

APPLICATION FOR NOMINATION TO JUDICIAL OFFICE

**SECTION I: PUBLIC INFORMATION
(QUESTIONS 1 THROUGH 71)**

PERSONAL INFORMATION

1. Full name: Tracey Jo Westerhausen
 2. Have you ever used or been known by any other legal name? Yes
If so, state name: Tracey W. Wells
 3. Office address:
335 East Palm Lane
Phoenix, AZ 85004
 4. When have you been a resident of Arizona? Continuously since 1964.
 5. What is your county of residence and how long have you resided there?
Maricopa County; 52 years.
 6. Age: 58
 7. List your present and former political party registrations and approximate dates of each: I have been a registered Democrat since 1975.
 8. Gender: Female
- Race/Ethnicity: White
 Hispanic
 Black
 Native American
 Asian/Pacific Islander
 Other: _____

EDUCATIONAL BACKGROUND

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

Arizona State University, 1975 – 1976

Scottsdale Community College 1976 – 1978

Phoenix College 1978 – 1979 (Associate of Arts degree, paralegal studies)

Arizona State University 1980 – 1982 (Bachelor of Arts - English)

Arizona State University College of Law 1982 – 1985 (J.D.)

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

Undergraduate school: paralegal studies (community college); English major, with additional emphasis in German and in religious studies, but not enough to constitute minors (university).

From 1977 – 1982, I worked full time as a legal assistant and went to college full time.

Graduate school: major was study of law; my primary extra-curricular activity in graduate school was working.

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

First Year Moot Court Award for Best Brief (shared with my team-member); selection as intern to the Hon. Sarah D. Grant, Arizona Court of Appeals, Division One.

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.

Arizona, 1985.

District of Arizona Federal Court, 1986.

Ninth Circuit Court of Appeals, 1987.

United States Supreme Court, 1997.

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.
- 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.

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.

Employer	Dates	Location
<u>Debus, Kazan & Westerhausen, Ltd.</u>	<u>1998 to present</u>	<u>335 East Palm Lane Phoenix, AZ 85004</u>
<u>Debus & Kazan, Ltd.</u>	<u>1992 – 1998</u>	<u>335 East Palm Lane Phoenix, AZ 85004</u>
<u>Tracey Westerhausen Solo Practice</u>	<u>1988 – 1992</u>	<u>335 East Palm Lane Phoenix, AZ 85004</u>
<u>Debus, Bradford & Kazan, Ltd.</u>	<u>1986 – 1988</u>	<u>335 East Palm Lane Phoenix, AZ 85004</u>

The Hon. Sarah D. Grant
Court of Appeals, Div. 1

1985 – 1986

1700 West Washington
Phoenix, AZ 85007

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.

Current law partners: Larry L. Debus and Lawrence I. Kazan.
Associate: Gregory M. Zamora.

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.

My practice is now 95% criminal and juvenile law. I represent clients at the trial court level, on appeal, and in post-conviction relief proceedings. I also represent victims of crimes. Civil personal injury and civil forfeiture lawsuits comprise the remainder of my practice.

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

Previously, as a paralegal and then as an associate lawyer, I worked extensively in personal injury (both plaintiff and defense), medical malpractice (defense) and insurance law.

18. Identify all areas of specialization for which you have applied for or been granted certification by the State Bar of Arizona. None.

19. Describe your typical clients.

Criminal.

My criminal clients generally fall into three broad categories: individuals charged with crimes or convicted of crimes; individuals employed by a corporation under investigation; and, crime victims.

For the first category, as I am privately retained , many clients charged with a crime are business and professional people, or their relatives. But because I also represent clients for post-conviction review, about a third of my clients are incarcerated in prison.

For the second category, the client works for a corporation that is under investigation. Often, the investigative agency wants to interview the company's employees and have them appear before grand juries. I help the client through that process and protect the employee-client's interests.

Victims of crime represent the third category. While prosecuting agencies have the obligation to assure that victims' rights are honored in the process, victims increasingly assert their rights through private counsel.

Juvenile.

In juvenile court, I represent minors who are the subject of a petition for delinquency or for dependency. I also represent parents in dependency cases.

Civil.

Current plaintiffs' personal injury cases include one for adoption agency malpractice. The adoptive parents were with the birth mother s throughout her pregnancy and were there when the baby, a girl, was born. Unbeknownst to them, the first agency they hired to perform a home study on them wrote a letter to the court that contained misrepresentation. A juvenile court commissioner withdrew the parents' temporary adoption papers and ordered them to surrender the baby to the state. They never saw her again.

Another civil case is based on a detective's repeated lies under oath to obtain an indictment that the state dismissed after one defense motion.

Current claimants' forfeiture actions include a businessman whose family's assets were seized in 2010 and the State has done almost nothing to prove its case. Another is a mother of three, with one on the way, whose traffic stop is now the subject of a federal civil rights claim.

