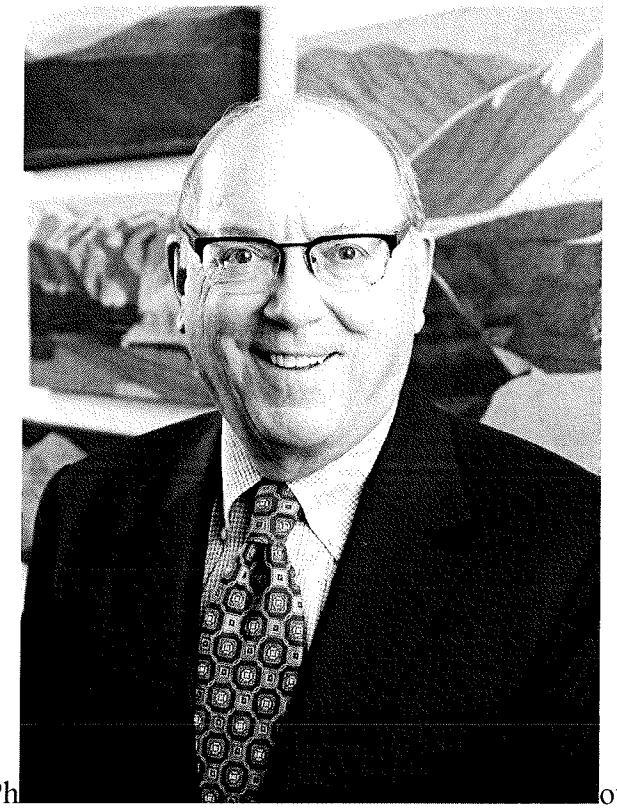
COMMISSION ON JUDICIAL SELECTION

APPLICATION

NEVADA SUPREME COURT
SEAT G

By

Michael Edward Buckley



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COMMISSION ON JUDICIAL SELECTION
CERTIFICATION, WAIVER OF CONFIDENTIALITY AND RELEASE OF INFORMATION

I hereby certify that the answers and information provided herewith are true and correct to the best of my knowledge. MEB (initial)

I hereby certify that I meet the minimum qualifications to be a Supreme Court Justice as set forth in NRS 2.020.
MEB (initial)

I authorize any person or custodian of records, including, without limitation, the Commission on Judicial Discipline; the Department of Public Safety, Records and Identification Services; the Federal Bureau of Investigation; the Supreme Court of Nevada, Office of the Clerk; any credit reporting agency utilized by the Commission, and the State Bar of Nevada to release to the Commission on Judicial Selection any and all information that may be available concerning me. MEB (initial)

I hereby release and discharge the Nevada Commission on Judicial Selection (Commission), its individual members, as now or hereafter constituted, and any other entity and/or individual(s) authorized herein to provide information to the Commission, of and from any and all claims, demands, liability and damages arising out of the release and use of such information concerning me, the undersigned, on file or otherwise available with any of the said entities and/or individuals MEB (initial)

Should I be favorably considered, I will accept appointment to the Court indicated. MEB (initial)

Michael E Buckley
Signature of Applicant

September 9, 2016
Date

Michael Edward Buckley
Printed Name of Applicant

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

The undersigned, upon oath, deposes and states as follows: That (s)he is the person whose signature appears herein above on the instrument entitled "Application ", that (s)he has read the same and is aware of the contents thereof; that the same is true and correct according to the best knowledge and belief of the undersigned; and that (s)he executed the same freely and voluntarily, and for the purpose of inducing the Nevada Commission on Judicial Selection to give favorable consideration to this Application for judicial office.

Michael E Buckley
Signature of Applicant

Michael Edward Buckley
Printed Name of Applicant

SUBSCRIBED and SWORN to before me this 9th of September, 2016

Notary

NOTARY PUBLIC
TRISTA DAY
STATE OF NEVADA - COUNTY OF CLARK
MY APPOINTMENT EXP. MAR. 15, 2020
No: 04-88154-1

SECTION I: PUBLIC INFORMATION (QUESTIONS 1 THROUGH 47)

Personal Information

1. **Full Name**: Michael Edward Buckley

2. **Have you ever used or been known by any other legal name (including a maiden name)? If so, state name and reason for the name change and years used.**

   No. N/A

3. **Work Address**: 300 South 4th St., Suite 1400, Las Vegas, Nevada 89101

4. **How long have you been a continuous resident of Nevada?** 44 years.

5. **Age**: 66

   (NRS 2.020 states that a Supreme Court justice must be at least 25 years old.)

