

**APPLICATION FOR NOMINATION
TO JUDICIAL OFFICE**

**SECTION I: PUBLIC INFORMATION
(QUESTIONS 1 THROUGH 65)**

PERSONAL INFORMATION

1. Full Name: **Jeffrey Louis Sklar**
2. Have you ever used or been known by any other name? **No**
If so, state name: **Not applicable**
3. Office Address: **Arizona Superior Court in Pima County / 110 West Congress St., Suite 555W / Tucson, AZ 85701**
4. How long have you lived in Arizona? **I have lived in Tucson since February 2010. I previously lived in Arizona from 1994 to 2000, from 2001 to 2004 and from August 2007 to August 2008. I maintained my Arizona residency while attending college in California from August 2000 to May 2001 and while attending law school in California from August 2004 to August 2007. I was a California resident from August 2008 to February 2010.**
What is your home zip code? **85742**
5. Identify the county you reside in and the years of your residency. **Pima County, most recently since February 2010.**
6. If nominated, will you be 30 years old before taking office? yes no
If nominated, will you be younger than age 65 at the time the nomination is sent to the Governor? yes no
7. List your present and any former political party registrations and approximate dates of each: **Republican, since 2000 (registered in Arizona except from**

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approximately August 2008 to February 2010, when living and registered to vote in California).

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

8. Gender: **Male**

Race/Ethnicity: **Caucasian**

EDUCATIONAL BACKGROUND

9. List names and locations of all post-secondary schools attended and any degrees received.

University of Southern California – August 2000 to May 2001 (no degree)
University of Arizona – August 2001 to May 2004 (Bachelor of Arts)
University of Southern California – August 2004 to May 2007 (Juris Doctor)

I also received credit at Pima Community College for several classes that I took as a student at Salpointe Catholic High School. I graduated from Salpointe in 2000.

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

At USC in 2000 and 2001, I majored in print journalism.
At the UA, I majored in journalism and political science, and I minored in Spanish.

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

At the UA, I was a member of Mortar Board Senior Honorary and Phi Beta Kappa. I also graduated *summa cum laude*, which meant that my grade point average was over 3.9. Before my senior year, I received a scholarship as the outstanding student in the College of Social and Behavioral Sciences, which was the largest college in the university. I also received merit scholarships from the Department of Journalism.

For the entire time I attended the UA, I worked for the *Arizona Daily Wildcat*. My positions included reporter, news editor, and editor in chief. Some of these positions required 40 hours of work per week, in addition to my full-time course load. As editor in chief, I led a staff of nearly 100 students in putting out a high-quality, popular daily newspaper. My work, and that of

our staff, was honored by multiple national organizations. In 2004, I received a 10th place national award for in-depth writing and a 16th place national award for personality profiles from the William Randolph Hearst Foundation. I also received the *Daily Wildcat* scholarship.

Beginning in August 2004, I attended USC's Gould School of Law on a merit scholarship. USC was and is ranked among the nation's top 20 law schools. I worked for two years on the *Southern California Law Review*, the school's principal journal. In my 3L year, I was executive notes editor, which was one of six positions on the journal's executive board. I oversaw the selection of student notes for publication and the editing process for notes written by 2Ls. I graduated from USC in the Order of the Coif, an honor reserved for students with the top 10 percent of grade-point averages.

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 any administrative bodies that require special admission to practice.

State courts of Arizona (admitted October 2008)

State courts of California (admitted July 2008)

State courts of Nevada (admitted May 2013; inactive as of December 2021)

U.S. District Court for the District of Arizona (admitted March 2010)

U.S. District Court for the Northern District of California (admitted January 2018)

U.S. District Court for the Central District of California (admitted July 2009)

U.S. Court of Appeals for the Ninth Circuit (admitted March 2010)

U.S. District Court for the District of New Mexico (admitted *pro hac vice* February 2011)

I should add one point of clarification about the dates of admission. I passed the July 2007 bar exam in California and could have been admitted that year. But because I was serving as a law clerk and could not practice law, I chose to delay my admission until shortly before the end of my clerkship.

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. **Not applicable**

- b. Have you ever had to retake a bar examination in order to be admitted to the bar of any state? **No.**

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If so, explain any circumstances that may have hindered your performance. **Not applicable**

14. Describe your employment history since completing your undergraduate degree. List your current position first. If you have not been employed continuously since completing your undergraduate degree, 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
Arizona Superior Court	3/21-present (judge) 7/22-present (family presiding judge)	Tucson
Lewis Roca Rothgerber Christie LLP (formerly Lewis & Roca LLP) (formerly Lewis Roca Rothgerber LLP)	1/15-2/21 (partner) 3/10-12/14 (associate)	Tucson
Irell & Manella LLP	9/08-1/10 (associate)	Los Angeles
Arizona Supreme Court Law Clerk to Justice Scott Bales	8/07-8/08	Phoenix
Mayer Brown Rowe & Maw LLP (now Mayer Brown LLP)	7/06-8/06 (summer associate after 2L year) 6/05-7/05 (summer associate after 1L year)	Los Angeles
Irell & Manella LLP	5/06-7/06 (summer associate after 2L year)	Los Angeles
Jamestown Associates	6/04-8/04 (political consultant)	Tucson

Although not employment, I also interned for Congressman Jim Kolbe in Summer 2004 and at the Los Angeles County District Attorney's Office in Fall 2006.

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

See Exhibit A-1 (Lewis Roca Rothgerber Christie attorneys from September 2017 to February 2021 (my departure from the firm));

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Exhibit A-2 (Judges and commissioners on Arizona Superior Court in Pima County from March 2021 to present).

16. Describe the nature of your law practice over the last five years, listing the major areas of law in which you practiced and the percentage each constituted of your total practice. If you have been a judge or commissioner for the last five years, describe the nature of your law practice before your appointment to the bench.

I am the presiding judge on the family bench of the Superior Court in Pima County. I have served in that role since early July 2022. There are 13 judicial officers on the family bench. As presiding judge, I do not supervise the judicial officers — who manage their chambers and make decisions independently — but I have administrative responsibilities concerning the family bench’s functioning. These responsibilities include working with the Conciliation Court, which provides services such as mediation and child interviews. They also include facilitating family-law legal clinics, managing dozens of volunteer judges *pro tem*, and helping the county presiding judge manage the court’s functioning. I also maintain my own caseload.

I have been a family judge since March 2022. I preside primarily over divorce and special paternity cases. I conduct frequent trials and evidentiary hearings. As there are no jury trials in family court, I am the decision-maker. The subject matter ranges from property division to parenting time and legal decision-making.

When I joined the Superior Court in March 2021, I was assigned to the civil bench. I served on that bench for a year. I conducted both bench and jury trials, including five jury trials that went to verdict. I also heard and decided numerous motions, ranging from simple to very complex. The cases spanned an enormous range of factual and legal issues. Simple cases involved credit-card debt defaults and minor car accidents. Complex cases involved wrongful deaths, medical malpractice, and commercial disputes.

Before taking the bench, my law practice consisted primarily of commercial litigation. My cases involved disputes over unpaid loans, breaches of leases, and sales of businesses. The most complex — and my favorites — involved complicated financial transactions that spanned years and required expert witnesses to interpret. I enjoyed reading financial statements and appraisals, which often held the keys to winning and losing cases. I likewise enjoyed the challenge of translating the financial records into legal arguments and communicating them clearly in my writing. I understand that the Court of Appeals has relatively few judges with a background in complex commercial disputes. That is one area where I could immediately add depth to the court.

Aside from commercial cases, my practice spanned eminent domain, antitrust, receiverships, and bankruptcy. I practiced regularly in the state and federal courts across Arizona, including the appellate courts. In my last few years as a lawyer, my practice's geographic scope expanded to California, where I handled similar types of cases in state and federal courts, as well as arbitration.

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

Early in my career, I handled some personal injury and product liability cases. My practice later gravitated away from those cases. While working at Irell & Manella in Los Angeles, I also worked on intellectual property litigation.

Until being appointed to the court, my whole career was in a civil practice, though I worked on criminal cases as a law clerk at the Arizona Supreme Court and an intern at the Los Angeles County District Attorney's Office. In private practice, I also served for about two years as a judge *pro tem* handling family law settlement conferences. That experience helped immensely as I became a family judge.

18. Identify all areas of specialization for which you have been granted certification by the State Bar of Arizona or a bar organization in any other state. **None**
19. Describe your experience as it relates to negotiating and drafting important legal documents, statutes and/or rules.

My primary experience in drafting legal documents relates to settlement agreements. When the cases that I handled would settle, I typically drafted a settlement agreement. These ranged in complexity from a few pages to 30 pages or more. In my litigation practice, I also drafted pleadings, motions, briefs, discovery requests and responses, and other documents. And as a judge, I have drafted dozens of rulings.

20. 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 Registrar of Contractors – 2
City of Tucson Zoning Examiner – 1

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

Sole Counsel: 0

Chief Counsel: 3

Associate Counsel: 0

21. 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: 20

Chief Counsel: 6

Associate Counsel: 15

22. List at least three but no more than five contested matters you negotiated to settlement. State as to each case: (1) the date or period of the proceedings; (2) the names, e-mail addresses, 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.

a. ***Daniel Nowlin, et al. v. Farm Credit Services Southwest, et al.***
U.S. Bankruptcy Court, District of Arizona Case Nos. 4:14-bk-16069-BMW; 4:14-bk-16072-BMW; 4:14-bk-16073-BMW; and
Adv. No. 4:15-ap-00048-BMW
Hon. Brenda Whinery

Arizona Superior Court – Pinal County, Case No. CV 2014-02506
Hon. Jason Holmberg and Hon. Robert Carter Olson

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This matter was litigated from 2014 to 2018. It was probably the most complex piece of litigation that I handled. It involved a series of interconnected disputes against my client, a federally chartered agricultural lender. A group of borrowers filed bankruptcy and simultaneously filed a lawsuit against my client. They sought millions of dollars in damages. My client asserted counterclaims for tens of millions of dollars in unpaid loans. The borrowers alleged that my client had made improper loans that had drowned their businesses in debt and caused their principals to lose millions of dollars in investments. After we defeated a summary-judgment motion in the Bankruptcy Court, we negotiated a complicated settlement with most of the borrowers. The settlement was memorialized in a Chapter 11 plan that was confirmed by the Bankruptcy Court. However, several of the borrowers rejected the settlement and proceeded with litigation in state court. That litigation was hotly contested. After we succeeded on several motions for partial summary judgment, we negotiated a settlement with those remaining borrowers.

These cases were significant because of their complexity. We disclosed tens of thousands of documents, took numerous depositions, and fended off complicated claims from plaintiffs whose interests were often diverging. The complexity of the case required long-term strategic thinking. Because my client was federally regulated, the governing statutes and regulations added a further layer of complexity. We needed to comply with those rules while effectively representing our client's interests.

b. *Tonn Investments v. Eco Clean Solar, Inc.*
U.S. District Court, District of Arizona Case No. 2:15-cv-2048-DLR
Hon. Douglas Rayes

U.S. Bankruptcy Court, Central District of California, Santa Ana
Division Case Nos. 8:13-bk-12153-SC and Adv. Case No. 8:15-ap-
01421-SC
Hon. Scott Clarkson

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Attorneys for Richard Marshack, Chapter 7 Trustee

This case was litigated from 2016 to 2018. I represented the court-appointed receiver for a large solar construction contractor. A receiver is a court-appointed officer responsible for protecting and preserving the assets of the company in receivership. Once a receiver is appointed, it is common for numerous parties to threaten or initiate litigation against the company. The receiver's duties include defending against and resolving that litigation. As the receiver's counsel, I defended against a hotly contested fraudulent-transfer claim that had been brought by a bankruptcy trustee in California. I eventually settled that claim favorably. I also settled a dispute with the company's landlord, as well as other claims against the company. The case concluded after all claims were settled.

This case was significant because it involved the intersection of numerous areas of law, across multiple states. For example, in the

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fraudulent-transfer case, we had to address whether the matter should be heard by a Bankruptcy Court in California or U.S. District Court in Arizona. The case also involved issues of California landlord-tenant law and Arizona debtor-creditor law. These issues had to be untangled against the backdrop of receivership law, which is often not well-defined. I found receivership work fascinating because it involved a wide range of disputes across many areas of law. My receivership experience, which is somewhat unusual, would be a unique benefit that I would bring to the appellate bench.

- c. *PGS Trading, Inc., et al. v. Lee Lee Oriental Supermarket, et al.*
Arizona Superior Court – Pima County, Case No. C20142842
Hon. Charles Harrington and Hon. Jeffrey Bergin

Chandler Municipal Court Case Nos. 14-C-H102-1 and 14-C-H104-1
Hon. Gary Lafleur

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Attorneys for Lee Lee Oriental Supermart, Inc.

This case was litigated in 2014 and 2015. I represented the suppliers of a chain of grocery stores that was owed several million dollars by

the store owners. In partial settlement of that debt, my client had also acquired one of the stores. I was retained shortly after the stores' owner obtained an injunction against harassment against my clients. Very quickly thereafter, I appeared at a trial in the Chandler Municipal Court to quash the injunction, where I was successful. After that, I represented my clients in a preliminary injunction trial in Pima County. My clients were partially successful. After significant further litigation and a 12-hour mediation, we reached a settlement that allowed my clients to recover a significant amount of money.

This case was significant for several reasons. First, I was able to represent my clients in two trials in a short period of time. Second, the amount of money was significant to both sides. Third, because all the parties were first-generation immigrants, I had to successfully navigate the cultural pressures that were motivating the parties.