20. Have you served regularly in a fiduciary capacity other than as a lawyer representing clients? If so, give details.
- a. Board Member, Liberty Wildlife, a 501.c.3 non-profit corporation, from 1990 to present. Liberty Wildlife cares for indigenous wildlife that is orphaned, injured or ill. I was the chair for our annual fundraiser in 1999.
 - b. Friends of COMPAS, a sub-group of the now-defunct COMPAS non-profit corporation, which supported the Desert Botanical Garden, the Phoenix Zoo, the Phoenix Symphony, the Phoenix Art Museum, the Heard Museum and the Arizona Science Center as well as other, smaller non-profit local organizations. I was on the board from 1992 – 1995. In 1994, I was the co-chair of the annual fundraiser and the co-chair of the television auction in 1996.
 - c. Board Member, State Parks Board 2007 – 2013, chair 2011 – 2012.
 - d. Partner, Debus, Kazan & Westerhausen, Ltd., 1998 to present.
21. Describe your experience as it relates to negotiating and drafting important legal documents, statutes and/or rules.

The trial court cases, that I handle, typically involve complex and extensive motion practice on a variety of issues including issues under the Bill of Rights, the proper use of experts, other acts evidence (Rules 404.b and c), the rape shield law (A.R.S. §13-1421), victim's rights, and a variety of other legal issues. The same is true of the post-conviction cases.

For the State Bar of Arizona, I was a member and chair of what was then the Criminal Rules Committee from approximately 1992 – 1996. Judges, prosecutors and defense attorneys served on this committee. We regularly parsed and responded to petitions for rule changes. From 2009 – 2016, I served on a state bar committee that was exclusively for criminal defense attorneys: the Criminal Practice & Procedure Defense Subcommittee, where we did the same thing.

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.

i. The Arizona Board of Behavioral Health Examiners.

ii. The Arizona Board of Massage Therapy.

iii. The Arizona Board of Executive Clemency.

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

i. Sole Counsel: 9

ii. Chief Counsel:

iii. 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:

i. Sole Counsel: 3

ii. Chief Counsel:

iii. Associate Counsel: 1

In criminal cases, I have participated in settlement conferences too many times to count.

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.

a. **In the Matter of NN, a Person under 18 years of age.**

Maricopa County Juvenile Court
November 2015 – March 2016

Virginia Herrera-Gonzales, counsel for the Department of Child Safety
Office of the Attorney General
120 West First Avenue
Mesa, AZ 85210
602.771.4047
virginia.gonzales@azag.gov

Woodrow Thompson, counsel for Mother
Gallagher & Kennedy PA
2575 East Camelback Road, Suite 1100
Phoenix, AZ 85016
602.510.9999
woody.thompson@gknet.com

Fabiola Gilles, guardian-ad-litem
Law Center
1900 West University Drive, Suite 222
Tempe, AZ 85281
480.277.2525
lawfjg@aol.com

NN, a 16 year-old girl, told her boyfriend that her father (my client) had been molesting her since she was nine-years old. On November 23, 2015, from her boyfriend's home, she called the police. On December 3, 2015, at a second interview with police, NN recanted her claims. On December 8, 2015, DCS filed a dependency petition which led to NN and her younger sister being placed with their aunt and grandmother. In addition to the recantation, the defense presented DCS with the results of the Father's polygraph test results, which confirmed that he had never inappropriately touched NN. Nonetheless, Father eagerly participated in individual, couple's, and family counseling, because he recognized that something serious had to be amiss for NN to make the false allegations. The family's progress was dramatic, so much so that the assistant attorney general was persuaded to go along with a dismissal of the petition and the family remains united.

b. State v. GH.

Maricopa County Superior Court Cause No. CR2013-000XXX
January 2013 – June 2014
Judge Jeanne Garcia

Frankie Grimsman, counsel for the state
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Phoenix, AZ 85003
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GH was charged with nine counts of sexual exploitation of a minor (possession of child pornography) after police tied a computer internet connection to his address. If GH were convicted on all counts, he would be sentenced to a minimum term of 90 years in prison. The first offer was 10 years in prison, followed by probation with sex offender terms. The defense began mitigation and also, with the help of a computer-forensic expert, challenged the search that led to the discovery of the contraband on Fourth Amendment grounds. These steps helped in obtaining a new plea offer, to a prison term of two to two-and-a-half years, followed by sex offender probation. The judge imposed two years plus the requisite probation.

c. State v. CW

Maricopa County Superior Court CR2014-101XXX

Judge Teresa Sanders

January 2014 – November 2014

John Brinker, counsel for the state

Maricopa County Attorney's Office

301 West Jefferson Street

Phoenix, AZ 85003

602.372.0032

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Jason Lamm, counsel for the victim

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CW met the victim while they were both in rehabilitation. Both were physicians. They began living together in the victim's home. When the victim returned from a trip, he found that a floor safe had been drilled open and its contents gone. CW had nothing in the safe and no permission to access the safe. The state filed a complaint alleging burglary, a class 4 felony, and theft, a class 2 felony. As charged, CW faced mandatory prison time on the theft count, if convicted. CW entered into a plea agreement to Class 4 theft. The pre-sentence report writer recommended probation with four months of jail time. The court sentenced CW to three months of jail time. This was a good result for our client, who had no prior felony history. And it was a good result for the victim, who wanted CW to remain employed so that she could pay him back, which she did.