Employment History

6. **Using the format provided in Attachment "A" please start with your current employment or most recent employment, self-employment, and periods of unemployment for the 20 years immediately preceding the filing of this Application.**

Educational Background

7. **List names and addresses of high schools, colleges and graduate schools (other than law school) attended; dates of attendance; certificates or degrees awarded; reason for leaving.**

   Loyola High School
   1901 Venice Blvd.
   Los Angeles, California 90006
   September 1964 - June 1968
   High School Diploma
   Graduated

University of California, Los Angeles
405 Hilgard Avenue
Los Angeles, California 90095
September 1968 – June 1972
B.A., English Literature
Graduated

University of Nevada, Las Vegas
4505 S Maryland Pkwy
Las Vegas, Nevada 89154
Summer Session I, 1969
Summer Sessions I and II, 1971

UNLV Graduate Program, English Department
Fall 1977 – Spring 1978
Dropped out because of time commitments

8. **Describe significant high school and college activities including extracurricular activities, positions of leadership, special projects that contributed to the learning experience.**

High school: *The Loyalist* (school newspaper) writer and photographer (Junior/Senior); Paleontological Society (Junior); CSF Life Member (California Scholarship Federation).

College: Op-Ed columnist, UCLA *Daily Bruin*, January, 1972; Chancellor's Marshall, Commencement Ceremonies, June 14, 1972.

9. **List names and addresses of law schools attended; degree and date awarded; your rank in your graduating class; if more than one law school attended, explain reason for change.**

Santa Clara University
500 El Camino Real
Santa Clara, California 95053
J.D. Degree, Cum Laude, May, 1975
Rank: Unknown (Cumulative GPA 3.15)

10. **Indicate whether you were employed during law school, whether the employment was full-time or part-time, the nature of your employment, the name(s) of your employer(s), and dates of employment.**

Summer vacation, 1972: Full time, Orderly Medical Floors. Southern Nevada Memorial Hospital, Las Vegas, Nevada.

Summer vacation, 1973: Full time, Warehouse worker. Lamb & One, Las Vegas, Nevada.

Summer vacation, 1974: Jones, Jones, Bell, LeBaron, Close, Bilbray and Kaufman: Full time, law clerk.

September, 1974 – January 1975 (approximately): Jones, Jones, Bell, LeBaron, Close, Bilbray and Kaufman: Part time, law clerk.

11. Describe significant law school activities including offices held, other leadership positions, clinics participated in, extracurricular activities.

2L and 3L: Staff, reporter and poetry contributor, *The Advocate*, Santa Clara University Law School newspaper.

Law Practice

12. **State the year you were admitted to the Nevada Bar**. 1975

13. **Name states (other than Nevada) where you are or were admitted to practice law and your year of admission.**

California, 1976. District of Columbia, 1982.

14. Have you ever been suspended, disbarred, or voluntarily resigned from the practice of law in Nevada or any other state? If so, describe the circumstance, dates, and locations.

In approximately 2013, I voluntarily withdrew from the practice of law in the District of Columbia. I became a member of the bar in 1982 in connection with our firm's Washington office, but never had occasion to practice law there. My withdrawal was accepted without condition.

15. Estimate what percentage of your work over the last 5 years has involved litigation matters, distinguishing between trial and appellate courts. For judges, answer questions 16-20 for the 5 years directly preceding your appointment or election to the bench.

A small percentage, roughly 3 - 5%, has involved litigation, primarily working with litigators in the firm, conferring on real estate matters at both trial and appellate levels. Between approximately 2010 and 2014, I worked with attorneys in my firms representing clients involved in mortgage foreclosure, deficiency and homeowner association foreclosure related litigation. In 2013 I was the primary author of amicus briefs filed in the District Court (SFR) and the Supreme Court (Villa Palms), discussed elsewhere (Question 20). I have recently worked on analyzing district court claims for relief involving land use matters.

16. Estimate percentage of time spent on (1) domestic/family and juvenile law matters,

(2) civil litigation, (3) criminal matters, and (4) administrative litigation.

To the extent my practice has involved litigation: (1) 0%; (2) 95%; (3) 0%; and (4) 5%.

17. In the past 5 years, what percentage of your litigation matters involved cases set for jury trials vs. non-jury trials?

No jury trial involvement.

18. **Give the approximate number of jury cases tried to a conclusion during the past 5 years with you as lead counsel. Give the approximate number of non-jury cases tried to a decision in the same period.**

None

19. List courts and counties in any state where you have practiced in the past 5 years.

I have been indirectly involved in cases in Clark County, 8th Judicial Court and Bankruptcy Court.