- d. *In re Sister Jose Women's Shelter*
City of Tucson Zoning Examiner – matter number SE-16-21
Zoning Examiner: Jim Mazzocco

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Attorney for Sister Jose Women's Shelter

I handled this matter in 2016. My clients were residents of a local neighborhood. They objected to a request by a women's shelter for an exception to the zoning regulations. The exception would have allowed the shelter to move into the neighborhood. My clients had legitimate concerns about whether the shelter was suited for their neighborhood, or whether it would fit better in another location. Before I was involved, the dispute had been hotly contested and received substantial media coverage. I represented my clients at a contested hearing before the Zoning Examiner. Although we put on a strong case, the Zoning Examiner ruled against us and allowed the zoning exception. However, due in part to the trust I had built with opposing counsel, we were able to work out a settlement even after the adverse ruling. The settlement involved the shelter moving to a different location, where it has thrived.

This case was significant because it was high-profile and controversial. The adverse party had done great work for the

community, so it had a great deal of public support. I am proud of the way I advocated my client's position while remaining respectful of the other side's good work. I believe my approach to handling the case was a significant reason the case was able to ultimately be resolved on mutually agreeable terms.

- e. **MC Management v. University Medical Center Corp.**
Arizona Superior Court – Pima County, Case No. C20096861
Hon. Kenneth Lee

John Gabroy (deceased)
Lyle Aldridge (inactive)
Bosse Rollman P.C. (formerly Gabroy Rollman Bosse P.C.)
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520.320.1300
Attorneys for MC Management

I litigated this case from approximately 2010 to 2012. I represented a hospital that leased apartments to house patients who were recovering from transplants. The patients were immunocompromised, so it was important that the apartments be clean. After a series of incidents involving mold and other contaminants, the hospital ended its relationship with the apartment complex. The apartment owner sued the hospital for the unpaid balance on the leases. I successfully defended against a summary-judgment motion from the apartment owner. I also obtained an important ruling that the leases were not residential. This meant that the provisions of the Arizona Residential Landlord-Tenant Act did not apply. We then prevailed on numerous motions *in limine*, and the case settled less than a week before the jury trial was set to begin. This was a significant case because it required me to navigate emotionally sensitive issues involving a hospital's need to care for its patients.

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

The approximate number of cases in which you appeared before:

Federal Courts: 80
State Courts of Record: 130
Municipal/Justice Courts: 10

The approximate percentage of those cases which have been:

Civil: 99%

Criminal: 1%

The approximate number of those cases in which you were:

Sole Counsel: 40%

Chief Counsel: 30%

Associate Counsel: 30%

The approximate percentage of those cases in which:

You wrote and filed a pre-trial, trial, or post-trial motion that wholly or partially disposed of the case (for example, a motion to dismiss, a motion for summary judgment, a motion for judgment as a matter of law, or a motion for new trial) or wrote a response to such a motion: 20%

You argued a motion described above 10%

You made a contested court appearance (other than as set forth in the above response) 20%

You negotiated a settlement: 20%

The court rendered judgment after trial: 5%

A jury rendered a verdict: 0%

The number of cases you have taken to trial:

Limited jurisdiction court 1

Superior court 4

Federal district court* 0

Jury 0

*** I tried 4 cases in the United States Bankruptcy Court, in addition to the five trials listed above, for a total of 9 court trials.**

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

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

The approximate number of your appeals which have been:

Civil: 10 (including bankruptcy appeals)

Criminal: 0

Other: 0

The approximate number of matters in which you appeared:

As counsel of record on the brief: 10

Personally in oral argument: 2

25. Have you served as a judicial law clerk or staff attorney to a court? **Yes.**

If so, identify the court, judge, and the dates of service and describe your role. **I served as a law clerk to Justice Scott Bales of the Arizona Supreme Court from August 2007 to August 2008. My work involved writing bench memos for cases on which the court had granted review. The memos summarized the arguments and applicable law, and they made recommendations on how the court should decide the cases. I also prepared the first draft of opinions in cases that had been assigned to Justice Bales and reviewed and commented on opinions prepared by other justices. I worked on civil, criminal, and family cases.**

A significant portion of the court's work involves capital cases, which are automatically appealed to the Supreme Court. Each capital case was assigned to a law clerk, whose job was to review the record, including the entire trial transcript. Law clerks were required to undertake this review to ensure that the court was adequately prepared to review the case. I found the work on capital cases to be among the most important work of my clerkship. Of course, it was good exposure to criminal law. But more importantly, it was an opportunity to work on cases that involved the most serious crimes that a person can commit, but where protecting the defendant's rights are of the highest importance.

26. List at least three but no more than five cases you litigated or participated in as

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an attorney before mediators, arbitrators, administrative agencies, trial courts or appellate courts that were not negotiated to settlement. 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 judge or officer before whom the case was heard; (3) the names, e-mail addresses, 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.

a. *First Credit Union v. Craig Courtney, et al.*

**Arizona Superior Court – Pima County, Case No. C20111505
Hon. Jan E. Kearney; Hon. Ted B. Borek**

**Arizona Court of Appeals, Division Two, Case No. 2 CA-CV 2013-0005
Hon. Joseph W. Howard; Garye L. Vasquez; Michael Miller.**

Supreme Court of Arizona Case No. CV-13-0319-PR

**G. Lawrence Schubart
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520.623.5466
Attorney for Defendants**

This case took place from 2011 to 2014. I represented a credit union that was seeking to collect an unpaid loan in the amount of about \$3.7 million. The loan had been secured by a lien on commercial real estate. My client foreclosed that lien, then sued the guarantors to recover the balance due after the foreclosure. The balance was approximately \$1.3 million, plus interest. The guarantor sought summary judgment on several legal issues. I successfully opposed those motions. The case then proceeded to trial to determine the fair market value of the property that my client had foreclosed. This was an important issue because under Arizona's anti-deficiency statute, a lender cannot recover from a guarantor more than the difference between the loan balance and the foreclosed property's fair market value. The trial involved competing expert appraisers, as well as the guarantor's own opinion of value. Ultimately, the court agreed with my appraiser's valuation and awarded my client the full balance due. The guarantors appealed, and the Court of Appeals affirmed the judgment in a published opinion. The guarantors filed a petition for review with the Arizona Supreme Court, which was denied.

This case was significant because I handled the trial and appeal on

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my own, despite being a junior lawyer. It is unusual for a large-firm associate in a commercial practice to be allowed to handle a seven-figure trial on his or her own. It was also an example of a case where understanding real-estate appraisals and valuations was essential. My client prevailed because I was able to persuasively demonstrate why our expert's appraisal more accurately valued the property than our opponent's appraisal.

- b. *LegalForce RAPC Worldwide v. State Bar of Arizona, et al.*
U.S. District Court, Northern District of California Case No. 5:17-cv-7194-MMC

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Attorneys for Plaintiff Legal Force RAPC Worldwide, P.C.

This case was litigated from 2017 to 2018. I represented the State Bar of Arizona in an antitrust dispute filed by a lawyer in Northern California. The lawyer was upset that certain state bar associations, including Arizona's, were in his view, preventing him from offering certain trademark-related services without engaging in the practice of law. He believed that other entities were allowed to provide similar services without practicing law, and that he was at a competitive disadvantage because he was required to comply with the legal ethics rules. This case received coverage in the national legal press. After extensive negotiations, I persuaded the plaintiff to dismiss the case against the State Bar of Arizona.

This case was significant because it provided me the opportunity to represent the State Bar of Arizona. I was especially pleased to do so in the California courts, where I practiced frequently in more recent years. The case also presented some interesting substantive issues in the antitrust area. And the work was gratifying, as I was able to obtain a quick dismissal on behalf of the State Bar.

I should add that the State Bar of Arizona was one of many defendants. I have not listed counsel for the other defendants, with whom I had very little contact. If the Commission would like that information, I am happy to provide it.

- c. ***John Dumbolton, D.O. v. Community Health Systems Professional Services Corporation, et al.***
Arizona Superior Court – Gila County, Case No. S0400CV201200296
Hon. Bryan Chambers

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Co-counsel for Defendant Community Health Systems Professional Services Corporation**

This case took place from 2012 to 2018, though my involvement did not begin until 2014. My client was the management company for a hospital in Payson. My client had been sued by an emergency room doctor who had been employed by a practice that worked in the hospital. After the doctor was removed from the schedule of physicians practicing in the emergency room, he sued the hospital

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and its CEO, along with my client. He alleged tortious interference and other claims. After extensive document discovery, my client moved for summary judgment. I handled the briefing and oral argument, and my client prevailed. It was also awarded attorneys' fees.

This case was significant because it involved a complex set of contractual relationships between my client, the hospital, and other related parties. To obtain summary judgment, I had to demonstrate that my client could not have had a meaningful role in the events that gave rise to the doctor's claims. This required a succinct presentation of the facts and a clear explanation of the legal principles. I have always prided myself on providing clear and concise explanations of legal issues. This case illustrates that doing so can yield positive results. Of course, those same explanatory skills are important qualities in an appellate judge, who must explain the bases for the decision, including to parties and lawyers who it will disappoint. Those explanations must also be both persuasive and useful to people relying on that decision in the future, especially where it creates binding precedent.

- d. *Jose Alfredo Ramirez-Carrasco v. Holder*
United States Court of Appeals for the Ninth Circuit Case No. 12-70902
Judges Farris, McKeown, and Tashima

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Acting Assistant Attorney General
Ada E. Bosque
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Jem C. Sponzo
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This was an immigration appeal that I handled on a *pro bono* basis from 2012 to 2014. My client was in detention. He was seeking an immigration remedy called cancellation of removal, which would have allowed him to stay in the United States despite certain criminal convictions. I was appointed as counsel by the Ninth Circuit to

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ensure that he would have counsel to craft his legal arguments. I spent dozens of hours preparing the briefs and handling the oral argument. I was successful on one of my arguments, and the case was remanded to the Board of Immigration Appeals for further proceedings.

This case was significant for two reasons. First, it demonstrates my willingness to learn new areas of law. I had never handled an immigration matter, so I had to spend many hours learning the relevant issues. As I did in that case, an appellate judge must be willing to become immersed in unfamiliar areas. Second, this case demonstrates my commitment to *pro bono* work.

e. *Truitt v. Truitt, et al.*

Arizona Superior Court – Pima County, Case Nos. C20074380 and C20112768 Hon. Scott Rash, Hon. Paul Tang

Arizona Court of Appeals, Division Two, Case No. 2 CA-CV2011-0119
Hon. J. William Brammer, Jr., Hon. Peter J. Eckerstrom, Hon. Joseph W. Howard

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I litigated these cases from 2010 to 2017. They were part of a complicated family dispute involving ownership of business entities. My client was a partnership that owned a medical office building in Sierra Vista. The two family members involved in the dispute, an

uncle and his nephew, were both partners in the partnership. The uncle sued my client, alleging that it had refused to change its records to identify what he believed was the rightful owner of the partnership interest. We sought and obtained summary judgment. The uncle appealed, and the Court of Appeals affirmed. My client was awarded its attorneys' fees at both levels. We continued litigating a related matter, involving a lease of partnership office space, for several more years before that matter settled.

These cases were significant because they were hotly litigated for many years and required a great deal of persistence. My client was only a bit player in the larger dispute between the family members. My job was to extract my client from that dispute as quickly and inexpensively as possible. By obtaining summary judgment and having it affirmed on appeal relatively early in the dispute, I was able to minimize my client's risk and ultimate exposure.

27. 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.).

In January 2021, Governor Ducey appointed me to the Arizona Superior Court in Pima County. I took office in March 2021. I served for one year on the civil bench, where I presided over a wide range of cases. These included medical malpractice and personal injury cases, property disputes, and commercial cases. I oversaw and decided issues at every phase of the civil process, including jury trials.

Much of my work on the civil bench involved drafting written rulings on substantive motions. These included case-dispositive motions such as summary-judgment motions, motions to dismiss, and motions to compel arbitration. I drafted over 50 of these written rulings. They often ran several pages or more. My goals were to provide clear and detailed explanations for my rulings, as well as to demonstrate to the parties that I grappled with all their substantive legal arguments. I have attached two samples as Exhibits E and F.

In March 2022, I rotated to the family bench. My duties include deciding high-conflict, high-stakes disputes involving sensitive personal issues. Nearly every day, I decide matters involving parenting time and decision

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making for children. I also have to decide matters involving property division, spousal maintenance, and child support. While emotionally difficult, the work is rewarding.

From 2018 to early 2021, I also served as a judge *pro tem* for the Pima County Superior Court. This is a volunteer appointed position. I typically served one half-day per month, primarily conducting settlement conferences. I was also appointed as an arbitrator in several superior court matters. Most of these matters settled before my services were required, but I did decide an auto-accident matter in December 2019.

28. List at least three but no 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, e-mail addresses, 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.

- a. ***Carla Leshne v. City of Tucson, et al.***
Arizona Superior Court – Pima County, Case No. C20196316

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Kurt Kroese
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This was a wrongful-death case involving a pedestrian who was hit by a vehicle at an intersection in Tucson. The case went to trial in October 2021. The plaintiffs were the wrongful-death beneficiaries of the victim. In addition to the driver, they sued the City of Tucson for defective roadway design. Both parties sought summary judgment, which I denied in a lengthy ruling. The City then sought to bifurcate the trial under a statute that provides it with immunity against road-design claims under certain circumstances. I granted the motion in part, so the jury trial proceeded in two phases. The first phase involved allocating liability for the crash between the driver and the City. After six days, the jury found the driver 90 percent at fault, and the City 10 percent at fault. That night, the driver and the plaintiff entered into a confidential settlement. The case then proceeded to the second phase, where the jury was required to determine the total amount of damages. It found the total damages to be \$1.2 million.