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

a. The approximate number of cases in which you appeared before:

i. Federal Courts: At least 10.

ii. State Courts of Record: Several hundred (See Note 1)

iii. Lower Courts (Municipal/Justice Court): At least several dozen (See Note 1)

Note 1: From 1986 – 1988, I worked for a partner with a busy practice in insurance defense and personal injury. In 1998, I began working primarily in criminal defense and have continued to do so to this day, in both felony and misdemeanor courts. I did not keep statistics on how many cases I handled since 1986.

b. The approximate percentage of those cases which have been:

i. Civil: 1986 – 1988: 100%
1988 – 2016: 5%

ii. Criminal: 1988 – 2016: 95%

c. The approximate number of those cases in which you were:

i. Sole Counsel: 60%

ii. Chief Counsel:

iii. Associate Counsel: 40%

- d. The approximate percentages of those cases in which:
- i. You conducted extensive discovery¹: 30%
 - ii. You wrote and filed a motion for summary judgment
(N/A Since 1988.) I have, however, in the last three years, survived two of the three motions for summary judgment that I responded to.
 - iii. You wrote and filed a motion to dismiss:
The closest criminal motion to a civil motion to dismiss is to ask the trial court to remand a case back to jury. 10%.
 - iv. 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%
 - v. You made a contested court appearance (other than as set forth in response): 95%
 - vi. You negotiated a settlement: 95%
 - vii. The court rendered judgment after trial: 1%
 - viii. A jury rendered verdict: 3%
 - ix. Disposition occurred prior to any verdict: 1%
- e. The approximate number of cases you have taken to trial:

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

I have not kept long-term statistics for the number of trials that I have conducted over the last 30 years.

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

Court: At least 3

Jury: At least 15

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

a. The approximate number of your appeals which have been:

i. Civil: 25%

ii. Criminal: 75%

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

i. As counsel of record on the brief

AZ: Unfortunately, I must approximate because I did not keep records of all the cases on which I worked. Over the years, my focus has been on my clients not necessarily keeping statistics. Westlaw lists 34 Arizona cases, but does not include older cases in which the Court of Appeals issued a memorandum decision. Westlaw also does not include appeals from misdemeanor court to the superior court.

U.S.: Approximately 8.

ii. Personally in oral argument

AZ: At least 12 times.

U.S.: At least three times before the Ninth Circuit.

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.

The Hon. Sarah D. Grant of the Arizona Court of Appeals, Division One, offered me the privilege of serving first as an intern and then as a law clerk from January 1985 to September 1986. The experience was professionally and personally enriching. Professionally, the positions allowed me to learn about every kind of law that could be the subject of an appeal. More importantly, they honed my writing skills. And, I got a close-up view of the workings of the Court. Personally, I am still friends with fellow clerks, and have maintained friendly relationships with the now-former judges.

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.

- a. State v. Palenkas, 188 Ariz. 201, 933 P.2d 1269 (App. 1996).
September 1995 – July 1997
Maricopa County Superior Court Cause No. CR2005-1112602
Trial Court Judge Christopher Skelly
Arizona Court of Appeals, Division One
Appellate Judges Ed Voss, James Sult and Susan Ehrlich

Marc Budoff, co-counsel (deceased)

Mona Peugh-Baskin, counsel for the appellee
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Phoenix, AZ 85007
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mona.baskin@azag.gov

Edward Palenkas was convicted of manslaughter and leaving the scene of a fatal injury accident. The trial court sentenced him to a total of ten and one-half years.

At trial, in violation of rulings on a defense motion in limine, the prosecution introduced evidence that when police contacted Mr. Palenkas, he would not let them look at his car, and told them he was waiting to hear from his lawyer.

The Court of Appeals concluded that admission of these areas of evidence violated Mr. Palenkas's due process right to a fair trial. After the state unsuccessfully petitioned the Arizona Supreme Court and the United States Supreme Court, the matter returned to the trial court. He was sentenced to time served and probation.

b. State v. TS

Maricopa County Superior Court No. CR2002-007xxx
April 2003 – June 2004
Judge Jeffrey Hotham

Lawrence I. Kazan, guilt-phase co-counsel
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Jeanette Gallagher, co-counsel for the state
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Maria Armijo, co-counsel for the state
U.S. Department of Justice
505.522.2304
maria.armiho@usdoj.gov
(No further information available)

TS was accused of murdering his estranged wife and her co-worker/lover at the latter's home by gunshot. The state filed the case as one of first-degree/capital murder. It was one of the earliest post-*Ring* cases. Evidence issues included personal knowledge of witnesses under Ariz. R. Evid 602, relevance under Rules 401 and 403, and character evidence under Rule 404.a. Constitutional issues included a "presumption of death" question on the jury questionnaire as objectionable under the Eight Amendment, and whether the Eighth Amendment precluded a death sentence after the jury hung at the penalty phase. The parties agreed that Judge Hotham could decide the sentence, and he imposed natural life.