20. List by case name and date the five cases of most significance to you (not including cases pending in which you have been involved), and list or describe:

a. case name and date,
b. court and presiding judge and all counsel
c. the importance of each case to you and the impact of each case on you,
d. your role in the case.

Case 1:

(a) *Swartz v. Adams*, 93 Nev. 74 (1977).

(b) Supreme Court. George Cromer (Adams); Joe Brown and myself (Swartz).

(c)/(d) As a law clerk, I assisted Joe Brown on this case in the summer of 1974 and continued when I went back to school in the fall. The case involved an attorney who had obtained a judgment against his former clients for unpaid attorney fees and later purchased his former client's property at an execution sale. The suit for unlawful execution claimed that notice given under the statute in effect at the time was constitutionally deficient. Joe handled the case in District Court which granted summary judgment in favor of the attorney defendant. After I joined the firm in 1975, Joe assigned the case to me and I handled the appeal. The Supreme Court ruled in favor of Mrs. Swartz, holding that the notice required by the statute was unconstitutional. This case was important to me for several reasons. First, the critical issue of notice required by due process connected the real life practice of law to law school. To this day, *Mullane v. Central Hanover Bank & Trust Co.* remains firmly set in my mind. Secondly, for Joe to turn the case over to me to write the brief and argue the case on appeal, while intimidating, was the ultimate confidence builder for a young lawyer. Finally, although

the case involved constitutional law, it also involved attorney conduct. To this day, I can still hear Justice Mowbray say, "I'm shocked," when I recited the facts. The case remains a lesson in client relations.

Case 2.

(a) *Wiley v. Cook*, 94 Nev. 558 (1978).

(b) Supreme Court. George Rudiak (Wiley); Jeff Green and myself (Cook).

(c)/(d) I worked on this case at Jones, Jones following Jeff Green's handling of the trial in the 8th Judicial District Court, which found that Roland Wiley had entered into an enforceable lease and option agreement with our client, Tommy Cook, et al. for a large parcel of real property in North Las Vegas. Jeff left the firm shortly after I joined. The matter was assigned to me. This case was a lesson in advocacy. The grounds on which George based the appeal were numerous and well argued. George was a tireless advocate. Successfully defending the judgment definitely felt like a battle well won. After the appeal I worked with Tommy Cook for many years as he attempted to turn the property into a successful real estate development, finally selling the property in 2001, which itself was a lesson in visions of how the city would grow.

Case 3.

(a) *Carrillo v. Valley Bank*, 103 Nev. 157 (1987).

(b) Supreme Court. Sam Lionel and David Frederick (Carrillo); myself (Valley Bank).

(c)/(d) Background. In 1987 my practice had primarily transitioned into real estate transactional work. A large part of that practice was acting as lender's counsel for Valley Bank on commercial loans and workouts. I had also become a member of the State Bar's Business Law Committee, led by Jeff Zucker at Lionel Sawyer & Collins. Real estate lending was going through a troublesome period. Those of us who represented lenders were very fearful of the effect of the one action rule, NRS 40.430, and the possibility that a lender might inadvertently lose its mortgage as a result of an "act" construed to be a violation of the one action rule, a drastic result. I worked closely with the bank's general counsel, Jon Joseph, who supported legislative changes to make clear what was and what was not permitted. Through the Business Law Committee I had the pleasure of working with, Edward Hale and Chuck Deaner, the acknowledged deans of real estate lawyers in the State. In 1987, our Committee had proposed amendments to NRS 40.430, which were adopted by the Legislature, to provide a number of safe harbors.

The case: Valley Bank made a loan to Mr. Carrillo, secured by a second deed of trust, which was eliminated when the holder of the first deed of trust foreclosed. At the foreclosure sale, Valley bid $1 more than the beneficiary of the first deed of trust and acquired the property. Valley argued in district court that the fair value deficiency statutes did not apply because it was a "sold out junior." The district court agreed and granted Valley summary judgment against Carrillo for the full amount of the loan, less $1. On appeal, Carrillo claimed the deficiency statutes should apply. By way of background, in December, 1986, the Supreme Court, in *First Interstate Bank v. Shields*, 102 Nev. 616,

and *Crowell v. John Hancock*, 102 Nev. 640, had overturned a long line of cases that had held guaranties were separate obligations and guarantors were not entitled to protection of the borrower deficiency statutes. Although Jon knew I was not a litigator, he asked me to handle the appeal by Mr. Carrillo because of my familiarity with the topic. In light of *Shields* and *Hancock*, our chances did not look good. Still, when I found an old case authored by Justice Traynor, my law school hero, I thought I had a chance. At oral argument, however, it became clear which way the Court was leaning, and no one was surprised when the Court sided with Carrillo.