This was a significant case because it was the first case that was tried to verdict in front of me. I learned a great deal about managing juries and making quick decisions at trial. Although none of my rulings were appealed, the case presented a valuable lesson in understanding why appellate courts must be deferential to trial courts' evidentiary rulings. In making those rulings, trial judges must react quickly to the tone and tenor of the testimony. These matters are rarely clear on an appellate record. The issues presented on appeal can therefore look significantly different than they did in real time. The case was also significant because it presented issues of factual and legal complexity. Nevertheless, I spent considerable time drafting rulings that explained my reasoning.

- b. *Anita Busha, et al. v. Christopher Compton, et al.*
Arizona Superior Court – Pima County, Case No. C20182328**

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This was a medical malpractice case that culminated in a seven-day jury trial. I presided over the trial in February 2022. During a biopsy of a blood vessel near the plaintiff's ear, the defendant, a vascular surgeon, inadvertently removed a section of the plaintiff's nerve. The result was that the plaintiff, an 80-year-old woman, lost the ability to involuntarily blink. She alleged that the injury was the result of the surgeon's negligence. The surgeon argued that the plaintiff had failed to prove that he had violated the standard of care. After a full day of deliberation, the jury rendered a verdict in favor of the plaintiff. It awarded total damages of \$800,000.

This trial was also significant for its complexity. I decided 10 motions in limine leading up to the trial, some of which were interrelated and required careful monitoring at trial to ensure that counsel and the witnesses complied. The trial was also noteworthy because it was one of Pima County's first civil trials under the new jury-selection rules that eliminate peremptory strikes. I was nervous about how jury selection would run given that both the lawyers and I were accustomed to the old procedures. But jury selection ran smoothly, and we seated an attentive and thoughtful jury.

- c. *Tucson Restoration LLC v. Anne Mohr, et al.*
Arizona Superior Court – Pima County, Case No. C20193675

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This case involved a three-day jury trial over which I presided in December 2021. The case involved a home-restoration contractor that sued customers who it alleged failed to pay for restoration services. The homeowners defended on various grounds, most notably that the work had been inadequately performed. The parties hotly contested the issues. I decided six motions *in limine* and numerous disputes over jury instructions. The jury ultimately reached a verdict in favor of the contractor. I later awarded attorneys' fees to the contractor. The homeowners appealed, but the parties settled before the appeal could be briefed.

This was a significant case due in large part to the high quality of the lawyers on both sides. They were very well prepared and attuned to the issues. I knew my decisions needed to be well-supported. The case also tested my trial-management skills. Many witnesses testified, and the parties presented complicated disputes that could have resulted in the trial not finishing within the allotted three days. This would have created significant problems, as there was no possibility of bringing the jury back for a fourth day. Fortunately, the jury reached a verdict — though at 5:30 p.m. on a Friday — and the parties obtained the resolution they needed.

- d. *Caraleen Fawcett v. Vincent Flores*
Arizona Superior Court – Pima County, Case No. SP20120508**

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**Vincent Flores
Self-Represented Respondent**

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Contact information in confidential section

This case involved a family-court trial that presented complicated issues. The mother sought to modify prior orders for legal decision-making and parenting time, and the father sought to relocate with the minor child to Oregon. After a two-day trial in May 2022, I issued a detailed ruling that awarded the parties joint legal decision-making, with the father having the final say on certain issues. I also awarded each parent substantial parenting time. I denied the father's request to relocate with the child to Oregon. Under the family-law statutory scheme, I was required to make detailed findings that weighed the facts concerning the parents' relationships with the child, the parents' own complex histories, and other issues. Ultimately, I concluded that the outcome I reached was in the child's best interests.

The case was significant for two main reasons. First, the father was self-represented, while the mother had counsel. Cases in which only one party is represented present unique challenges, because judges must even-handedly require compliance with the rules while acknowledging the self-represented party's unfamiliarity with those rules. Second, the facts were complex. The parties' minor child had profound physical and mental disabilities, and the parties disagreed about the best means for treating them. Each of the parties also had complicated backgrounds. The case involved mental-health and substance-use issues, and both parents had spent substantial time apart from the minor child.

- e. *Danielle Schipper v. Michael Rutherford*
Arizona Superior Court – Pima County, Case No. SP20120094**

**Danielle Schipper
Self-represented Petitioner
Contact information in confidential section**

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This case was tried in July 2022. It concerned whether prior legal decision-making and parenting-time orders should be modified. The

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issue was whether a child should live primarily with his mother in Tucson or his father in Texas. The child had strong parents and support systems in both places, and he had done well in both locations. He had lived primarily in Tucson, but he had spent the last school year in Texas. His mom wanted him to return to Tucson for the new school year, while his father wanted him to remain in Texas. After hearing testimony from both parties and other witnesses, I ruled that the child should continue living primarily in Texas, while spending summers and many holidays in Tucson.

This case was significant because it was emotional. When I joined the family bench, I was warned that some of the most difficult decisions would involve cases where two good parents lived a substantial distance apart. In those cases, it is impossible to allow the parents equal parenting time, as the child needs to remain in one place for the school year. This case illustrated that emotional challenge. The child would have been well-served in either location, but as the judge, I had to choose. I concluded that his interests would be slightly better served by residing primarily in Texas.

Delivering my decision was one of the most challenging moments of my judicial career. As I often do, I ruled orally from the bench rather than in writing later. Doing so here allowed me to be as empathetic as possible. I repeatedly reassured both parents that the child was in good hands with each of them and needed both of them involved in his life. There were tears in the courtroom — some of them mine — as I made my ruling. But I am hopeful that both parties left the courtroom convinced that I treated each of them fairly, humbly, and respectfully.

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

In addition to my litigation work, I served as outside general counsel to the Metropolitan Domestic Water Improvement District. This was a role I took over when one of my former partners, John Hinderaker, was appointed to the Superior Court. He is now a judge on the United States District Court. My work included reviewing and advising the District on a range of contractual issues, as well as on the risks and benefits of potential litigation. I also provided advice to the Board of Directors, including in executive session, and I represented the District in three eminent domain cases. Because the District is a public body, I was required to work with open meeting and public record laws, as well as the set of statutes that govern the District's authority. My exposure to these areas of law will serve me well when matters of municipal and other public law come before me on the bench.

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I also served as outside counsel to the Arizona-Sonora Desert Museum. I advised the Museum on issues ranging from contract review to potential litigation risks.

BUSINESS AND FINANCIAL INFORMATION

30. 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. **Not applicable.**

31. Are you now an officer, director, majority stockholder, managing member, 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. **Not applicable.**

Do you intend 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, explain your decision. **Not applicable.**

32. Have you filed your state and federal income tax returns for all years you were legally required to file them? **Yes.**

If not, explain. **Not applicable**

33. Have you paid all state, federal and local taxes when due? **Yes.**

If not, explain. **Not applicable**

34. Are there currently any judgments or tax liens outstanding against you? **No.**

If so, explain. **Not applicable**

35. Have you ever violated a court order addressing your personal conduct, such as orders of protection, or for payment of child or spousal support? **No.**

If so, explain. **Not applicable**

36. Have you ever been a party to a lawsuit, including an administrative agency matter but excluding divorce? **Yes.**

If so, identify the nature of the case, your role, the court, and the ultimate

disposition. I was named as a defendant in *Samuel Rodriguez v. GE Capital Commercial, Inc., et al.*, Pima County Superior Court Case No. C20136586. This case was filed by a *pro se* litigant against whom I had been representing a client. As I recall, the complaint alleged improper behavior in connection with a foreclosure and the litigation I had been handling. The allegations were not meritorious. The complaint and summons were never served, and the case was eventually dismissed.

37. Have you ever filed for bankruptcy protection on your own behalf or for an organization in which you held a majority ownership interest? **No.**

If so, explain. **Not applicable**

38. Do you have any financial interests including investments, which might conflict with the performance of your judicial duties? **No.**

If so, explain. **Not applicable**

CONDUCT AND ETHICS

39. Have you ever been terminated, asked to resign, expelled, or suspended from employment or any post-secondary school or course of learning due to allegations of dishonesty, plagiarism, cheating, or any other “cause” that might reflect in any way on your integrity? **No.**

If so, provide details. **Not applicable**

40. Have you ever been arrested for, charged with, and/or convicted of any felony, misdemeanor, or Uniform Code of Military Justice violation? **No.**

If so, identify the nature of the offense, the court, the presiding judicial officer, and the ultimate disposition. **Not applicable**

41. If you performed military service, please indicate the date and type of discharge. If other than honorable discharge, explain. **I have not served in the military. I registered for the Selective Service upon turning 18 years old.**

42. List and describe any matter (including mediation, arbitration, negotiated settlement and/or malpractice claim you referred to your insurance carrier) in which you were accused of wrongdoing concerning your law practice. **None.**

43. List and describe any litigation initiated against you based on allegations of misconduct other than any listed in your answer to question 42. **See answer to Question 36.**

44. List and describe any sanctions imposed upon you by any court. **None.**

45. Have you received a notice of formal charges, cautionary letter, private admonition, referral to a diversionary program, or any other conditional sanction from the Commission on Judicial Conduct, the State Bar, or any other disciplinary body in any jurisdiction? **No.**

If so, in each case, state in detail the circumstances and the outcome. **Not applicable**

46. During the last 10 years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by federal or state law? **No.**

If your answer is “Yes,” explain in detail. **Not applicable**

47. Within the last five years, have you ever been formally reprimanded, demoted, disciplined, cautioned, placed on probation, suspended, terminated or asked to resign by an employer, regulatory or investigative agency? **No**.

If so, state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) and contact information of any persons who took such action, and the background and resolution of such action. **Not applicable**

48. 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 and contact information 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. **Not applicable**

49. 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 the circumstances of the litigation, including the background and resolution of the case, and provide the dates litigation was commenced and concluded, and the name(s) and contact information of the parties. **Not applicable**

PROFESSIONAL AND PUBLIC SERVICE

50. Have you published or posted any legal or non-legal books or articles? **Yes**.

If so, list with the citations and dates.

- **Co-Author, "Creditor Options in the COVID-19 Pandemic," *InBusiness*, 04/23/2020**
- **Co-Author, "How the Uniform Commercial Real Estate Receivership Act ("UCRERA") May Be An Option For Business Creditors Affected By the COVID-19 Pandemic," Blog, April 2020**
- **Author, "Arizona Governor Prohibits Most Commercial Lockouts and Evictions Through May 31, 2020," Blog, April 2020**
- **Co-Author, "Tenants Face Questions and Landlords Face Rent Losses During COVID-19 Pandemic," Blog, March 2020**

- Co-Author, "Changes to California Law Impact Collection of Consumer Debt," Lewis Roca Rothgerber Christie, 10/01/2018
- Co-Author, "A New Year and a New Arizona Anti-Deficiency Statute," 01/21/2015
- "Arizona Supreme Court to Decide if Borrowers and Guarantors Can Waive Fair Market Value Defense," 10/08/2014
- Co-Author, "Anti-Deficiency Protection Held Not to Extend to Vacant, Unimproved Residential Lots," *Lewis Roca Rothgerber LLP Client Alert*, 02/05/2014
- "Prospective Waivers of the Fair Market Value Defense Held Invalid," *Lewis Roca Rothgerber LLP Client Alert*, 12/11/2013
- Co-Author, "Reimbursement for LTD Overpayments Questionable in the Ninth Circuit," *ERISA Report*, April 2013
- *Author*, "The Presses Won't Stop Just Yet: Shaping Student Speech Rights in the Wake of Hazelwood's Application to Colleges," 80 S. Cal. L. Rev. 641, 2007

51. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge? **Yes.**

If not, explain. **Not applicable**

52. 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. **I was a member of the Morris K. Udall Inn of Court from approximately 2010 to 2015. The Inn of Court met monthly, and each month, a group of members gave a presentation on a legal topic of interest. Each member was supposed to be part of a group that presented each year, though I recall that my group ended up not presenting one year. I do not recall the reason. I do not have my notes from the presentations that I did give, but I can recall speaking about mentorship, election law, and then-recent Supreme Court decisions.**

I gave a presentation on state public records law to a client sometime in 2010.

I also presented in-house CLE seminars at Lewis Roca. The first, in 2018,

concerned collection of judgments. The second, in August 2020, concerned landlord-tenant issues in bankruptcy.

Also in 2018, I moderated a panel discussion on changes to the Local Rules of Bankruptcy Procedure. This discussion was hosted by the Federal Bar Association, the local chapter of which I was a board member.