- c. **State v. Rhodes, 219 Ariz. 476, 200 P.2d 973 (App. 2008)**
April 2005 – November 2009
(First trial, appeal, second trial)
Maricopa County Superior Court No. CR2005-112602-001
Trial Court Judge (first trial) Bethany Hicks
Trial Court Judge (second trial) Commissioner Shellie Smith
Arizona Court of Appeals, Division One
Appellate Judges Maurice Portley, Philip Hall and John Gemmill

Yigael Cohen, counsel for the state in both trials
Maricopa County Attorney's Office
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Phoenix, AZ 85003
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Lisa Marie Martin, counsel for appellant
Maricopa County Attorney's Office
301 West Jefferson Street
Phoenix, AZ 85003
602.506.7422
martinl@mcao.maricopa.gov

Daniel Raynak, co-counsel for second trial
2601 North 16th Street
Phoenix, AZ 85006
602.992.5545
danraynak@yahoo.com

Steven Rhodes was accused of sexual conduct with a minor, by licking the genitals of a nine-year-old girl during a Halloween party at his home. Prior to trial, the defense moved to allow witnesses to testify regarding Mr. Rhodes's reputation for sexual normalcy, and their observation that his conduct around children was appropriate, under Ariz. R. Evid. 404.a.1 and 405.a. The motion was denied. After the jury convicted Mr. Rhodes, the defense moved for a new trial on grounds that included that the Rules 404.a.1 and 405.a testimony should have been allowed. The trial court granted the motion on that basis, and the state appealed.

The Court of Appeals affirmed the trial court. After the Arizona Supreme Court denied review, the case returned to the trial court. At the new trial, the jury heard from at least five witnesses regarding reputation and conduct evidence. The jury acquitted Mr. Rhodes.

d. State v. EE

Maricopa County Superior Court Cause No. CR2006-163xxx

January 2009 – July 2010

Judge Warren Granville

Lawrence I. Kazan, guilt-phase co-counsel

Debus, Kazan & Westerhausen, Ltd.

335 East Palm Lane

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Louis Giaquinto, co-counsel for the state

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Mr. E. was charged, along with a co-defendant, for the murder of a police informant. The defense interviewed many witnesses pre-trial in case mitigation evidence would be necessary. At trial, issues included a response to the state's change of tactic to an *Enmund/Tison* theory to support the death penalty. After the jury found guilt and a death eligible factor, it returned a verdict of life.

e. State v. JO

Maricopa County Superior Court No. CR2011-140XXX

October 2014 – November 2015

Judge Brad Astrowsky

Gregg Woodnick, co-counsel

Gregg R. Woodnick, PLLC

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Brad Miller, counsel for the state

Deputy County Attorney

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Phoenix, AZ 85003

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JO had three locations in the Valley where he ran a web-cam business. His web-cam employees, all women 18 years of age or older, performed sexually-based requests from web-cam viewers. Five of the employees complained that JO had sexually assaulted them while at work. This resulted in 23 counts of sexual misconduct. A tricky issue for the defense was avoiding questions that might violate Arizona's rape shield law, A.R.S. §13-1421. The jury returned verdicts, finding him guilty of all but one offense with regard to four victims, and acquitting him as to the fifth.

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.).

Only as an arbitrator for Maricopa County Superior Court cases that are subject to mandatory arbitration. Of those, only four ever went all the way through arbitration.

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.

Not applicable.

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

Until our associate, Greg Zamora, joined the firm in 2015, I was the only lawyer to act as trial co-counsel, in criminal cases, with both Larry Debus and Larry Kazan. As you can imagine, those experiences were beyond priceless in terms of developing trial preparation, strategy, and advocacy skills.

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? Yes. If so, give details, including dates.

During my high school and early college years, I worked as a restaurant cashier and waitress. During my later college years and part-time in law school, I worked as a legal assistant, as follows:

Van O'Steen
3505 North 7th Avenue
Phoenix, AZ 85013
602.252.8888
vosteen@vanosteen.com
From 1978 –1979

Kenneth L. Tucker
Now at Tucker and Miller
1440 East Missouri Avenue, Suite C150
Phoenix, AZ 85014
602.714.9864
kent@tucker-miller.com
From 1979 – 1984

33. Are you now an officer, director, or majority stockholder, or otherwise engaged in the management, of any business enterprise? No.
34. Have you filed your state or federal income tax returns for all years you were legally required to file them? Yes.
35. Have you paid all state, federal and local taxes when due? No. If not, explain.

During the time when I practiced on my own, my bills and mortgage payment were greater than the money than I was earning, and I failed to withhold money for taxes. While I filed late tax returns, both state and federal, for the years in question (1988 – 1991), I didn't pay the taxes when due. My taxes to the State of Arizona have been paid in full, as of 1995. The Internal

Revenue Service and I entered an agreement for monthly payments in 1994, which ended in no later than 2003.

36. Are there currently any judgments or tax liens outstanding against you? No
37. Have you ever violated a court order including but not limited to an order for payment of child or spousal support? No.
38. Have you ever been a party to a lawsuit, including bankruptcy but excluding divorce? Yes. If so, identify the nature of case, your role, the court, and the ultimate disposition.

In 1976, I was a passenger in a car that collided with a semi-tractor-trailer and I was injured. My attorney filed suit, which must have been in the Maricopa County Superior Court. The case was settled. I do not remember the amount.

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

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

On May 7, 2016, the Town of Paradise Valley's photo radar captured me going 53 mph in a 40 mph zone. I'm taking traffic school on-line.

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.