Carrillo is important to me because it involved an area of law in which I was deeply involved. I still refer to the case as important precedent. It was also a lesson in humility, going up against the top advocates in the state.

Case 4.

(a) *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408, 130 Nev. Adv. Op. 75 (2014).

(b) Supreme Court. Jackie Gilbert and Howard Kim (SFR); Ariel Stern (U.S. Bank).

(c)/(d) This case is important to me because it resolved an issue with which I had been involved since the economic downturn in 2008, primarily as a member of the Nevada Commission on Common Interest Communities and Condominium Hotels (CCICCH): the relative priority of HOA assessment liens and first mortgages under NRS Chapter 116.

Background: Around 1988, Steve Hartman of the Allison MacKenzie firm and I heard a seminar presentation which inspired us to support Nevada's enactment of the Uniform Common Interest Ownership Act (UCIOA). Working through the Business Law Committee, we were successful in 1991 when the Legislature adopted NRS Chapter 116. Since then, through the Community Associations Institute (CAI), the State Bar and the CCICCH I have worked on legislative issues relating to NRS Chapter 116 in, I believe, every regular legislative session. With the downturn in the economy in 2008, different interpretations of NRS 116.3116 resulted in hundreds of lawsuits reaching conflicting decisions. Things came to a head in the summer of 2013. In June, the Common Interest Committee (Committee) of the Real Property Law Section (Section) was invited by District Court Judge Tao in *SFR Investments Pool I, LLC v. U.S. Bank National Association, et al* (Case No. A-13-678858-C) to file an amicus brief addressing the priority issues. With the approval of the Section, on August 1, Will Wright and I, on behalf of the Committee, submitted a brief, of which I was the main author, which made the case that HOA assessment liens had a true priority over first mortgages to the extent of the "super priority." (As I recall, this had been the position of Judge Tao.) Among other things, through ACREL (See Question 23) we were able to connect with one of the original drafters of UCIOA, Carl Lisman.

On August 22, the Joint Editorial Board for Uniform Real Property Acts (JEB) issued a request (JEB Request) for comments on UCIOA 3-116 (NRS 116.3116) in light of the

controversies and different interpretations of the statute in different states, including Nevada, which many believed to be "ground zero." The JEB Request included a "Report" analyzing the history, meaning and present interpretations of 3-116.

On September 23, Karen Dennison and I, co-chairs of the Committee, were invited by Zachary P. Takos, Esq. of Greene Infuso, on behalf of the appellant in *Villa Palms Court 102 Trust v. Riley et al.* (Case No. 62528), to file an amicus brief on the HOA priority issue. We were informed this was "the first-filed case before the Supreme Court (besides the Centeno case)" involving the super priority issue. While the Committee believed the UCIOA, both in its plain language and in its history, was clear in support of the HOA super priority, both the Section and the Board of Governors had come to a greater appreciation of the depth of the controversy. Accordingly I authored a short amicus brief on behalf of the Section simply directing the Court's attention to the JEB Request and its accompanying report, in order to make sure the Court was aware of the latest Uniform Law considerations and interpretations regarding UCIOA 3-116.

SFR Investments resolved the super priority debate a year later in September 2014, confirming the position espoused by the Committee. While our amicus brief had not been filed in the case, the majority opinion's reference to the JEB Report led us in the Section to believe the Court had considered our contribution to be worthwhile.

Case 5.

(a) *Geo B. Smith Chemical Works v. Simon*, 92 Nev. 580 (1976).

(b) Supreme Court. Pete Rittenhouse (Geo. B. Smith); Joe Brown and myself (Simon).

(c)/(d) Although I had not participated in the district court, Joe asked me to prepare the respondent's brief. The tenant under a lease, Smith, was entitled to exercise a renewal option if its facility was operating when it exercised its renewal option. Although the tenant had not operated its facility for some time, it commenced operations at the time it exercised its option. The trial court found the term "operating a manufacturing plant" to be ambiguous and, based on parol evidence, agreed with our client, Simon, that the tenant's last minute operations did not satisfy the lease condition. The Supreme Court, declining oral argument, held that the words were unambiguous and, thus, the district court erred when it admitted parol evidence to determine their meaning. To this day, I retain a fascination for the meaning of words in the context of litigation, as evidenced by the article discussed below in the Fall 2016 edition of ACMA's *The Abstract*.