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

- Arizona Family Court Improvement Committee (2022-present)
- Interfaith Community Services, Board of Directors (2014-2022), Board Secretary (2017-18), and Fund Development Committee Chair (2018-2021)
- Federal Bar Association William D. Browning Tucson Chapter, Executive Board (2018-2021)
- Pima County Superior Court Judge Pro Tem (2018-2021)
- Federalist Society Southern Arizona Chapter, board member (2018-2021)
- Greater Tucson Leadership (2011-2012)
- Morris K. Udall Inn of Court (2010-15 (approximate))
- St. Thomas More Society of Southern Arizona (2018-present, vice president 2020-present)

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? **All such service is listed in my answer to the prior question.**

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. **All offices in bar-related activities are described in my answer to the prior question.**

With respect to *pro bono* service, I am not permitted as a judge to provide legal services. But until I was appointed, *pro bono* work was an important part of my practice. For several years leading up to my appointment, I devoted considerable time to working in *pro bono* clinics at Southern Arizona Legal Aid and Step

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Up to Justice. My focus in these clinics was on consumer issues, so I advised attendees on issues like potential bankruptcy filing, disputes with lenders, and landlord/tenant issues.

Aside from my clinic work, I undertook direct representation of *pro bono* clients in several areas. For example, I represented a retired technician in the Arizona Air National Guard in a case concerning whether his Social Security benefits could be reduced because he also receives a civil-service pension. That issue was ultimately resolved by the U.S. Supreme Court in a separate case. I also handled a Section 1983 claim on behalf of a prisoner who alleged that the prison medical provider's deliberate indifference had resulted in his blindness. I represented other *pro bono* clients in areas including consumer bankruptcy, prisoners' rights, and immigration.

I was recognized for my *pro bono* work on both a local and statewide basis. Locally, I was named by Southern Arizona Legal Aid as its volunteer of the month for August 2019. In connection with this honor, I was profiled in the Pima County Bar Association publication, *The Writ*. Of the over 500 lawyers who volunteer their time at SALA, only 12 each year are named volunteer of the month. I was also honored on a statewide basis in 2019 by the Arizona Bar Foundation as one of the top 50 *pro bono* attorneys in the state.

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

From 2014 to 2022, I served on the board of directors of Interfaith Community Services, a social-services organization devoted to helping people in need achieve healthy, stable, and independent lives. ICS houses numerous programs, from a food bank, to meals on wheels, to a scholarship program for single moms. It has a \$6 million annual budget and helps 41,000 people per year. In addition to serving on the board, I was also chair of ICS's Fund Development Committee and board secretary. My work on the board also included serving on a due-diligence committee that helped integrate a wonderful organization called Helping Hands for Single Moms into ICS. That program, now known as Single Mom Scholars, helps single mothers finish their education by providing scholarships and other support. The program's alumni regularly move onto well-paying jobs and self-sufficiency. It is gratifying to have played a small role in sustaining such an important program.

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

In 2016, 2018, and 2019, I was named to Benchmark Litigation's 40 & Under Hot List. This is a national honor given to partner-level lawyers who are

“among the top young talent in their respective litigation communities.” Benchmark Litigation is a well-respected lawyer-ranking publication, and other winners of this award include partners at some of the nation’s top law firms. To my knowledge, I am the only lawyer from Tucson to have ever received this award.

I was also named a Rising Star by Southwest Super Lawyers every year from 2015 until I became a judge.

56. List any elected or appointed public offices you have held and/or for which you have been a candidate, and the dates. **I currently serve as a Superior Court judge. I was also under consideration for a vacancy on the United States District Court in 2019. I interviewed with representatives from Sen. Martha McSally’s office, as well as from the White House Counsel’s Office and the Department of Justice.**

Have you ever been removed or resigned from office before your term expired?
No

If so, explain. **Not applicable**

Have you voted in all general elections held during the last 10 years? **Yes.**

If not, explain. **Not applicable**

57. Describe any interests outside the practice of law that you would like to bring to the Commission’s attention. **My judicial career brings me great personal satisfaction, but my family is the greatest joy in my life. My wife, Caitlin, exemplifies selfless devotion to family. She graduated high school at 16 years old, finished second in her class in law school, and had the opportunity for a lucrative career at a national law firm. She was later a globetrotting salesperson for two legal services companies. And she taught political science at the University of Arizona. But when we decided to begin a family, she put her career on hold to focus on being a stay-at-home mom for our children. We have an eight-year-old, a five-year-old, and a two-year-old. Although I can never come close to matching Caitlin’s selflessness and dedication, her example has made me a better parent and better person. I am honored to be her husband.**

Aside from my marriage, the greatest joy in my life is my children. Watching my children grow and explore the world is a joy I could never understand until I became a father. As they have gotten older, my weekends have filled up with swimming, gymnastics, and trips to the park. While I sometimes wish I had more time for personal hobbies, parenting and experiencing life through my children’s eyes is more rewarding than

anything else I could be doing.

HEALTH

58. Are you physically and mentally able to perform the essential duties of a judge with or without a reasonable accommodation in the court for which you are applying? **Yes.**

ADDITIONAL INFORMATION

59. The Arizona Constitution requires the Commission to consider the diversity of the county's population in making its nominations. Provide any information about yourself (your heritage, background, life experiences, etc.) that may be relevant to this consideration.

My personal background has been comfortable and happy. I am grateful to my parents for the sacrifices they made to ensure this. They still live in Tucson and remain an important part of my life. Watching them play with their grandchildren fills me with joy.

Although my life has been comfortable, I have faced challenges. I was diagnosed with cancer when my wife was six months pregnant with our first child. To suddenly realize that our child could grow up without a father was frightening, perhaps more so than the risk of dying. Fortunately, within a few weeks of being diagnosed and having surgery, the doctors told me that the cancer was slow-moving and not life-threatening, so that fear was allayed quickly. By the time my daughter was born, the scare had passed. I have now been cancer-free for nine years.

Like many of life's struggles, my cancer scare left me with a richer appreciation for the struggles of others. I find myself having more compassion for children and parents who are separated from each other, be it due to death, illness, or any other reason. My time on the family bench has reinforced that compassion. I am constantly reminded that when children and parents are separated — even where circumstances require it — sorrow and sadness are unavoidable. Judges are privileged to help families through these times. Simple matters like listening to people without interruption or smiling and nodding compassionately can bring people solace.

An appellate judge is more removed from these interactions. Losing the opportunity to engage in them is my only apprehension about seeking this position. But appellate judges are also responsible for ensuring that litigants are treated fairly and correcting errors when they are not. This is its own form of compassion, and one for which my life experience prepares me.

60. Provide any additional information relative to your qualifications you would like to bring to the Commission's attention.

I understand that the Court of Appeals is somewhat lacking in judges with experience handling complex financial cases. Although these cases arise

Filing Date: September 2, 2022
Applicant Name: Jeffrey L. Sklar
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less frequently than others, they can consume significant judicial resources due to their complexity. They are also among the most difficult to adjudicate, as they involve complex facts and lengthy histories. As my application illustrates, my experience in private practice involved many of these complex cases. I am both unafraid of and familiar with the issues that arise, and I enjoy dealing with them. If selected for this position, I would bring valuable depth to the Court of Appeals in dealing with complex financial cases.

61. If selected for this position, do you intend to serve a full term and would you accept rotation to benches outside your areas of practice or interest and accept assignment to any court location? **Yes. Although appellate judges do not rotate across benches like Superior Court judges, they must be willing and able to handle cases across virtually all areas of state law. Only a few areas, such as capital cases and certain election appeals, are beyond the Court of Appeals' jurisdiction. Having been a civil practitioner, as well as a civil and family judge, I am familiar with many areas of state law. But I would also hear and decide cases in areas with which I have less experience. These include criminal, juvenile, and probate cases. While handling cases in new areas would be challenging, it is also one of the great rewards of serving on the Court of Appeals. I have always enjoyed the challenge of learning about new areas of the law and developing new skills. I would eagerly accept the challenge of resolving these cases and developing Arizona case law in every area that the Court of Appeals touches.**

If not, explain. **Not applicable**

62. Attach a brief statement explaining why you are seeking this position. **See Exhibit B.**
63. Attach two professional writing samples, which you personally drafted (e.g., brief or motion). **Each writing sample should be no more than five pages in length, double-spaced.** 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. **See Exhibits C and D.**
64. 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. **Each writing sample should be no more than five pages in length, double-spaced.** 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. **See Exhibits E and F.**

65. 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 three performance reviews. **I have not yet been subject to judicial performance reviews. My first review cycle will begin in 2023.**

Exhibit A-1

J.Sklar
Attorneys During 9.2017 to 2.2021

Employee Name	Job Title	Location
Walters, Ryan Michael	Associate	Albuquerque
Albright, Jeffrey H	Equity Partner	Albuquerque
Jontz, Dennis E	Equity Partner	Albuquerque
Crown, Ross L	Senior Partner	Albuquerque
Collins, Bobbie Jo	Associate	Colorado Springs
Dyer, Nicholas N	Associate	Colorado Springs
Mellema, Matthew Daniel	Associate	Colorado Springs
Speir, Ian S	Associate	Colorado Springs
Edwards, Nathaniel	Counsel	Colorado Springs
Hall, Eric V	Equity Partner	Colorado Springs
Kunstle, David P	Equity Partner	Colorado Springs
Mahaffey, H. William	Equity Partner	Colorado Springs
Nussbaum, L. Martin	Equity Partner	Colorado Springs
Steinhour, Jan A	Equity Partner	Colorado Springs
Kniffin, Eric	Income Partner	Colorado Springs
Gleason, Edward A	Senior Partner	Colorado Springs
Nelson, William D	Senior Partner	Colorado Springs
Bach, Chris Bradley	Associate	Denver
Barker, Nathaniel S	Associate	Denver
Barnes, Aurora Temple	Associate	Denver
Entner, Kelsey Suzanne	Associate	Denver
Ewing, Lee Lockwood	Associate	Denver
Falvo, Kevin A	Associate	Denver
Flanigan, Conor Andrew	Associate	Denver
Fugier, Megan Cunningham	Associate	Denver
Guevara, John Michael	Associate	Denver
Gullett, F Broc	Associate	Denver
Harder, Abby Caroline	Associate	Denver
Helm, Andrew J	Associate	Denver
Hennessy, Stephen H	Associate	Denver
Herzog, Lindsey Christine	Associate	Denver
Hudgens, Benjamin Warren	Associate	Denver
Ikard, John Milton	Associate	Denver
Kallman, Hermine	Associate	Denver
Nemkov, Tyler Mark	Associate	Denver
Owen, Tyler J	Associate	Denver
Raemdonck, Dieter	Associate	Denver
Reaven, Elliot Joseph	Associate	Denver
Stadt, Frances Ann	Associate	Denver
Strandjord, Jay R	Associate	Denver
Thoreson, Nathan Brown	Associate	Denver
Vu, Nhu Thuy	Associate	Denver
Arundel, Lyndsay R	Counsel	Denver
Arthur Jr, Robert S	Equity Partner	Denver
Bartel, Trevor G	Equity Partner	Denver
Baumann, Frederick J	Equity Partner	Denver
Bayton, Emily Ann	Equity Partner	Denver
Browning, Scott M	Equity Partner	Denver

J.Sklar
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Employee Name	Job Title	Location
Caby, Chadwick S	Equity Partner	Denver
Charlesworth, Emily Jane	Equity Partner	Denver
Cohen, Brent R	Equity Partner	Denver
Coles-Oliver, Cindy	Equity Partner	Denver
Cumming, Justin D	Equity Partner	Denver
Dougherty, Thomas J	Equity Partner	Denver
Fry, Joel C	Equity Partner	Denver
Fuller, Jessica L	Equity Partner	Denver
Glover, Joel A	Equity Partner	Denver
Goodlette, Tamara F	Equity Partner	Denver
Johnson, Stephen T	Equity Partner	Denver
Kelly, Kevin M	Equity Partner	Denver
Kostolansky, Kris J	Equity Partner	Denver
Lemieux, Darren J	Equity Partner	Denver
Lyons, James M	Equity Partner	Denver
Martin, Donald Gregory	Equity Partner	Denver
McKae, Lindsay L	Equity Partner	Denver
Meyer, Mark A	Equity Partner	Denver
Myers, Alex C	Equity Partner	Denver
Ochoa, Ben M	Equity Partner	Denver
O'Loughlin, Franklin D	Equity Partner	Denver
Plachy, Michael D	Equity Partner	Denver
Rogers III, Thomas M	Equity Partner	Denver
Spano, Brian J	Equity Partner	Denver
Sperber, Susan S	Equity Partner	Denver
Tumminello, Douglas B	Equity Partner	Denver
Walker, James R	Equity Partner	Denver
Wells, Hilary D	Equity Partner	Denver
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Hazel, Diane	Income Partner	Denver
Hoefner, Dietrich Curran	Income Partner	Denver
Kunnemann, Nicole King	Income Partner	Denver
Mankamyer II, Jack Laverne	Income Partner	Denver
Massaro, Adam L	Income Partner	Denver
McHugh, Caitlin Conroy	Income Partner	Denver
Rossmann IV, Kenneth F	Income Partner	Denver
Vichick, Angela Marie	Income Partner	Denver
White, Holly Christine	Income Partner	Denver
Woller, Joy T	Income Partner	Denver
Bowers, Robin L	Of Counsel	Denver
DeVoe, Adam	Of Counsel	Denver
Guillon, Stacy K	Of Counsel	Denver
Ward, Nina Gawne	Of Counsel	Denver
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Jensen, Charles E	Associate	Las Vegas
Jensen, Chelsea C	Associate	Las Vegas
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Tran, Mary	Associate	Las Vegas
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Henriod, Joel D	Equity Partner	Las Vegas
Jorgensen, J. Christopher	Equity Partner	Las Vegas
Light, Glenn James	Equity Partner	Las Vegas
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Polsenberg, Daniel F	Equity Partner	Las Vegas
Rutledge, Karl F	Equity Partner	Las Vegas
Waite, Dan R	Equity Partner	Las Vegas
Blakley, Brian Douglas	Income Partner	Las Vegas
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Park, Matthew W	Income Partner	Las Vegas
Smith, Abraham Gordon	Income Partner	Las Vegas
Steffen, Jeffrey J	Income Partner	Las Vegas
Zhong, Meng	Income Partner	Las Vegas
Kohli, Eric Neeraj	Of Counsel	Las Vegas
Epstein, Ike Lawrence	Of Counsel Other	Las Vegas
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Heinz, Von S	Senior Partner	Las Vegas
MacTaggart, Scott Y	Senior Partner	Las Vegas
Reid, Josh McAllister	Senior Partner	Las Vegas
Cushman, Cameron A	Associate	Los Angeles
Emery, Alek Charles	Associate	Los Angeles
French, Steven James	Associate	Los Angeles
Havens, Sami Irene Schilly	Associate	Los Angeles
Kaminsky, Olga Mikhaylovna	Associate	Los Angeles
Koplow, Michael A	Associate	Los Angeles
Kwun, Yong Jean Jimmy	Associate	Los Angeles
Luetzgen, Dustin Marcus	Associate	Los Angeles
Prange, Kurt Stephen	Associate	Los Angeles
Tom, Jeffrey Carlton	Associate	Los Angeles
Wakil, Abdul Hamid	Associate	Los Angeles
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Bleeker, Gerrit W	Equity Partner	Los Angeles