In 1998, the firm sued to recover fees in a case in which I was the attorney of record: Debus, Kazan & Westerhausen, Ltd, v. Karen Hennessy, Maricopa County Superior Court No. CV1998-22981. Ms. Hennessy had agreed to pay legal fees for her then-boyfriend, and then reneged. The firm received an arbitration award, and the case settled.

In 2002, my former client, Roy Haught, sued the firm. In Gila County, Mr. Haught was accused of second degree murder and aggravated assault in the beating death of a man from Strawberry, Arizona. He was convicted of negligent homicide and aggravated assault, and received a sentence of probation. That sentence was overturned on appeal. Mr. Haught sued because he claimed he thought that Larry Debus was going to try his case (even though Mr. Debus never made any appearances in court), and he didn't think I did as good a job as Mr. Debus would have. I believe the carrier settled for \$10,000.

44. List and describe any litigation involving an allegation of fraud in which you are or were a defendant. None.
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. None.
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.
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? N/A.

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.
49. In the past year, have you ever been reprimanded, demoted, disciplined, placed on probation, suspended, cautioned or terminated by an employer as result of your alleged consumption of alcohol, prescription drugs or illegal use of drugs? No.
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.
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.
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.
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 substantive requirements of any business or contractual arrangement? No.
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.

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.

Chapter 4, Arizona Appellate Handbook, co-author since 1992 for each edition, until 2001.

Chapter 24, Arizona Appellate Handbook, co-author from 1993 – 2001 for each edition.

56. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge? Yes.
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.
- a. October 2001, Appellate Advocacy Institute Faculty Member.
 - b. February 2005, Prevent Child Abuse Seminar, The Defense Attorney Perspective of the Investigation of Sex Crimes - practice cross-examination for police officers and social workers.
 - c. February 2006, Prevent Child Abuse Seminar, The Defense Attorney Perspective of the Investigation of Sex Crimes - practice cross-examination for police officers and social workers.
 - d. April 25, 2008 SANE (Sexual Assault Nurse Examiner) Presentation, The Criminal Trial Process.
 - e. March 31, 2012, Arizona Psychological Association, Required Breaches of Confidentiality.
 - f. June 27, 2013, Strangulation Seminar in conjunction with the Maricopa County Attorney's Office.

- g. June 25, 2014, Arizona Public Defenders Association, What You Need to Know when Handling Your First Sex Case.
 - h. June 24, 2016, Arizona Public Defenders Association, Responding to the Psychology of Prosecutors.
58. a. List memberships and activities in professional organizations, including offices held and dates.

State Bar of Arizona since 1985

Arizona Attorneys for Criminal Justice, 1994 to present

National Association of Criminal Defense Attorneys, 1999 – 2015

Arizona Women’s Lawyer Association, 2002 to present

- b. 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.

- c. 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.

Expert for State Bar of Arizona in misconduct case, February 2002

Chairman, Criminal Rules Committee, State Bar of Arizona, 1997 – 2000

Member, Criminal Rules Committee, State Bar of Arizona, 1993 – 2000

Member, Criminal Practice of Procedure Defense Subcommittee, State Bar of Arizona, 2009 – 2016

Reviewed pro bono case for the Justice Project, in an effort to see if the defendant-inmate should have a new trial, based on new DNA testing, 2001 – 2007. The original case was *State v. Hummert*, ’88 Ariz. 119, 933P.2d 1187 (1997).

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

December 2014 to June 2016, member, workgroup, “Child Sexual Abuse: Assessment and Early Intervention for Alleged Abusers, Protective Parents, and the Child Who Alleges Sexual Abuse.” This was a collaboration of judges, mental health care providers, prosecutors and defense attorneys to create a “bench book” (currently being edited) for family court judges who have cases that also involve allegations of child sex abuse.

June 2016 to present, member, workgroup, “Start by Believing,” for the Governor’s Office of Youth, Faith and Family. The group is reviewing the pros and cons of implementing a campaign to have law enforcement officers and related professionals commit to believing a victim of a sex offense at the first reporting.

From 2001 – 2004, I served on the Citizen’s Advisory Committee for the Madison Elementary School district. We were parents from each school whose main purpose was to try to educate our legislators about school and district issues.

Since 1988, I have volunteered for Liberty Wildlife, a non-profit foundation devoted to wildlife education and to caring for injured, sick and orphaned indigenous wildlife. In the past, my work included education programs at schools and weekly hands-on care for the “patients.” Starting in 1997, my participation switched to that of a board member and fund-raiser. I was the benefit chairman in 1999.

I was also a member of Friends of COMPAS, an arts and sciences support group, from 1992 – 1995, and was the co-chairman of the annual benefit in 1994. In 1996, I co-chaired the COMPAS television auction. COMPAS disbanded in approximately 2001.

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

Martindale-Hubbell (martindale.com)

AV Preeminent rating since at least 2005 to present.

Best Lawyers in America since at least 2011 to present.

Arizona's Finest Lawyers since at least 2008 to present.

61. a. List any elected or appointed offices you have held and/or for which you have been a candidate, and the dates. None.
- b. Have you been registered to vote for the last ten years? Yes.
- c. Have you voted in all general elections held during those years? Yes.