21. Do you now serve or have you previously served as a mediator, an arbitrator, a part-time or full-time judicial officer, or a quasi-judicial officer? To the extent possible, explain each experience.

The CCICCH (See Number 29 below) heard appeals by persons affected by disciplinary or other licensing actions taken by the Nevada Real Estate Division (NRED). As chair of the Commission, I presided over these public hearings, making evidentiary rulings and

working with my fellow commissioners to reach decisions. As I recall, the CCICCH met about every two months, alternating locations between the north and the south parts of the State.

22. Describe any pro bono or public interest work as an attorney.

Board of Bar Examiners. Member, 2013 – present. In addition to overseeing the admission process, bar examiners write and grade bar exam questions.

State Bar of Nevada

(a) Fee Dispute Committee, 1983-1990. Las Vegas Chair 1983-1988; State Chair 1989-1990. My duties as chair included assigning and supervising arbitrations. I also served as arbitrator on many disputes.

(b) Business Law Section, 1985-1991; 1993 – 2007. Executive Committee, 1985-1991: As a member of the State Bar's Business Law Committee, I participated in reviewing, commenting on and supporting the enactment of the following legislation: Revised Uniform Limited Partnership Act, 1985; UCC Article 2A, 1989; NRS Chapter 40 (one acti0n rule and guarantor rights), 1987-1989; Uniform Common Interest Ownership Act, 1991. This often involved testifying before the Legislature on the purpose and effect of proposed legislation. The Committee later became a Section and I became a member (perhaps the sole member) of Real Estate Law Committee, reviewing and commenting on legislation affecting real property.

(c) Real Property Law Section: Founding member, member and chair of Executive Committee, 2007- present.

(i) Legislative Activities. Through the Section I have participated in reviewing, commenting on and supporting legislative proposals affecting real property. Legislative proposals must (1) relate closely and directly to the administration of justice; (2) involve matters which are not primarily political and as to which evaluation by lawyers would have particular relevance if not related closely and directly to the administration of justice; or (3) come within the Section's special expertise and jurisdiction. A number of our proposals have involved NRS Chapter 116, but we have also proposed simple clarifications. For example, in 2015 I was the primary author of SB 453, which aimed at "cleaning up" NRS Chapter 40, following several years, beginning in 2009, of legislative enactments which didn't always fit together.

(ii) Amicus Briefs. As noted above (Question 20), the Section filed briefs on super priority issues in 2013.

(iii) CLE. With the Section I have participated in CLE programs at the Annual Meetings in 2008 – 2012, 2014 – 2015, as well as at a number of legislative update programs. The Section was instrumental in bringing Mike Rubin to Las

Vegas in one of the best attended CLE programs ever, jointly sponsored by the Business Law and Real Property Sections. The Section was also responsible for bringing to Las Vegas and Reno, respectively, perhaps the two most well respected real estate professors in the country, Pat Randolph and Roger Bernhardt.

(iv) Liaison. The Section is the liaison to other bar associations and groups regarding the practice of law in our state. As noted above, in 2013 the JEB requested comments on HOA priority issues. I was the primary author of an October 31, 2013 response, on behalf of certain members of the CIC Committee, regarding conditions in Nevada. As chair, I occasionally get questions from groups regarding practices in Nevada.

(iv) Working Groups. Beginning in October, 2012 and continuing through early 2013, I participated in the Attorney General's Working Group considering issues relating to AB 284 (2011) which had imposed the requirement of a lender's affidavit on trustee's sales resulting in severe problems in trustee's sale foreclosures throughout the State. Participants, besides the Attorney General, included representatives of the lending and title insurance industries, pro bono legal services and Karen Dennison and myself on behalf of the Section. Consensus legislation was approved by the group and passed in 2013. In 2014, Karen Dennison and I attended meetings of Senators Ford and Hammond's working group on HOA super priority liens, which resulted in consensus bill SB 306. Our primary service was to alert the group of "bigger picture" issues when solutions ranged too far or used terminology which brought into play other areas of law, such as the UCC.

(v) Board of Governors. On behalf of the Section I have participated in meetings sponsored by the Board of Governors regarding Section practices, such as the meetings presently ongoing, regarding Section organization, procedures and funds.

(d) Transitioning into Practice (TIP). 2012 - present. (I believe I am on my eighth mentee.) Meeting with and mentoring newly admitted lawyers pursuant to a State Bar sponsored mentoring program.