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Green, Robert A	Equity Partner	Los Angeles
Hasan, Syed A	Equity Partner	Los Angeles
Hsueh, Peter C	Equity Partner	Los Angeles
Jeon, Jun-Young E	Equity Partner	Los Angeles
Lampert, Gregory S	Equity Partner	Los Angeles
MacDermott, Michael J	Equity Partner	Los Angeles
Marantidis, Constantine	Equity Partner	Los Angeles
Nelson, Gary J	Equity Partner	Los Angeles
Plumley, David A	Equity Partner	Los Angeles
Schneider, Lauren E	Equity Partner	Los Angeles
Tabandeh, Raymond R	Equity Partner	Los Angeles
Wang, Anne	Equity Partner	Los Angeles
Ehresmann, Justin O	Income Partner	Los Angeles
Kellar, Kyle W	Income Partner	Los Angeles
Lee, Shaun P	Income Partner	Los Angeles
Martone, Jason C	Income Partner	Los Angeles
Miresghhi, Abazar	Income Partner	Los Angeles
Regehr, Martin W	Income Partner	Los Angeles
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Carson, John	Of Counsel	Los Angeles
Quigley, Katherine L	Of Counsel	Los Angeles
Schwartz, Edward R	Of Counsel	Los Angeles
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Felix, Rachel R	Associate	Phoenix
Godusi, Yalda	Associate	Phoenix
Gowan, Justin Kent	Associate	Phoenix
Graham, Justin Thomas	Associate	Phoenix
Haspel, Caroline Carmer	Associate	Phoenix
Hellewell, Brandon Makay	Associate	Phoenix
Hickman, Lucas Michael	Associate	Phoenix
Hoffman, Ari Brendan	Associate	Phoenix
Lee-Cota, Jennifer	Associate	Phoenix
Lowell, Karen Marie Jurichko	Associate	Phoenix
Salgado, Daniel Alexis	Associate	Phoenix
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Schellinger, Jacob Bergman	Associate	Phoenix
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Zamora, David M	Associate	Phoenix
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Barber, Bryant D	Equity Partner	Phoenix
Barkel, Edwin A	Equity Partner	Phoenix
Bressler, Stephen Michael	Equity Partner	Phoenix
Brown, Scott K	Equity Partner	Phoenix
Campbell, Flavia	Equity Partner	Phoenix
Chang, Samuel S	Equity Partner	Phoenix
Consoli, Carla	Equity Partner	Phoenix
Curry, Michael J	Equity Partner	Phoenix
Demarchi, Kimberly A	Equity Partner	Phoenix
Derdenger, Patrick	Equity Partner	Phoenix
Dewald, Scott Douglas	Equity Partner	Phoenix
Forcucci, Glenn D	Equity Partner	Phoenix
Freeman, Susan	Equity Partner	Phoenix
Goldfine, Dan William	Equity Partner	Phoenix
Grabel, Joshua	Equity Partner	Phoenix
Hallam, Michael T	Equity Partner	Phoenix
Harris, Gregory Yale	Equity Partner	Phoenix
Hart, Stephen	Equity Partner	Phoenix
Haynes, Frances Jeanne	Equity Partner	Phoenix
Kasten, Lawrence A	Equity Partner	Phoenix
Larson, Peter A	Equity Partner	Phoenix
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McKirgan, Robert Howard	Equity Partner	Phoenix
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Jackson, David Arthur	Income Partner	Phoenix
Kim, John Kyung-Chan	Income Partner	Phoenix
Kort, Robert Matthew	Income Partner	Phoenix
Lutz, Stanley B	Income Partner	Phoenix
Magestro, Molly Anne	Income Partner	Phoenix
Nicholas, Rachel A	Income Partner	Phoenix
Olafson, Shane E	Income Partner	Phoenix
Pasqualone, Laura Mary	Income Partner	Phoenix
Reich, Adam T	Income Partner	Phoenix
Selitto, Ralph W.	Income Partner	Phoenix
Sjoberg, Frances R	Income Partner	Phoenix
Sutton, Jared Lynn	Income Partner	Phoenix
Thatcher, Amanda L	Income Partner	Phoenix
Verkamp Pate, Melanie	Income Partner	Phoenix
Villanueva, Cindy A	Income Partner	Phoenix
Furedy, Jason	Of Counsel	Phoenix
Galvani, Kami	Of Counsel	Phoenix
Gerlach, Douglas	Of Counsel	Phoenix
Gray, John Christopher	Of Counsel	Phoenix
Herrera Jr., Roy	Of Counsel	Phoenix
Hubbard, Christy	Of Counsel	Phoenix
Ormond, Jill	Of Counsel	Phoenix
Richer, Stephen I	Of Counsel	Phoenix
Story, Kirstin A.	Of Counsel	Phoenix
True, Nicole Green	Of Counsel	Phoenix
Vanell, Andrew	Of Counsel	Phoenix
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Weiss, Jon D	Of Counsel	Phoenix
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Carper, Anderson L	Senior Partner	Phoenix
Danneman, Dale A.	Senior Partner	Phoenix
Goldsmith, Richard N	Senior Partner	Phoenix
Hulsman, Steven J	Senior Partner	Phoenix
Olson, Kevin L.	Senior Partner	Phoenix
Parkis, Linda R F	Senior Partner	Phoenix
Robberson, Foster	Senior Partner	Phoenix
Simpson, Jesse B	Senior Partner	Phoenix
West, John Clifton	Senior Partner	Phoenix
White, Nancy Lee	Senior Partner	Phoenix
Borisov, Roman O	Associate	Reno

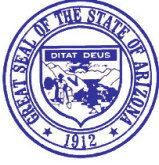
J.Sklar
Attorneys During 9.2017 to 2.2021

Employee Name	Job Title	Location
Cabrera, Michael William	Associate	Reno
Crow, Lucy Clara	Associate	Reno
Stiteler, Casey Joseph	Associate	Reno
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Gordon, Garrett Daniel	Equity Partner	Reno
Matteoni, Paul A	Equity Partner	Reno
McGuinness, Sean Michael	Equity Partner	Reno
Reid, E Leif	Equity Partner	Reno
Martini, Kristen L.	Income Partner	Reno
Scott, Nicole Sarah	Income Partner	Reno
McElhinney, David C	Senior Partner	Reno
Mousel, David Lloyd	Senior Partner	Reno
Trachok, Richard	Senior Partner	Reno
Low, Clara Chiu	Associate	Silicon Valley
Bartow, Daryl Stuart	Equity Partner	Silicon Valley
Ahearn, Terry Wayne	Income Partner	Silicon Valley
Johnson, Aaron David	Income Partner	Silicon Valley
Swank, Ryan M	Income Partner	Silicon Valley
Hashimoto, Takashi	Of Counsel	Silicon Valley
Logue, Holly Jean	Of Counsel	Silicon Valley
Yoo, Siho	Of Counsel	Silicon Valley
Crandell, Joshua Gregory	Associate	Tucson
Downey, Kenneth David	Associate	Tucson
Schmidt, Cindy Kay	Associate	Tucson
Simon, Jason R	Associate	Tucson
Charles Jr, Robert M	Equity Partner	Tucson
Patton, Mark D	Equity Partner	Tucson
Schorr, Andrew D	Equity Partner	Tucson
Schorr, Lewis D	Equity Partner	Tucson
Sweger, Matthew C	Equity Partner	Tucson
Sklar, Jeffrey L	Income Partner	Tucson
Aikman-Scalise, Anne Elizabeth	Of Counsel	Tucson
O'Hagan, Kimberly A	Of Counsel	Tucson
Thomas, Pilar M	Of Counsel	Tucson
Beckmann, Gabriel	Senior Partner	Tucson
Hinderaker, John C	Senior Partner	Tucson
Iurino, John	Senior Partner	Tucson
Kyle, Roy W	Senior Partner	Tucson
McNulty, Linda	Senior Partner	Tucson
Schorr, S L L	Senior Partner	Tucson

Exhibit A-2

The following page contains a list of current judicial officers on the Superior Court in Pima County, with bench assignments. In addition, the following judges and commissioners have retired or otherwise left the court since I joined in March 2021:

Hon. Deborah Bernini
Hon. Paul Tang
Hon. Ken Sanders
Hon. Alyce Pennington
Hon. Dean Christoffel



Arizona Superior Court

Pima County
110 West Congress
Tucson, Arizona 85701

BENCH ASSIGNMENTS

Effective July 1, 2022

Presiding Judge: Jeffrey Bergin

Associate Presiding Judge: Danelle Liwski

Civil

Kellie Johnson, Presiding
Christopher Browning
Kyle Bryson
Michael Butler
Gary Cohen
Richard Gordon
Casey McGinley
Greg Sakall

Criminal

James Marner, Presiding
Renee Bennett
Javier Chon-Lopez
Brenden Griffin
Danelle Liwski
Scott D. McDonald
Douglas Metcalf
Catherine Woods
Howard Fell (Pro Tem – Rule 11)
Teresa Godoy (Pro Tem – Drug Court; STEPS)
Renee Hampson (Pro Tem – DTAP; Mental Health Court,
STEPS, Expungements)

Juvenile

Peter Hochuli, Juvenile Court Presiding
Kathleen Quigley
Lisa Abrams
Janet Bostwick
Kimberly Ortiz
Laurie San Angelo
Joan Wagener

Probate

Kenneth Lee, Presiding
Kyle Bryson
Julia Connors (Comm)
Lori Jones (Comm)

Family

Jeffrey Sklar, Presiding
Alan Goodwin
Cynthia Kuhn
Wayne Yehling
Jack Assini (Comm)
Randi Burnett (Comm)
Patricia Green (IV-D Comm)
Nicholas Knauer (Comm)
Jennifer Langford (IV-D Comm)
Lisa Schrinier Lewis (Comm)
Deborah Pratte (Comm)
Gilbert Rosales, Jr. (Comm)
Helena Seymour (Comm)

Hearing Officers

Lee Ann Roads
June Harris

Juvenile/Commissioners

Lisa Bibbens
Jane Butler
Jennifer Espino
Geoffrey Ferlan
Cathleen Linn
Bunkye Chi Olson
Kristin Schrinier

Exhibit B

My work as a Superior Court judge is quintessential public service. When I don my robe and enter the courtroom, I help people navigate some of their lives' biggest challenges. As a family judge, I work with parents struggling with emotional choices about their children. On my civil rotation, I dealt with catastrophic injuries and death, business failures, attorney malpractice, and other important disputes. My work has been meaningful, challenging, and rewarding.

I am nevertheless seeking appointment to the Court of Appeals. I am drawn to that court's role in our constitutional structure. As the commission knows, that role is to correct lower courts' errors while developing Arizona's case law. That role fits my two professional passions. First is my passion for faithfully applying the law, regardless of my personal preferences. Second is my passion for providing clear, written explanations of my decisions, which is essential in precedent-setting courts like the Court of Appeals.

As to faithfully applying the law, I am passionate that when judges rule, we must not carry out our own wishes or policy preferences. We must instead interpret and apply the law. Our constitutional structure, with its separation of powers, demands that we do so.

Carrying out that limited role can be emotionally challenging. I know firsthand. As a family judge, applying the law properly sometimes requires me to uphold parents' choices with which I disagree. As a civil judge, I denied summary judgment and forced defendants to face jury trials, even where I did not think a jury should find the defendant liable. I did so because the legal standard required it. Making these decisions can be difficult, but I am committed to putting aside my preferences and following the law.

I would bring that same commitment to the Court of Appeals. If a trial judge misapplied the law, I would correct it. I would do so even if I preferred the trial judge's outcome. Our constitutional structure and the separation of powers require no less.

My other professional passion is writing — particularly explanatory writing. I trained as a journalist and newspaper editor. And while I chose law over journalism, I never lost the passion to inform and educate that drives the best journalists. My favorite challenge is to clearly explain complicated concepts. These include the complex factual scenarios that I have faced as a lawyer and judge. They also include the nuanced legal issues that litigants, lawyers, and judges must understand and apply.