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

As a criminal defense attorney, my job can be extremely stressful. So, outside of work, I like to read, cook and garden. When I'm going out to eat, which I also like to do, I seek out dog-friendly places.

Another activity I enjoy is to assist in political campaigns. For state Representative and later Senator Ken Chevront, I learned about the grass-roots process of campaigning door-to-door in every one of his 10 runs for office. For Terry Goddard, I manned phone banks for his campaigns for the offices of attorney general and governor.

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.

My mom and dad, Jo and J Westerhausen, are from Wyoming. My dad left to attend the U.S. Naval Academy; my mom became a registered nurse and followed him to Washington, D.C., to work in a hospital. My dad took a commission with the Air Force (there was no Air Force Academy at the time). Mom wanted to enlist, but did not because she would have outranked my dad. They married at the Academy during June week.

Because my dad was in the service, we lived in a few places: Mississippi (where I was born); Texas (where my sister was born); and, South Dakota. We knew what it was like to build a new life with each transfer.

When my dad left the service, he accepted an engineering position in Boulder, Colorado. Then, when I was five- or six-years-old, we moved to Mesa, Arizona, where my parents still live. My brother was born there.

The Wyoming part of my family's background is important because you can't be from that state and not love the outdoors. I'm very lucky to have parents who took us camping in parks, not just in Arizona, but throughout the West. We grew up hunting and fishing. All three kids took the NRA hunter-safety course. The only fishing I do now is crabbing, but I love to birdwatch, thanks to my folks.

My son Ethan was seven when I adopted him, and he fit right in with his new grandpa and uncle, hunting and fishing. He, too, is a graduate of the hunter-safety class. Ethan's biological father retired from the Army, and Ethan followed in his footsteps as a member of the Army Reserves.

I know that I am incredibly lucky to be born into my family. I hope to bring that appreciation to the bench – to do what the law allows me to – to help people, agencies and businesses in our community.

The diversity I bring to the bench – gender – is, I’m happy to say, not as great as it used to be. The additional perspectives that contribute to diversity are that I’ve worked full-time and attended school full time at the same time, and know the value of hard work. I’ve paid salaries, insurance premiums and the like for our small business (the law firm) and understand small-business issues.

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

Representing victims (usually children) is part of my practice; many people don’t realize that defense attorneys often perform this role. When I represent a victim, invariably what they want is simply not to have to testify. This gives me the opportunity to use my negotiation skills on behalf of a victim, instead of on behalf of a defendant.

When people find out that I’m a criminal defense attorney, and one who often represents defendants accused of a sex crime, the question I always get is, “How can you defend those guys?” There are at least three responses to that question. First, serving the federal and state constitutions is an honor that all lawyers have. Second, Arizona’s sentencing laws for convicted sex offenders are among the harshest in the nation. In cases that are suitable for negotiation, I try to get some balance in the equation. Third, if everyone performs their jobs fairly and correctly, most of the time justice is served, is the goal.

66. If you are 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.
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.

68. Attach a brief statement explaining why you are seeking this position.
69. Attach a professional writing sample, which you personally drafted (e.g., brief or motion). The sample should be no more than a few pages in length. You may excerpt a portion of a larger document to provide the writing sample. 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).

Not applicable.

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.

Not applicable

68. Statement Explaining Why I'm Seeking This Position

I've been a criminal defense attorney for most of my legal career. But the types of crimes I defend often affect an entire family. So, I deal not only with the defendants, but their families who are in crisis, too. I believe that the way that I listen to all sides, while still fighting for my clients, has earned me the respect of judges, prosecutors and my colleagues.

The almost daily review of statutory, rule and constitutional issues has, over the years, rounded my experience so that I could serve well in family, civil and juvenile court.

I also believe that I have the skills and demeanor to serve effectively as a judge. The best prosecutors have the ability to see all sides of an issue. That is true as well of criminal defense attorneys and I believe I have that ability.

For thirty years now, I have served my community in three aspects. I've represented defendants, of course, but also juveniles who were the subject of neglect or alleged neglect, parents accused of neglect, and victims of crimes. I would like to serve the community – and the rule of law – by becoming a superior court judge. It would be an honor.

69. Professional Writing Sample

1 Tracey Westerhausen
2 Debus, Kazan & Westerhausen, Ltd.
3 335 East Palm Lane
4 Phoenix, AZ 85004
5 Telephone: (602) 257-8900
6 Facsimile: (602) 257-0723
7 Email: tw@dkwlawyers.com
8 State Bar #010518

9 Natalee E. Segal
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11 1095 East Indian School Road, Ste 600
12 Phoenix, AZ 85014
13 Telephone: (602) 277-0044
14 Facsimile: (602) 277-1097
15 State Bar #016775
16 Attorneys for an Apartment Complex

17 **Superior Court of the State of Arizona**
18 **County of Maricopa**

19 State of Arizona,)
20) No. LC2016-000177
21 Appellee,)
22 -vs-) Phoenix Municipal Court
23) No. 20129028614
24)
25 (An Apartment Complex),)
26)
27)
28 Appellant.)