(e) Las Vegas Bar Building. In 2012 and 2013, I represented the State Bar on a pro bono basis, assisting the Bar in contract negotiations and legal and title due diligence in connection with a proposed new headquarters site in northwest Las Vegas.

Community Associations Institute Legislative Action Committee (LAC), 1993-2003 (Co-chair, 1998-2001). As an attorney member of the CAI LAC (appointed by national CAI) I worked with other attorneys, community managers, developers and homeowners to monitor and comment on proposals affecting NRS Chapter 116. Prior to the economic downturn in 2008, when the conversation changed to lien foreclosures and association

finances, legislative issues primarily involved association management and developer issues.

23. List all bar associations and professional societies of which you are or have been a member. Give titles and dates of offices held. List chairs or committees in such groups you believe to be of significance. Exclude information regarding your political affiliation.

State Bar of Nevada: Business Law Section (1993 - present), Real Property Section (2007 – present)

California Bar Association: Real Property Section (1995 – present).

American College of Real Estate Lawyers (ACREL), 1988 - present. "ACREL is the premier organization of U.S. real estate lawyers. Admission is by invitation only after a rigorous screening process. ACREL's distinguished, nationally-known lawyers have been elected to fellowship for their outstanding legal ability, experience and high standards of professional and ethical conduct in the practice of real estate law." (From the ACREL website.) (Nevada has nine members.) A significant requirement of ACREL is an attorney's commitment to pro bono activities or activities which improve the profession, the so-called "give back."

(i) Public Policy Forum (PPF). I have been a member of the PPF since 2011 and, since 2015, the chair. PPF sponsors meeting programs with non-lawyer speakers, who address topics which impact our practice, but are not CLE. Topics have included port development, abandoned housing in urban areas and stadium developments. In 2012 I put arranged and moderated a program at the Las Vegas meeting, featuring Pat Mulroy, who spoke about water in the West. In 2015, at the Scottsdale meeting, I arranged and moderated a program on the effect of immigration policy on real estate development.

(ii) Unique Deal. In 2003, at ACREL's meeting in Las Vegas, I arranged and moderated a presentation on the Las Vegas Monorail, featuring, among others, Commissioner Bruce Woodbury.

(iii) CLE. October, 2009, panelist, "Issues in Distressed Common Interest Ownership Communities." October 2011, panelist, Mixed Use Developments in Troubled Times.

(iv) Editing. Since about 2005 I have been an editor of the ACREL Papers, which is the ALI/CLE book containing program materials from the ACREL meetings. Each editor is given one or two papers to review before final publication.

(v) Common Interest Communities Committee. I have participated in the CIC Committee in the past at ACREL meetings and online, but my involvement at meetings is limited because of PPF conflicts.

American College of Mortgage Attorneys (ACMA). 2010 - present. ACMA focuses, as its name implies, on issues relating to lawyers practicing commercial real estate finance law. (Nevada has four members.)

(i) Legislative Committee. Since about 2014, I have been co-chair of the Legislative Committee, which considers and comments on proposed legislation. Through this Committee I have participated in an analysis and response to the JEB Request and the proposed Uniform Law Commission's Uniform Commercial Receivership Act which is likely to be introduced in Nevada in 2017.

(ii) *Mortgage Law Summary*. ACMA publishes the *Mortgage Law Summary* every two years, covering mortgage law procedures, forms and laws throughout the country and Canada. I participated in the summary of Nevada laws in the current 2015-2016 Summary.

(iii) *The Abstract*. ACMA publishes *The Abstract* in the Fall and the Spring. I am the author of "The Meaning of Equal Priority" in the Fall 2016 edition, discussing the Nevada Supreme Court's decision in *Southern Highlands Community Association v. San Florentine Avenue Trust et al.*, 132 Nev Adv. Op. 3 (2016).

St. Thomas More Society. (2012 – present). The St. Thomas More Society of Nevada is an association of Roman Catholic lawyers, judges, law professors and civic leaders organized to promote the ideals of Saint Thomas More and the practice of traditional ethics in the legal and business communities. The Society has sponsored the Red Mass in Las Vegas, two "galas" featuring speeches by Justices Scalia and Alito and continuing legal education programs. I have also participated in Society sponsored volunteer days at Catholic Charities' food pantry and dining room.

Community Associations Institute (CAI). 1993 to about 2009. Legislative Action Committee 1993 - 2003 (Co-Chair, 1998 – 2001). CAI is the preeminent national organization for professionals involved with community associations, including attorneys, managers, homeowners, developers and governmental officials.