My work as a commercial litigator tested my explanatory skills. Unlike many lawyers, commercial litigators primarily advocate through written motions. Trials are rare. My favorite cases involved complex financial transactions that required careful, clear explanations. Without those explanations, readers could become confused. My most satisfying victories were those where my clear explanations persuaded a judge to rule in my client's favor.

As a Superior Court judge, I have honed my explanatory skills further. Although my rulings do not make law, clear explanations still matter. This is especially true for parties who are not successful. They need to appreciate that the judge considered their arguments, and they need to understand why those arguments were rejected. As my writing samples demonstrate, unsuccessful litigants in my court have the benefit of that understanding.

I would bring that same attitude to the Court of Appeals, where clear explanations are even more important. It is not just the litigants and lawyers who need to understand the court's reasoning. The court's opinions make law. Lawyers and the public rely on those opinions for decades. An imprecise word can create years of confusion. My passion for clear writing will minimize the risk of this confusion.

In short, my passions and skills are perfectly suited for the Court of Appeals' role. If appointed, I would faithfully apply the law as written. I would give litigants and the public clear, careful explanations of the court's decisions. On an error-correcting and precedent-setting court, nothing less is required.

Exhibit C

This writing sample is from an opening brief to the Arizona Court of Appeals in a medical malpractice case where the jury had rendered an adverse verdict against my client, a hospital. The excerpt concerns whether the jury had been improperly instructed on a claim under Arizona's elder-abuse statute, the Adult Protective Services Act ("APSA"). References to the parties have been changed to "Appellant" and "Appellee," and the name of one witness has been removed. Since this brief was drafted, the Arizona Supreme Court has changed the applicable legal standard. The four-part *McGill* test described in the brief is no longer good law. But I have nevertheless selected this writing sample because it illustrates my ability to clearly explain complicated legal concepts.

A. Standard of Review.

¶ 4 This Court must independently review whether jury instructions accurately state the law. *Lawrence R. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 585, 587 ¶ 6, 177 P.3d 327, 329 (App. 2008). It must determine whether the instructions, taken as a whole, provide the jury with the correct rules for reaching its decision. *Security Title Agency, Inc. v. Pope*, 219 Ariz. 480, 491 ¶ 43, 200 P.3d 977, 988 (App. 2008).

¶ 5 If a jury is erroneously instructed, reversal is appropriate if the error was prejudicial. *Romero v. Sw. Ambulance*, 211 Ariz. 200, 204 ¶ 8, 119 P.3d 467, 471 (App. 2005). An instruction is prejudicial if it “cut[s] to the very heart of the case and misappl[ies] the applicable legal theories.” *Dart*, 147 Ariz. at 250, 709 P.2d at 884. For example, an instruction was prejudicial where it improperly stated that a defense had to be proven by clear and convincing evidence, when the law actually required only a preponderance. *Am. Pepper Supply Co. v. Fed. Ins. Co.*, 208 Ariz. 307, 311 ¶ 21, 93 P.3d 507, 511 (2004).

B. The APSA Statutory Scheme.

¶ 6 APSA creates a “remedial cause of action against those who abuse, neglect, or exploit the elderly.” *In re Estate of Wyatt*, 235 Ariz. 138, 140 ¶ 6, 329 P.3d 1040, 1042 (2014) (quoting *In re Estate of Winn*, 214 Ariz. 149, 150 ¶ 5, 150 P.3d 236, 237 (2007)). APSA plaintiffs must either be governmental entities or “vulnerable adults.” A.R.S. § 46-455(B), (E). A vulnerable adult is someone “unable to protect himself from abuse, neglect, or exploitation by others because of a physical or mental impairment.” A.R.S. § 46-451(A)(9). APSA claims survive the death of the vulnerable adult. A.R.S. § 46-455(P).

¶ 7 An APSA claim may allege “neglect, abuse or exploitation.” A.R.S. § 46-455(B). “Neglect” is a “pattern of conduct without the person’s informed consent resulting in deprivation of food, water, medication ... or other services necessary to maintain minimum physical or mental health.” A.R.S. § 46-451(A)(6). “Abuse” includes “[i]njury caused by negligent acts or omissions.” *Id.* at § 46-451(A)(1)(b). “Exploitation” was not at issue in this case.

¶ 8 With some exceptions not relevant here, APSA claims may be brought against “any person or enterprise that has been employed to provide care [or] that has assumed a legal duty to provide care ... to such vulnerable adult.” A.R.S. § 46-455(B). For purposes of this case, Appellant is such an “enterprise.”¹

C. Arizona Law Limits APSA Claims Where Plaintiffs Allege Medical Malpractice.

¶ 9 Arizona courts have long struggled with the extent to which medical malpractice against vulnerable adults violates APSA. But the Arizona Supreme Court in *McGill* recognized that it does not always do so. It reasoned:

We do not believe interpreting APSA so as to apply to any and every single act of medical malpractice would be consistent with the legislature’s obvious intent to protect a class of mostly elderly or mentally ill citizens from harm caused by those who have undertaken to give them the care they cannot provide for themselves.

McGill, 203 Ariz. at 529, 57 P.3d at 388.

¶ 10 Rather, *McGill* holds that a provider is liable under APSA only where the allegedly negligent treatment was necessitated by the incapacity that made the patient a vulnerable adult. *See McGill*, 203 Ariz. at 530 ¶ 16, 57 P.3d at 389. It adopts a four-part standard. The allegedly negligent acts must: (1) arise from the relationship of caregiver and recipient; (2) be closely connected to that relationship; (3) be linked to the service the caregiver undertook because of the recipient’s incapacity; and (4) be related to the problem or problems that caused the incapacity.² *Id.*

¶ 11 For example, *McGill* explained that no APSA violation would occur if a surgeon negligently failed to remove an instrument after performing surgery on a vulnerable adult. *Id.* at

¹ The Arizona Supreme Court recently held in *Wyatt*, 235 Ariz. at 141 ¶ 14, 329 P.3d at 1043, that acute care hospitals like Appellant are “enterprises” under APSA. Appellant disagrees with *Wyatt* and filed an *amicus curiae* brief in support of the hospital in that case. But it is not challenging *Wyatt* here. It reserves the right to do so in a future case.

² *McGill* primarily uses the term “incapacitated” rather than “vulnerable.” Both terms are used in the statutory scheme, and *McGill* makes clear that its analysis applies to both. *McGill*, 203 Ariz. at 528 ¶ 5, n.3, 57 P.3d at 387 n.3.

529-30 ¶ 14, 57 P.3d at 388-89. That negligence and injury could affect anyone. *Id.* It would not be linked to the care undertaken because of the incapacity or related to the problems that caused it. By contrast, *McGill* explained that an APSA violation could occur if a caregiver negligently allowed an incapacitated person’s bathwater to get too hot. *Id.* The incapacitated person could not get out of the bath, while a non-incapacitated person could.

D. By Denying Appellant’s Proposed Jury Instruction, the Trial Court Misled the Jury on APSA’s Scope.

¶ 12 Here, by denying Appellant’s proposed instruction, the trial court provided the jury with incorrect rules for reaching its decision. Violating *McGill*, it incorrectly instructed that medical malpractice against a vulnerable adult necessarily violates APSA.

¶ 13 The final APSA instruction had two components. First, it defined “abuse,” “neglect,” and “vulnerable adult,” consistently with the statute. *Id.* These definitions stated that “abuse” includes negligence. *Id.*

¶ 14 Second, the instruction listed the statutory elements of an APSA claim. It provided that Appellant should be liable if: (1) Appellee was a vulnerable adult; (2) Appellant assumed a legal duty to care for Appellee; (3) Appellant caused or permitted Appellee’s life or health to be endangered or injured by “abuse” or “neglect”; and (4) Appellee’s pre-death damages were caused by that abuse or neglect. [R248](#) at 8.

¶ 15 Taken together, these instructions merely parroted the familiar elements of a negligence claim — a duty to care for Appellee, a breach of that duty, and the causation of damages. *See Seisinger v. Siebel*, 220 Ariz. 85, 94 ¶ 32, 203 P.3d 483, 492 (2009) (listing elements of medical malpractice). Although the instructions did not say “breach,” they did say that “abuse” includes “negligence.” *See* [R248](#) at 8. The only added element was that Appellee had to be a vulnerable adult, which nobody disputed. This suggested, therefore, that if Appellant negligently treated Appellee, it was necessarily liable under APSA.

¶ 16 These instructions ignored *McGill*’s limitations. They were therefore incomplete. Appellant’s proposed instruction would have completed them. It would have explained that APSA claims are improper where the “negligent acts and resulting injury can affect anyone, and

not just the incapacitated.” [R221](#) at Defendant’s Proposed Jury Instruction No. 18. This accurately stated *McGill*’s two key elements — whether the allegedly negligent acts are: (1) “linked to the service the caregiver undertook because of the recipient’s incapacity” and (2) “related to the problem or problems that caused the incapacity.” *McGill*, 203 Ariz. at 530 ¶ 16, 57 P.3d at 389. By denying Appellant’s instruction, the Court inaccurately stated the law.

E. Denial of the Jury Instruction Prejudiced Appellant.

¶ 17 Not only did the court err by failing to give Appellant’s instruction, the error prejudiced Appellant. Had the jury been properly instructed, it could have concluded that the alleged negligence was not necessitated by Appellee’s incapacity — paraplegia — but was the type of negligence that “can affect anyone.”

¶ 18 The jury heard substantial evidence to support such a conclusion. For example, Appellant’s expert testified that the pressure ulcer formed and grew not because of Appellee’s paraplegia, but because the treatment for his cardiac arrest required him to lay on his back for an extended period. *See* [TR 3/17/15](#) at 153:15-154:18. This is consistent with testimony and evidence that not all pressure ulcers can be avoided. *See, e.g.*, [TR 3/6/15](#) at 33:10-16.

¶ 19 Appellee’s counsel exacerbated the prejudice in her closing argument. Ignoring *McGill*, she equated medical malpractice with an APSA violation. She said, “[T]here’s really only one issue in this case and that’s whether the care that Appellee received at Appellant was reasonable care.” [TR 3/19/15](#) at 27:18-23. Moments later, she reiterated that point, incorrectly telling the jury that on both claims, “[T]he bottom line is, was there medical negligence that caused that harm?” [TR 3/19/15](#) at 30:5-7. Given this prejudice, even if this Court does not believe that the “never event” error justifies a new trial on all plaintiff’s claims, it must remand for a new trial on the APSA claim.

Exhibit D

This writing sample is from a response to a motion for summary judgment filed against my client. My client was a healthcare provider seeking to enforce a restrictive covenant — sometimes known as a non-competition provision or non-compete — against a health-care provider. The provider moved for summary judgment on the ground that the covenant was unenforceable under Arizona law. I argued that the covenant was enforceable given the particular circumstances under which it had been entered. The names of the parties have been changed to “Plaintiff” and “Defendant(s),” and other proper names have been removed or changed.

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II. THE RESTRICTIVE COVENANT IS ENFORCEABLE

A. Arizona law applies a less stringent standard to restrictive covenants associated with purchases of a business

As Defendants note, the leading case concerning the validity of restrictive covenants involving medical practices is *Valley Medical Specialists v. Farber*, 194 Ariz. 363, 982 P.2d 1277 (1999). But Defendants’ analysis of *Farber* is too simplistic. It ignores critical discussion in *Farber* about the validity of restrictive covenants in the context of the sale of a business.

Unlike in this case, the covenant in *Farber* did not arise from the sale of a business. *Farber*, 194 Ariz. at 367. The fact that it did not was an important factor in the Arizona Supreme Court’s decision to closely scrutinize the covenant and ultimately invalidate it. The court explained that less scrutiny is appropriate when a business is sold, because the restrictive covenant is an important means of protecting the purchase of goodwill. *Id.* at 368. The court’s full explanation is illuminating:

When a business is sold, the value of that business’s goodwill usually figures significantly into the purchase price. The buyer therefore deserves some protection from competition from the former owner. A restraint accompanying the sale of a business is necessary for the buyer to get the full goodwill value for which it has paid.

Id. (citations omitted).

Arizona courts had acknowledged this reality even before *Farber*. As the Court of Appeals reasoned in *Amex Distributing Co., Inc. v. Mascari*, 150 Ariz. 510, 514, 724 P.2d 596, 600 (App. 1986), courts are “more lenient” in enforcing restrictive covenants associated with the sale of businesses. This leniency is necessary “because of the need to see that goodwill, which is usually sold, is effectively transferred.” *Mascari*, 150 Ariz. at 514, 724 P.2d at 600.

Here, the restrictive covenant was associated with the multi-million dollar sale of Defendant’s employer to Plaintiff. As set forth in the purchase agreement, the business and

1 personal goodwill of that employer and its principal were among the assets being
2 purchased. *Farber* makes clear that Plaintiff was entitled to protect its purchase of that
3 goodwill by requiring the execution of a restrictive covenant.

4 As a result, Defendants’ citations to cases concerning the “disfavored” nature of
5 restrictive covenants are inapplicable. *See* Cross-Motion at 4:4-18. Those cases did not
6 involve the sales of businesses. *See Hilb, Rogal & Hamilton Co. v. McKinney*, 190 Ariz.
7 213, 946 P.2d 464 (App. 1997) (involving anti-piracy agreement entered into by employee
8 of insurance agency), *Ohio Urology, Inc. v. Poll*, 594 N.E.2d 1027 (Ohio App. 1991)
9 (involving defendant who joined existing practice).