29 **Appellant's Reply Memorandum**

30 Attorneys for Appellant

31 Tracey Westerhausen
32 Natalee Segal

1 **I. The Testimony of the City's Witnesses should have been Analyzed**
2 **under Rules 701 and 702.**

3 At issue in this case were alleged violations of various codes for lack of
4 safety. They included Section 116.3, Unsafe Buildings or Structures, of the
5 Phoenix City Codes, the Fire Code, and Chapter 39 of the Neighborhood
6 Preservation Ordinance. (Appellant's Opening Brief Appendix at 68-80.) Also at
7 issue were blight/deterioration counts that largely were visible to an observer, such
8 as trash and weathered paint.
9
10

11 RR was the structural inspections field supervisor.¹ It was his job to
12 "enforce the International Building Code, i.e., look at the commercial buildings,
13 which would be everything except for a one and two family dwelling. So we look
14 at Circle K's to the Bank One Ballpark, to high-rises, to apartment buildings and
15 everything in between."² He also looked "at the Building Code from a structural
16 standpoint and a nonstructural standpoint, as far as life safety and seismic activity
17 and everything that deals with the International Building Code."³
18
19
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21

22 RR testified as an expert, hardly as a layperson. For example, for Count 25
23 of Complaint 2012-9028615 (the second complaint), he discussed the parking
24
25

26 ¹ Trial Transcript, November 11, 2014, at page 31. (hereinafter T date at page
27 number.)

28 ² T 11-14-13 at 20.

³ T 11-14-13 at 20.

1 canopy at Building G. He said that the parking canopy created an “unsafe
2 condition”:
3

4 The steel post, the steel vertical posts are used to support the roof, but
5 they’re also used for a lateral support of the structure itself. There’s – when
6 you have a building, you’ve got four sides on it. Well when you have a
7 parking canopy, you’re using the poles themselves to support the lateral
8 function of the, of the structure. So once you damage the poles like they are,
9 you lose the ability to safely laterally stabilize that canopy.⁴

10 He went on in technical detail about the design of the canopy, “They’re not really
11 considered a heavy structure. Their design on them, I believe, is only 20 pounds a
12 square foot for loading, where on a building it would be 30 to 40 pounds per square
13 foot So it’s about a half of what a building would be at – of occupy-able
14 building.”⁵
15

16 Turning to Count 26 of the same complaint, Richards testified about what
17 the complaint called a “steep site ramp”:
18

19 Ramps, the maximum level of degree – maximum steepness . . . of
20 the ramp is only for every foot that you go, you’re only allowed to drop one
21 inch. Anything more than that, somebody trying to come up that in a
22 wheelchair, in . . . the old World War II style hospital wheelchairs . . .
23 would go over backwards. So that’s why they, you know, they put that at a
24 1 in 12 slope. Eight percent is the grade. 8.3 percent is the grade that’s
25 allowed.⁶
26

27 ⁴ T 11-15-13 at 17.

28 ⁵ T 11-1513 at 18.

⁶ T 11-15-13 at 18-19.

1 He added that this was required by the Phoenix Construction Code.⁷ He concluded
2 by discussing the “allowable slope,” and said that this slope was double that
3 amount.⁸

5 When pressed about taking any measurements, RR said that he measured
6 every stairwell.⁹ Aside from using his hands to press on one or two handrails to
7 note deflection,¹⁰ he did not measure or test any of the structures.

9 AE was an asset manager for a company that provided management for the
10 complex. He was at the property when RR was inspecting and photographing. AE
11 asked RR to take measurements and tests; RR said no.¹¹

14 The code provision applicable to debris defined debris as “substance of little
15 or no apparent economic value which may be present in accumulations in excel of
16 six inches in height and ten inches in diameter” No one measured the
17 accumulations to see if they met the code parameters.¹²

19 MS, a structural engineer for the City, testified regarding her qualifications.
20

21 ⁷ T 11-15-13 at 19.

22 ⁸ T 11-15-13 at 19-20.

23 ⁹ T 04-03-14 at 20-21.

24 ¹⁰ T 01-08-14 at 23-24.

25 ¹¹ T 02-07-14 at 3.

26 ¹² T 01-08-14 at 96. (See Appendix 1 at Appellant-3.) See also RICHARDS:
27 “Building L, the entire building was written up as an incipient.” MCGILL: “I
28 presume you did not do any testing of the, you know, the load or any kind of
measurements?” RICHARDS: “I just did a visual inspection.” T 01-21-14 at 4;
appellant’s Opening Appendix at P.81-90.

1 I have a bachelor's degree in architectural engineering. I have a
2 master's degree in structural materials engineering. I also have a master's
3 degree in business administration. I have 16 years of engineering
4 experience, including everything from design, various components of the
5 structural design, through project management and code, code enforcement.
6 I am also registered license professional engineer in the State of Arizona,
7 and also State of Texas. And I hold certification as a building plans
8 examiner. And at the time of the inspection, I – my title was commercial
9 inspection supervisor for planning and development department of City of
10 Phoenix.¹³

11 MS described her work history prior to coming to work for the City. She worked
12 for the Department of Energy for six and a half years and had her own consulting
13 company as a structural engineer after that prior to the City.¹⁴ On August 21, 2012,
14 she was RR's supervisor.¹⁵ She, too, was hardly a layperson.