American Bar Association, Business Law Section, Real Estate Probate and Property Section.

Clark County Bar Association.

Fellows of the American Bar Foundation (2015 -)

24. List all courses, seminars, or institutes you have attended relating to continuing legal education during the past 5 years. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge?

2011: ACREL Spring and Fall Meetings. CEB Annual Real Property Law Section Retreat. State Bar of Nevada Annual Meeting (presenter for one break out session); Legislative Update (presenter).

2012: ACREL Spring and Fall Meetings. State Bar of Nevada Annual Meeting (presenter for one break out session). National Business Institute, Practical Zoning (presenter).

2013: ACREL Fall Meeting. State Bar of Nevada Annual Meeting; Legislative Update (presenter). St. Thomas More Society/UNLV, Natural Law.

2014: Clark County Bar Association, Mechanics' Liens. State Bar of Nevada Annual Meeting (presenter for break out session). ACREL Fall Meeting. ACMA Annual Meeting. National Conference of Bar Examiners Workshop.

2015: CEB Real Property Practice: Year in Review. ACREL Spring and Fall Meetings. State Bar of Nevada Annual Meeting (presenter at break out session); Rents, Refi and Reefer Madness. ABA London Sessions.

2016: CEB Understanding the Role of the Interpreter. ACREL Spring Meeting.

Fennemore Craig, 2012-2016. Fennemore Craig sponsors monthly practice group lunches (Real Estate, Creditors' Rights and Financial Restructuring, Business Law), many of which qualify for CLE. In addition, ALAS has made several in-house presentations on professionalism and malpractice avoidance.

Yes, I am in compliance (Nevada and California).

25. Do you have Professional Liability Insurance or do you work for a governmental agency?

Yes, through ALAS.

Business and Occupational Experience

26. Have you ever been engaged in any occupation, business, or profession other than a judicial officer or the practice of law? If yes, please list, including the dates of your involvement with the occupation, business, or profession.

No.

27. **Do you currently serve or have you in the past served as a manager, officer, or director of any business enterprise, including a law practice? If so, please provide details as to:**
    - **a. the nature of the business,**
    - **b. the nature of your duties,**
    - **c. the extent of your involvement in the administration or management of the business,**
    - **d. the terms of your service,**
    - **e. the percentage of your ownership.**

Jones, Jones Close & Brown/Jones Vargas. My ownership interest in the law firm varied. (Ownership was only important in terms of retirement, with retirement benefits based on the number of shares held in the firm. The retirement program was terminated in about 2011.) All major decisions were made by the board of directors or the stockholders, based on general corporate principles.

Managing Partner. During the mid-1980's I was, for a year or two, managing partner. My duties primarily involved interacting with the legal administrator on behalf of the stockholders.

Director. Until about 2005, all stockholders were directors. After 2005, Jones Vargas had, as I recall, a board of nine directors. I was a director from about 2009 or so until the firm's dissolution.

Officer. All stockholders were officers of the firm. Other than the managing partner and the firm president, stockholders were each Vice Presidents. Duties primarily involved the ability to execute documents on behalf of the professional corporation when authorized, as necessary.

Fennemore Craig, P.C.. My ownership interest in the law firm is the same as other stockholders. Major decisions are made by the board of directors or the stockholders, based on general corporate principles.

Director. Since 2012, I have been, as are other stockholders, a director.

Officer. I am a Vice President of the firm as are most other stockholders other than those in management positions, which I am not. Duties primarily involve the ability to execute documents on behalf of the professional corporation when authorized, as necessary.

28. **List experience as an executor, trustee, or in any other fiduciary capacity. Give name, address, position title, nature of your duties, terms of service and, if any, the percentage of your ownership.**

In March, 2016, I became the trustee of the trust created by my mother's father for his children and grandchildren. The trust originally covered all seven of my grandfather's

children and their children, but with my mother as the only living child, the trust has been distributed by order of the Superior Court in Los Angeles to all of the beneficiaries except my mother and her children. At present my experience has been meeting with my mother and my brother, Brian, our investment advisor, to determine the best way to provide our mother with income from the trust.

Civic, Professional and Community Involvement

29. Have you ever held an elective or appointive public office in this or any other state? Have you been a candidate for such an office? If so, give details, including the offices involved, whether initially appointed or elected, and the length of service. Exclude political affiliation.

