proper even though one of his conclusions was an ultimate issue for the jury's determination.).

[4] We note that Justice Feldman's report includes a summary of the law of bad faith in Arizona. This discussion was included for background purposes only. Justice Feldman will not testify about the standards for bad faith at trial; the Court will do so, using the RAJI instructions.

testify about the roles and responsibilities of the parties in a construction project, and other issues relating to problems with the construction. 216 Ariz. at 353, 166 P.3d at 144. Likewise, in *Johnson*, the trial court ruled that an expert would not be permitted to testify about the intent of certain witnesses, which it said was "a quintessential jury question." 525 F. Supp. 2d at 78. But the *Johnson* Court did allow the expert to testify about other topics, including "securities industry practice and concepts," which it concluded would assist the trier of fact. *Id.* In particular, the Court concluded that the proposed expert – a CPA and a certified fraud examiner – could help the jury determine whether a company properly "booked" $3.65 million in a given quarter. *Id.* While the Court noted that the propriety of the defendant's action was ultimately a question for the jury, it concluded that the expert's opinion "that the revenue was improperly recorded and his interpretation of the facts and circumstances that caused him to arrive at that conclusion . . . will assist the jury in determining whether the $3.65 million was or was not properly recorded." *Id.* The propriety of the defendant's accounting actions, then, was "fertile ground for expert testimony," and the Court concluded that it was "an area of expert opinion ripe for vigorous cross-examination and competing experts." *Id.* [5]

Just so here. Justice Feldman will not tell the jury whether there was coverage under the policy, but his testimony about subsidiary issues will assist it in determining the scope of the law that Ryce and Kirk were bound to follow.

Great American Misrepresents Justice Feldman's "Fairly Debatable" Opinion

Great American focuses on Justice Feldman's opinions about the concept of "fairly debatable," which is the test for evaluating first-party bad faith claims like this one. Here, Great American says that Justice Feldman lacks sufficient facts to testify about whether coverage was "fairly debatable" in this matter.

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[5] Likewise, in *Deutsch v. Novartis Pharm. Corp.*, 768 F. Supp. 2d 420, 448 (S.D.N.Y. 2011), the Court ruled that an expert could not state legal conclusions or comment about whether a witness was "acting in good faith," but permitted the medical expert to offer his opinion about the information that was available to the defendant, based on medical literature and documentary evidence.

But this is a non-issue, as Great American misrepresents Justice Feldman's opinions. As he clarified at his deposition, Justice Feldman's "fairly debatable" opinions will not relate to all aspects of whether there was coverage under the policy. His opinions are only limited to one aspect of coverage: whether employees violated "duties as prescribed by law." *See* Ex. A, Feldman Dep. 96:6 – 97:15.

Great American's Challenge to the "Factual Basis" of Justice Feldman's Testimony Goes to Weight, Not Admissibility

Great American then says that Justice Feldman "lacks sufficient facts" to testify about the sufficiency of its claims investigation.

This argument, however, goes to the weight of the testimony, rather than its admissibility. If Great American wants to challenge the factual basis for Justice Feldman's testimony, it is free to challenge him on cross-examination. *See Pipher v. Loo*, 221 Ariz. 399, 404, 212 P.3d 91, 96 (Ct. App. 2009) ("Questions about the accuracy and reliability of a witness' *factual basis*, data, and methods go to the weight and credibility of the witness' testimony and are questions of fact ... [that do] not turn on the judge's preliminary assessment of testimonial reliability. It is the jury's function to determine accuracy, weight, or credibility.") (quoting *Logerquist v. McVey*, 196 Ariz. 470, 488, 1 P.3d 113, 131 (2000)) (emphasis added).

In any event, he does have a factual basis for the conclusion he reached. Great American includes a chart suggesting that Justice Feldman's "knowledge" does not match up with the "undisputed facts." Motion at 14. For example, Justice Feldman testified at his deposition that:

> Well, from reading through all this material, including Mr. Marston's deposition, I don't know that they ever did make a coverage determination. I believe they kept getting more information, and they never took a position until the case was filed and they responded by answering.

See Ex. A, Feldman Dep. 94:4-10. In the chart, Great American suggests that he was wrong about the facts because of its view that a November 2, 2010 letter – sent before the case was filed – provided reasons for denying the claim. This is the sort of factual dispute that goes to the weight of Justice Feldman's testimony. It is no reason to exclude it altogether.

Justice Feldman is Qualified to Testify about the Opinions in his Expert Report

Great American also challenges Justice Feldman's expertise to evaluate Great American's handling of Plaintiffs' claims. Its apparent point is that you need to be a claims examiner to provide expert testimony on claims examining. But the Rules are flexible on this point – no particular expertise or experience is required to qualify an expert to express opinions at trial, and Great American offers no authority to the contrary. *See Pincock v. Dupnik*, 146 Ariz. 91, 95, 703 P.2d 1240, 1244 (Ct. App. 1985) ("... All that is necessary is that the potential witness have information from experience, training or education that would be helpful to the present trier. Furthermore, it is not required that the witness have the best possible qualifications, nor the highest degree of skill or knowledge, so long as he does have skill and knowledge superior to that of men in general. ...") (internal punctuation and citations omitted); *Englehart v. Jeep Corp.*, 122 Ariz. 256, 258-59, 594 P.2d 510, 512-13 (1979) ("[T]he only true criterion is: on this subject can a jury receive from this person appreciable help? In other words, the test is a relative one, depending on the particular subject and the particular witness with reference to that subject, and is not fixed or limited to any class of persons acting professionally") (internal punctuation and citations omitted); *Lohmeier v. Hammer*, 214 Ariz. 57, 64, 148 P.3d 101, 108 (Ct. App. 2006) ("Thus, under Arizona law, it is not necessary that an expert witness be a medical doctor in order to offer testimony regarding the causation of physical injuries so long as the trial court has properly determined that the expert has specialized knowledge that will assist the jury in its resolution of that issue").

Justice Feldman testified that he has seen thousands of claim investigations in his career, both on and off the bench. The Court should reject Great American's rigid approach and rule that Justice Feldman is qualified to testify at trial.

Likewise, Great American argues that Justice Feldman is not qualified to express an opinion about the meaning of a particular policy provision because he has not previously encountered this provision before this case. The Rules do not require such a specific degree of expertise. In *United States v. Laurienti*, 611 F.3d 530, 548 (9th Cir. 2010), the Ninth Circuit rejected this very argument:

> The government argues that Meyer was not qualified as an expert because his opinions were not supported by any methodology other than his own work experience. But the government does not explain why Meyer's experience was not sufficient in this regard. **It is true that Meyer's experience was only at a large firm, that he had little experience with the types of stocks at issue in this case, and that he had never heard of the term "house stock." But those facts do not undermine his general knowledge of the NASD rules and his general knowledge of the industry as a whole.** Although the district court has a gatekeeping function, the district court here abused its discretion by sustaining some of the government's objections, particularly with respect to questions about the NASD rules.

Id. at 548 (emphasis added). Justice Feldman need not be an expert in a single policy provision to be qualified to opine on the interpretation of that provision.

Conclusion

Justice Feldman's opinions will help the jury navigate unfamiliar territory at trial. He is undeniably qualified to offer the opinions expressed in his report. Great American's motion to exclude them should be denied.

DATED this 12th day of December, 2014.

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