15 She testified, for example, about Count 20 of Complaint No. 2012-9028614
16 (the first complaint). At issue was the common stairway between units 117, 118,
17 119 and 120 in Building G. Referring to Exhibit 26 (in the Reply Appendix), she
18 testified about "chamfer," the curved nosing of the concrete step.¹⁶ Her technical
19 explanation, with no measurements at all, of the defects in the stairway included:
20

21 This is what we have encountered. If you look at the photo just by
22 shadowing, you can tell there is a height difference. Furthermore, you see
23 that the rounded portion of the concrete appears to be, of the, of the left slab,
24 appears to be elevated above the surface of the right concrete and I can tell
25 by looking at that's chamfer of the concrete, that's typically a ¾ inch

26 ¹³ T 11-27-13 at 51.

27 ¹⁴ T 11-27-13 at 52.

28 ¹⁵ T 11-27-13 at 52.

¹⁶ T12-13-13 at 6.

1 chamfer, so my deduction looking at the picture is that's at least a 3/4 inch
2 difference.¹⁷

3 JE worked for neighborhood services for 19 years, the last 16 as the area
4 supervisor. He supervised a team of inspectors who enforced codes that applied to
5 neighborhood preservation, property maintenance ordinance (Phoenix City Code
6 39), and zoning code. He also made sure that the inspectors were following policy
7 and procedure and that they were doing the inspections in the way that is required
8 by the department and enforcement of the codes in the way that was mandated.
9
10

11
12 JE's professional credentials included certificates from the International
13 Conference of Building Officials and from the American Association of Code
14 Enforcement.¹⁸ He testified to violations of the Phoenix City Ordinance which
15 adopts the fire code,¹⁹ such as a window air conditioner that blocked "rapid
16 egress."²⁰ He also testified to specific instances of blight, such as "failure to
17 maintain the exterior surfaces, they're weathered. Paint is bad shape. ... there is
18 litter and debris on the balcony including paper, plastic and vegetative material and
19 other materials."²¹
20
21
22
23
24

25 ¹⁷ T 12-13-13 at 45.

26 ¹⁸ T 01-9-14 at 29-32.

27 ¹⁹ T 01-06-14 at 22.

28 ²⁰ T 01-06-14 at 22.

²¹ T 01-07-14 at 48.

1 The defense attorney consistently pressed on the lack of testing and
2 measuring. He asked JE, “Did you do any testing or measurements before you
3 concluded that an item was structurally unsound?” JE’s response: “I don’t know
4 what you mean by testing.” The defense attorney followed up with, “Do you know
5 what testing means?” And the witness said, “I have a vague understanding of what
6 testing can mean.”²² JE admitted that he did nothing to verify his assumptions or
7 theories with numbers, calculations, measurements and that kind of process.²³
8
9
10

11 The city employed RT as a fire inspector. His duties included inspections of
12 businesses, residential sites, assisted living facilities and special events, for code
13 compliance and for violations. The training that he received included the ICC, also
14 known as the International Code Counsel Inspector I, ICC International Code
15 Counsel Inspector II, along with plan review. It also included continuing
16 education classes and on-the-job training. He was familiar with matters such as the
17 need for fire extinguishers and what constitutes a problem of ingress/egress as
18 required by the fire code.
19
20
21

22 These witnesses are excluded by Rule 701 as lay witnesses. The rule
23 provides:
24

25 If a witness is not testifying as an expert, testimony in the form of an opinion
26 is limited to one that is:

27 ²² T 01-08-14 at 23. (See Appendix 1 at Appellant -2.)

28 ²³ T 01-08-14 at 24.

- 1 (a) rationally based on the witness's perception;
2 (b) helpful to clearly understanding the witness's testimony or to determining
3 a fact in issue; and
4 (c) not based on scientific, technical, or other specialized knowledge within
5 the scope of Rule 702.

6 While RR, MS, RT and JE could fit the first two prongs of Rule 701, sub-part c as
7 the third prong excludes them. Their familiarity with extensive codes and
8 recognizing violation of those codes is certainly "scientific, technical, or other
9 specialized knowledge."
10

11 Instead, these witnesses testified as expert witnesses, under Rule 702:

12 A witness who is qualified as an expert by knowledge, skill, experience,
13 training, or education may testify in the form of an opinion or otherwise if:

- 14 (a) the expert's scientific, technical, or other specialized knowledge will
15 help the trier of fact to understand the evidence or to determine a fact in
16 issue;
17 (b) the testimony is based on sufficient facts or data;
18 (c) the testimony is the product of reliable principles and methods; and (d)
19 the expert has reliably applied the principles and methods to the facts of the
20 case.

21 The defense agrees that prong (a) was met by each expert. The defense challenges
22 the remaining three prongs. The record does not reveal sufficient facts or data that
23 the experts relied on. The defense made this point repeatedly. The experts did not
24 establish that they used reliable principles and methods. This, too, was focused on
25 by the defense. Nor was there any showing the experts reliably applied the
26 principles and methods to the facts of the case. As the Opening Brief noted, at
27
28

1 page 25, "Each expert simply said there was a violation." There was too great an
2 analytical gap between the data and the opinions to satisfy the rules of evidence.
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