10 The “lenient” standard is also appropriate because Defendant received a \$10,000
11 bonus from the sale of her employer. She should not be able to both profit from the sale
12 and be entitled to the heightened scrutiny that applies to restrictive covenants in non-sale
13 contexts.

14 **B. Plaintiff’s restrictive covenant satisfied *Farber*’s reasonableness
15 standard**

16 Under *Farber*, a restrictive covenant’s reasonableness is evaluated under a two-part
17 test: (1) whether the restraint is greater than necessary to protect an employer’s legitimate
18 interest; and (2) whether the employer’s interest is outweighed by the hardship to the
19 employee and likely injury to the public.

20 **1. The restrictive covenant is no greater than necessary to protect
21 Plaintiff’s legitimate interest**

22 Applying the first prong of *Farber*’s test to this case is a two-step inquiry:
23 (1) whether Plaintiff has a legitimate business interest; and (2) whether the restraint is
24 greater than necessary to protect that interest.

25 **a. Plaintiff had a legitimate interest in protecting the business
26 goodwill it purchased**

As to the first step in the inquiry, Plaintiff had a legitimate interest in the restrictive
covenant. As explained above, it imposed the restriction to protect the substantial

1 investment it made in purchasing Defendant’s employer’s business. That business included
2 not just goodwill, but the employer’s contracts with the facilities where Defendant was
3 performing services. It also included the right to enter into subsequent contracts with those
4 facilities. If Defendant or other former providers associated with her employer could end
5 their employment with Plaintiff and continue providing services in those facilities, Plaintiff
6 would lose the value of that purchase.

7 In their Cross-Motion, Defendants argue that Plaintiff lacks a legitimate interest
8 because the patients have the ability to choose their own providers. Cross-Motion at 8:9-
9 17. But Plaintiff’s interest was in the contracts with the facilities and Defendant’s
10 employer’s business goodwill, not just the relationships with the patients themselves. *See*
11 HSOF ¶¶ 3-4; *see also* Plaintiff’s Statement of Facts in Support of Its Motion for Summary
12 Judgment Against Defendants (“PSOF”) at ¶¶ 2, 29 (describing the importance of
13 Plaintiff’s relationships with the facilities). Even *Farber*, despite all the language cited by
14 Defendants about public policy concerns with physicians’ restrictive covenants,
15 acknowledges that a medical practice “has a protectable interest in its referral sources.”
16 *Farber*, 194 Ariz. at 370, 982 P.2d at 1284.

17 Defendants also argue that Plaintiff has no interest in the patients, who they say
18 belong to the facilities. Cross-Motion at 8:18-20. Defendants rely on an Indiana case
19 holding that patients belonged to a hospital rather than a physician’s group that was
20 treating them. *Duneland Emergency Physician’s Med. Group, P.C. v. Brunk*, 723 N.E.2d
21 963, 966 (Ind. App. 2000).

22 But the Defendants’ citation to *Duneland* misses the point. Here, Plaintiff’s interest
23 arises from its purchase of the contracts with the facilities and the business goodwill.
24 Those facts were not present in *Duneland*. And as *Farber* makes clear, businesses do have
25 a legitimate interest in protecting a purchase. This includes medical practices, as *Farber*
26 itself involved the validity of a restrictive covenant involving a medical practice.

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b. The restraint is no greater than necessary to protect Plaintiff’s legitimate interest

As for the second step in the inquiry, the restraint is also no greater than necessary to protect Plaintiff’s interest. It precludes Defendant from providing services only in the facilities where she had performed substantial work for Plaintiff in the final six months of her employment. This protects Plaintiff’s investment in the contracts to provide services in those facilities, as well as Plaintiff’s investment in the business goodwill. But it does not unduly restrict Defendant from providing services at other facilities or even from providing non-hospitalist services at the same facilities.

Defendants do not dispute that the restrictive covenant applies to only four facilities. But they argue that the covenant’s duration — one year after the termination of Defendant’s employment — is greater than necessary. Cross-Motion at 6:12-8:5. Specifically, they argue that Plaintiff’s restrictive covenant should have extended in duration only for the length of time it would take to bring in replacement providers and “establish a working relationship” between those providers and the facilities.

Defendants’ position, though, relies on a misapplication of *Bryceland v. Northey*, 160 Ariz. 213, 772 P.2d 36 (App. 1989). *Bryceland* involved disc jockeys who were subject to a two-year restrictive covenant that applied across a 50-mile radius. This was substantially longer than was necessary to train replacement disc jockeys. *Bryceland*, 160 Ariz. at 217, 772 P.2d at 40. In invalidating the restrictive covenant, the court noted that the employer had not presented evidence “of any protectable interest other than the time it would take to replace [the employees] with trained deejays.” *Id.* This took far less than two years, so the restrictive covenant was invalidated.

Bryceland is not analogous to this case, because here, Plaintiff’s protectable interest is different. The relevant interest is not merely the need to staff the facilities with replacement providers. Rather, it is Plaintiff’s interest is in preserving the benefits of its

1 multi-million dollar purchase of Defendant’s employer. Even *Bryceland* recognizes that
2 this is a distinct interest from the need to train replacement workers. It acknowledges that
3 restrictive covenants arising from the purchase of a business are enforced more leniently
4 “because of the need to see that goodwill is effectively transferred.” *Bryceland*, 160 Ariz.
5 at 216, 772 P.2d at 39.

6

7 DATED this 2nd day of July, 2020.

8 LEWIS ROCA ROTHGERBER CHRISTIE LLP

9 By: /s/ Jeffrey L. Sklar
10 Jeffrey L. Sklar
11 Attorneys for Plaintiff

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Exhibit E

This writing sample is from a ruling denying summary judgment in a case where the plaintiff fell from a stool and hurt her shoulder. The defendant was the hotel where the incident took place. It argued that the plaintiff had failed to present expert testimony that her shoulder injury had been caused by the fall. As a result, it argued, judgment should be entered for the defendant without a jury being allowed to decide the case. The plaintiff argued that under the relevant legal standard, expert testimony was unnecessary because there was a clear connection between her fall and the injury. I ruled in favor of the plaintiff and allowed the case to go forward.

Before the Court is Defendant Hotel, LLC's Motion for Partial Summary Judgment Re: Damages, filed April 7, 2021. The Court has reviewed the motion, along with Plaintiff's Response and Opposition to Defendant's Motion for Partial Summary Judgment Re Damages, filed May 12, 2021, Defendant's Reply in Support of Motion for Partial Summary Judgment Re: Damages, filed May 27, 2021. The Court also heard oral argument on July 9, 2021. Based on the foregoing, and for the following reasons, the motion will be denied.

I. FACTUAL BACKGROUND

This case arises out of Plaintiff Jane Doe's fall from a stool. On July 20, 2019, Ms. Doe was attending a conference at a hotel operated by Defendant Hotel, LLC. She had been standing on a stool provided by Hotel to hang a curtain. She alleges that the stool broke without warning. She fell four feet from the stage to the ground, landing on her shoulder.

The motion relates to Ms. Doe's damages arising from the fall. After not seeking treatment for about a month, she was first treated with acupuncture in August 2019. She then obtained an MRI on September 10, 2019. The MRI revealed the tendon tear. She had surgery on September 30 and completed physical therapy a few months later. She asserts damages for medical expenses in the amount of \$61,276.

Hotel argues that Ms. Doe has failed to present evidence showing that this treatment was caused by the accident. Hotel notes that Ms. Doe has not disclosed any expert opinions on causation. It also argues that any shoulder pain was preexisting, as evidenced by treatment and prescription records from a pain-management clinic dating to 2017. Ms. Doe disputes the relevance of those records, claiming that she was primarily being treated for foot pain.

Hotel also argues that Ms. Doe has failed to disclose any expert to show that the medical expenses were reasonable and necessary. Based on its arguments, it asks the Court to grant summary judgment on Ms. Doe's claim to recover her medical expenses.

II. LEGAL ANALYSIS

A. Summary judgment standard

Ariz. R. Civ. P. 56(a) requires the Court to grant a motion for summary judgment only if "the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." In determining whether a genuine dispute of material fact exists, the Court must view the record in the light most favorable to the non-moving party. *Espinoza v. Schulenburg*, 212 Ariz. 215, 216, 129 P.3d 937, 938 (2006). However, it may not "pass on the credibility of witnesses with differing versions of material facts," "weigh the

quality of documentary or other evidence,” or “choose among competing or conflicting inferences.” *Orme School v. Reeves*, 166 Ariz. 301, 311, 802 P.2d 1000, 1010 (1990).

B. Expert testimony is not required if a lay person could determine causation

A negligence plaintiff must prove a causal connection between the breach and resulting injuries. *Dupray v. JAI Dining Servs. (Phoenix), Inc.*, 245 Ariz. 578, 583, 432 P.3d 937, 942 (App. 2018). Doing so requires showing both actual and proximate cause. *Id.* Actual cause requires the plaintiff to show that the defendant’s conduct “contributed to the result” and the “result would not have occurred ‘but for’ the defendant’s conduct.” *Ontiveros v. Borak*, 136 Ariz. 500, 505, 667 P.2d 200, 205 (1983). It is sufficient that the defendant’s conduct contributed “only a little” to the injuries. *Id.* And unless an unforeseeable, intervening event supersedes the defendant’s liability, the actual cause will also be the proximate cause. *Patterson v. Thunder Pass, Inc.*, 214 Ariz. 435, 438-39, 153 P.3d 1064, 1067-68 (App. 2007).

Often, causation is shown through expert testimony. Some Arizona cases — many, but not all, in the malpractice and worker-compensation contexts — require such testimony for a plaintiff to avoid summary judgment. *Gorney v. Meaney*, 214 Ariz. 226, 231-32, 150 P.3d 799, 804-05 (App. 2007); *see also Kreisman v. Thomas*, 12 Ariz. App. 215, 218-19, 469 P.2d 107, 110-11 (1970) (explaining that expert testimony was too general to meet “minimal standards” of showing that alleged negligence caused injury). Other cases explain that medical evidence of possible causation can be combined with other evidence or circumstances. *Coca-Cola Bottling Co. of Tucson v. Fitzgerald*, 3 Ariz. App. 303, 306, 413 P.2d 869, 872 (1966).

The analysis of those cases forms the basis of Hotel’s motion. But as Hotel acknowledges, those cases do not impose a bright-line rule requiring expert testimony on causation. They still allow plaintiffs to forego expert testimony if a lay person would be capable of determining causation. *See Asbestos Eng’g & Supply Co. v. Indus. Comm’n of Ariz.*, 131 Ariz. 558, 561, 642 P.2d 903, 906 (App. 1982) (stating in worker’s compensation case that “a condition is not one which is clearly apparent to a layman, such as a loss of limb or external lesions, the physical condition of a person can only be determined by expert medical testimony”); *Gregg v. Nat’l Med. Health Care Servs, Inc.*, 145 Ariz. 51, 54, 699 P.2d 925, 928 (App. 1985) (providing that in medical-malpractice cases, expert testimony on causation is required “unless a causal relationship is readily apparent to the trier of fact”).

C. Even without an expert, Ms. Doe has presented sufficient evidence of causation to send the case to the jury

Here, Ms. Doe has presented no causation expert. The Court must therefore answer two questions: (1) whether the causation issue is within a lay person's capability, and (2) whether Ms. Doe has presented sufficient evidence that a reasonable jury could find that Hotel's conduct caused the injury. The Court's answer to each question is "yes."

1. The causation issue is within a lay person's capacity to evaluate, even without an expert

On the first question, a lay person could infer a connection between Ms. Doe's fall and her shoulder treatment. Ms. Doe has presented an uncontradicted declaration that she fell onto her right shoulder. In that declaration, she also explains that she experienced pain, weakness, and limited range of motion after she fell. That pain, she says, was more severe than any pain she had previously suffered from in that shoulder. And a month later, she began undergoing treatment, including surgery and physical therapy. This testimony is sufficiently straightforward that a lay person could evaluate it without expert assistance.

Hotel responds that the medical records are technical in nature, such that a jury of lay people could not interpret them without assistance from an expert. The Court agrees that the records are technical. Perhaps assistance from an expert would be useful. But the jury need not understand every detail of the records. The chain of events from the accident to Ms. Doe's treatment is sufficiently straightforward for a lay person to grasp. And at least some of the records, such as the reference to a rotator-cuff injury, are within a lay person's comprehension.

Hotel also points to *Western Bonded Products v. Industrial Commission of Arizona*, 132 Ariz. 526, 647 P.2d 657 (App. 1982) to illustrate that the category of "readily apparent" injuries is small. But *Western Bonded Products* involves meaningfully different facts than this case. *Western Bonded Products* involved a back injury that did not materialize until at least two days after the plaintiff was struck in the head by a carpet pad. The causal connection between the incident and back injury is more attenuated than here, where Ms. Doe has testified that the shoulder pain began immediately after she fell on her shoulder. *See also Asbestos Eng'g & Supply Co.*, 131 Ariz. at 561-62, 642 P.2d at 906-07 (involving longstanding eye injury and noting that "[t]he rule requiring medical testimony is particularly appropriate in vision impairment cases").

2. Ms. Doe has presented sufficient evidence of causation to create a genuine dispute of material fact

As to the second question, the Court also finds sufficient evidence of causation to create a

genuine dispute of material fact. Ms. Doe's testimony about the chain of events raises a genuine dispute as to whether the fall contributed — even if “only a little” — to her injury.

Hotel argues, though, that Ms. Doe had complained of a pre-existing injury to her right shoulder and had been prescribed painkillers. Absent expert testimony, Hotel argues that a jury could not determine whether the surgery was necessitated by the incident or the pre-existing injury. But Ms. Doe's declaration provides a sufficient response to create a genuine dispute of fact. She says that although the prior medical records reference shoulder pain, her treatment was principally for leg pain. The records contain at least some evidence to support this view. Ms. Doe also states that she was not taking painkillers when the incident occurred. The jury, not the Court, should evaluate the weight to give Ms. Doe's testimony.

Hotel also notes that Ms. Doe delayed a month before receiving treatment. But Ms. Doe's declaration states that she delayed because she did not have health insurance. This is also an issue for the jury to evaluate.

D. On summary judgment, expert testimony is not necessary on the reasonableness and necessity of the medical treatment and billing

Hotel also argues that expert testimony is required on the reasonableness and necessity of Ms. Doe's medical treatment and billing. It argues that absent such testimony, the jury would have no way of knowing whether that treatment was necessitated by the accident. This argument also relates to causation. As explained above, Ms. Doe has presented sufficient evidence of causation to create a genuine dispute of material fact. And she has pointed to no case law suggesting that an expert is required to opine about the reasonableness of medical bills.

III. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that Defendant Hotel, LLC's Motion for Partial Summary Judgment Re: Damages is DENIED.

Exhibit F

This writing sample is from a ruling on an appeal from a decision of the Arizona Registrar of Contractors. The Superior Court has jurisdiction over appeals from state agencies, including the Registrar. The case involved a contractor that attempted to pay a subcontractor for work performed, but the payment was diverted due to an e-mail hack. The case presented a question of whether, under the contractor-discipline statutes, the contractor could be subject to discipline for failure to pay. Applying the statutory language, I reversed the Registrar and concluded that despite the contractor's efforts, it had failed to pay the subcontractor and was therefore subject to discipline. I remanded to the Registrar for a determination of what discipline should be imposed. This case illustrates my approach to statutory interpretation. Specifically, I look to the statutory text and apply the canons of statutory construction, then reach the conclusion best supported by the language.

Plaintiff Subcontractor Inc. has appealed from a Final Administrative Decision and Order of the Registrar of Contractors. That decision affirmed an Administrative Law Judge Decision in favor of Defendant Contractor LLC. The parties have stipulated to a *de novo* review by this Court based on the Record on Appeal from the Office of Administrative Hearings. The Court has reviewed that record, together with the briefing submitted by both parties and the supplemental authority submitted by Subcontractor. The Court also heard oral argument on February 4, 2022. Based on the foregoing, the Court **REVERSES** the Final Administrative Decision and Order and **REMANDS** to the Registrar of Contractors for further proceedings.

IV. FACTUAL BACKGROUND

A. Due to an e-mail hack, Contractor makes payment that is diverted from Subcontractor¹

The case arises out of Contractor's unsuccessful attempt to pay Subcontractor for asphalt work at a construction project. Subcontractor's work was performed under a contract executed on April 21, 2020. After the work was completed, Subcontractor issued an invoice dated May 19, 2020 in the amount of \$36,917.77.

Over the next three months, Subcontractor provided a conditional lien waiver and inquired several times about the status of payment. By August 4, Contractor indicated that it was receiving payment from another party and would send the money to Subcontractor via ACH as soon as that payment cleared.

Subcontractor appeared to respond later that day with an e-mail providing ACH information for the payment. The e-mail directed that payment be made to an account with Eagle Bank in Bethesda, Maryland.

Contractor did not pay immediately. In a subsequent e-mail dated August 26, Subcontractor stated, "I need that fed ex to me asap." Contractor responded two days later that the payment had been approved. Its representative also wrote, "Once I receive it, I'm mailing your check." But instead of mailing it, Contractor on August 31 wired \$37,364.36 to the Eagle Bank account. That amount included several hundred dollars in interest.

Subcontractor soon notified Contractor that it had not received the payment. It later concluded that it had been the victim of a hacker, though it is not clear which party's e-mail was hacked. Regardless, the e-mail containing the Eagle Bank information did not actually come from Subcontractor. Instead, it came from the hacker, who provided false information. The

¹ The facts set forth herein are taken from the Record on Appeal.

payment, which presumably was received by the hacker, has never been recovered.

B. Contractor files a complaint against Subcontractor with the Registrar of Contractors

Subcontractor initiated this action with the ROC by filing a Non-Payment Complaint Form on October 16, 2020. Contractor responded on October 24, 2020 that it had made the payment.

The ROC issued a Citation against Contractor dated November 9, 2020. The Citation charged Contractor with violating A.R.S. § 32-1154(A)(10). Contractor filed its Written Answer to Citation and Complaint on November 24, 2020, again asserting that it had made the payment.

On January 20, 2021, the ALJ held a hearing. She issued her decision on February 5, 2021. She concluded that the preponderance of the evidence did not show that Contractor was at fault for failing to pay Subcontractor. She therefore found no violation of the statute and dismissed the citation.

On February 19, 2021, the ROC issued its Final Administrative Decision and Order, which accepted the ALJ's decision. Subcontractor filed a Motion for Rehearing on March 24, 2021, which was denied on March 30, 2021. Subcontractor then timely appealed to this Court.

V. CONTRACTOR'S FAILURE TO PAY SUBCONTRACTOR, THOUGH INADVERTENT, STILL VIOLATED A.R.S. § 32-1154(A)(10)

A. Standard of review

This Court's review is governed by A.R.S. § 12-910. That statute provides for this Court to conduct a trial *de novo* if timely requested by the parties. The parties have stipulated that the Court's review should be *de novo*, but that the Court would review the paper record rather than conducting a trial.

B. Because A.R.S. § 32-1154(A)(10) does not impose an intent requirement, Contractor violated it by failing to pay Subcontractor

This case turns on the application of A.R.S. § 32-1154(A)(10). That statute allows the ROC to discipline a licensed contractor that:

[fails] to pay monies in excess of \$750 when due for materials or services rendered in connection with the licensee's operations as a contractor unless the licensee proves that the licensee lacks the capacity to pay [] and has not received sufficient monies as payment for the particular construction work project or operation for which the services or materials were rendered or purchased.

Contractor argues that it did not violate the statute because it did issue a payment. The hacker's actions simply prevented the payment from reaching Subcontractor.

Whether Contractor violated subsection (A)(10) depends on how that statute is construed. As the Court must in construing statutes, it attempts to achieve the legislative intent. *Stambaugh v. Killian*, 242 Ariz. 508, 509, 398 P.3d 574, 575 (2017). The most reliable indicator of that intent is the statutory language itself. *Matter of ABB Trust*, 251 Ariz. 313, 317-18, 491 P.3d 1120, 1124-25 (App. 2021). Unless the language is ambiguous or absurd, the inquiry ends with the language's plain meaning, read within the overall statutory context. *Welch v. Cochise County Bd. of Supervisors*, 251 Ariz. 519, 523, 494 P.3d 580, 584 (2021).

The Court concludes that subsection (A)(10) unambiguously required Contractor to actually pay Subcontractor. It requires the contractor to “pay monies ... when due for materials or services rendered.” To satisfy this requirement, a contractor must pay the party that provided the materials or services. Although Contractor argues otherwise, paying a third party is insufficient. The statute's “when due” language makes this clear. Until the monies are paid to the party that provided those materials or services, they remain due. That is precisely the situation here.

Nor does the statute provide an exception for Contractor's good-faith, but unsuccessful, effort to pay. The statutory language provides only one exception — a lack of capacity to pay. And that exception applies only until the contractor receives “sufficient monies as payment” for the project for which it furnished services or materials. Contractor cannot avail itself of this exception because the record demonstrates that it was paid for its work.

The Court lacks authority to create a further exception where the contractor made a good-faith effort to pay. *Silver v. Pueblo Del Sol Water Co.*, 244 Ariz. 553, 564-65, 423 P.3d 348, 359-60 (2018) (explaining that courts lack “the constitutional authority to construe a statute so that it encompasses matters that were not covered or addressed by the legislature”).

Subsection (A)'s statutory context reinforces the Court's conclusion. That subsection subjects 24 types of acts to sanction by the ROC. Several of these acts contain an explicit intent requirement. *See, e.g.*, A.R.S. § 32-1154(A)(13) (“Knowingly entering into a contract...”), (A)(16) (“Knowingly contracting beyond the scope of the license...”). Others imply an intent requirement by their language. *See, e.g.*, A.R.S. § 32-1154(A)(1) (“Abandonment of a contract...”), (A)(5) (“Misrepresentation of a material fact...”).

By contrast, subsection (A)(10) neither expresses nor implies an intent requirement. This omission, where the requirement is included in other subsections, suggests that the omission was intentional. *See City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 211, 437 P.3d 865, 870

(2019) (applying canon of statutory construction that the expression of one item implies the exclusion of others).

Thus, the best reading of subsection (A)(10) is that Contractor's good-faith attempt to pay is not relevant. The failure to pay is itself dispositive. Accordingly, Contractor violated subsection (A)(10).

C. The Court rejects Contractor's argument that finding a violation is inconsistent with the statutory purpose

Contractor argues that excluding an intent requirement from subsection (A)(10) is inconsistent with the licensing statutes' purpose. That purpose is to protect the public from unscrupulous and irresponsible contractors. *See Beazer Homes Ariz., Inc. v. Goldwater*, 196 Ariz. 98, 101, 993 P.2d 1062, 1065 (App. 1999). Contractor argues that in light of its good faith, sanctioning it would not further that purpose.

The Court sympathizes with Contractor's reasoning. It does not believe Contractor's conduct was unscrupulous or irresponsible. Neither did the ALJ or ROC. At worst, Contractor was careless in trying to send payment to Subcontractor via ACH when the most recent e-mail traffic suggested that the payment should be sent via Fed Ex.

But what this Court, the ALJ, and the ROC consider unscrupulous or irresponsible is irrelevant in determining whether Contractor violated subsection (A)(10). It is for the Legislature to decide the categories of conduct that can subject a contractor to discipline. And the Legislature included failure to pay in those categories, without regard to intent. If Contractor believes that result is too harsh, its remedy is with the Legislature, not with the ROC or the courts.

Importantly, though, Contractor's intentions are relevant to the appropriate sanction for violating subsection (A)(10). The ROC will address that issue on remand in exercising its discretionary power to sanction. *See* A.R.S. § 32-1154(B)(3).

Contractor also argues that finding it in violation would be inconsistent with the purpose of the Prompt Pay Act. But it has pointed to no language in the Prompt Pay Act that would justify interpreting subsection (A)(10) in a manner inconsistent with that subsection's language.

D. The Court lacks the power to award attorneys' fees, as this is a statutory action rather than a contract action

Both parties seek an award of their attorneys' fees under A.R.S. § 12-341.01 and the Prompt Pay Act. Contractor also seeks interest under the Prompt Pay Act. The Court concludes that it lacks the power to award these remedies.

As to Section 12-341.01, a fee award is not permissible on statutory appeals from ROC proceedings. *Keystone Floor & More, LLC v. Ariz. Registrar of Contractors*, 223 Ariz. 27, 30, 219 P.3d 237, 240 (App. 2009). As *Keystone Floor* holds, the appeal is not an action arising out of a contract under that statute “because the basis for the action is purely statutory.” *Id.* Similar to that case, the question here is not whether Contractor breached its contract with Subcontractor, but whether it violated A.R.S. § 32-1154(A)(10). Fees under Section 12-341.01 are therefore not awardable.

As to the Prompt Pay Act, the fee-shifting provision is A.R.S. § 32-1183(J). That subsection reads, “In any action or arbitration brought to collect payments or interest pursuant to this section, the successful party shall be awarded costs and attorney fees in a reasonable amount.” Applying that language and the logic of *Keystone Floor*, the Court concludes that this is not an action brought to collect payments under the Prompt Pay Act. Rather, this was a statutory action brought to compel compliance with Section 32-1154(A)(10). Accordingly, attorneys’ fees are not awardable under the Prompt Pay Act.

Subcontractor disagrees, citing the unpublished decision in *Shea Connelly Development LLC v. Arizona Registrar of Contractors*, 2020 WL 6503616 (Ariz. App. Nov 3, 2020). That case does look to the Prompt Pay Act’s time periods in determining whether a contractor had failed to timely pay its subcontractor. But it does not purport to apply the Prompt Pay Act’s remedies, such as an award of attorneys’ fees, in ROC proceedings and appeals. As to whether doing so is proper, the Court finds *Keystone Floor*’s logic more applicable than *Shea Connelly*’s.

By similar logic, the Prompt Pay Act’s interest provision is also inapplicable. That provision allows the recovery of interest if payment is delayed beyond the statutory time period. A.R.S. § 32-1183(H). But as this matter does not arise under the Prompt Pay Act, interest is not awardable here.

The Court emphasizes that its conclusion on the attorneys’ fee and interest issues applies because this action initiated under the ROC statutes. The Court makes no comment on whether fees and interest could be awarded in a civil action arising out of Contractor’s failure to pay Subcontractor.

VI. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** that the Final Administrative Decision and Order of the Registrar of Contractors is **REVERSED**;

IT IS FURTHER ORDERED that this matter is **REMANDED** to the Registrar of

Contractors for further proceedings consistent with this ruling.

IT IS FURTHER ORDERED that no further matters remain pending, and judgment is entered under Ariz. R. Civ. P. 54(c). This ruling is intended to be appealable under JRAD Rule 13.