Trustee, Nevada Bar Foundation, 1987 – 1989. Elected by members of bar (as I recall). Duties primarily consisted of determining the use of IOLTA funds.

Commissioner, City of Las Vegas Planning Commission, 1994 – 2002, Chair 1999 - 2000. January – July, 2009. Appointed by City Council. Local governmental body responsible for reviewing and approving land use applications, including master plan amendments, zone changes, use permits and variances. In 2000 – 2001 I served as the Planning Commission's representative on the City of Las Vegas 2020 Master Plan Steering Committee. In 2009, I agreed to serve on an interim basis, following the resignation of a commissioner, until municipal elections.

Commissioner, State of Nevada Department of Human Resources Block Grant Commission, 1996 – 2003, Chair 1998 - 1999. Appointed by the Governor. The Commission reviewed applications for, and awarded, federal block grant money to local community organizations.

Commissioner, State of Nevada Commission on Common-Interest Communities and Condominium Hotels, 2003 – 2012, Chair 2003 - 2012. Appointed by Governor. The Commission worked with the Nevada Real Estate Division (NRED) to supervise and administer NRS Chapters 116, 116A and 116B, including promulgating regulations (NAC 116 and 116A), advising NRED on issues relating to common-interest communities, reviewing and testifying on proposed legislation and acting as a judicial body for hearings involving licensing matters under NRS 116 and 116A. On two occasions, once with Senator Mike Schneider and once with Administrator Gail Anderson, I made a presentation to a California Legislature senate or assembly committee considering the adoption of an ombudsman program similar to Nevada's.

30. **State significant activities in which you have taken part, giving dates and offices or leadership positions.**

Mrs. Graves Junior Cotillion. Through my sister, Leslie, who was then teaching at H.P. Fitzgerald grammar school, I met Priscilla Graves during reading week,. Mrs. Graves invited me to be an usher at her junior cotillion which she holds near the end of the

school year for girls in the 4th or 5th grades. Mrs. Graves provides the girls with white ballroom gowns and their escorts, the boys, and the ushers with white tuxedos. The girls are introduced to the audience, as Mrs. Graves, herself in a ballroom gown, names the girls' parents or guardians and tells the audience about the girls, including what they want to be when they grow up. The girls and boys dance in choreographed moves to rock and hip hop music. Prizes are awarded and many of the girls are given scholarships to a local dance company. During all of this Mrs. Graves speaks to the parents and guardians about the importance of them in their children's lives. It is a moving experience, full of hope, and I am blessed to have been a part of this for nine years.

Jones Jones/Jones Vargas: Chair of Business and Real Estate Practice Group. About 1996 – 2012. As chair, I led meetings of practice group attorneys to discuss and create firm practices, host speakers on practical topics (e.g., title insurance and surveys) and promote collegiality.

Nextdoor Rancho Bonito- Sereno. I was the initial organizer of Nextdoor (Nextdoor.com) for our neighborhood. Nextdoor is a social network through which neighbors communicate on matters of interest.

31. Describe any courses taught at law schools or continuing education programs. Describe any lectures delivered at bar association conferences.

State Bar of Nevada: Avoiding and Responding to Fee Dispute Complaints, 1984; Fundamentals of Nevada Law, aka Bridging the Gap (Real Estate Law), 1985, 1986; Partnership Law in Nevada, 1986; Legislative Update, 1995; CC&R's and Homeowners Associations, 1995; Nevada Foreclosure Issues, The One Action Rule and Cash Collateral, 2008; Loan Workouts, Overview and Selected Issues, 2008; Practical Real Property Issues Affecting Foreclosures, 2009; Common Interest Communities Legislative Update, 2009; Legislative Update Series, 2011; Common Mistakes Transactional Lawyers Make, 2011; The Criminalization of Everyday Conduct, 2012; Legislative and Case Law Update: Foreclosures and Mortgage Lending, 2013; The HOA-Super Priority Lien: What the Fight is All About, 2014; Introduction and Overview of HOA Lien Priority Issues and Nevada Supreme Court Cases Involving Loans Secured by Real Estate, 2015; State Bar Real Estate Legislative Update Webinar, 2015

NALS Education Conference and National Forum: The Criminalization of Everyday Conduct, 2015.

National Business Institute: Issues Impacting Real Estate Transactions in Nevada, 1993; Legal Aspects of Condominium Development and Homeowners Associations, 2003; Practical Guide to Zoning and Land Use Law, 2012.

American College of Real Estate Lawyers: The Unique Deal: The Las Vegas Monorail, 2003; Issues in Distressed Common Interest Communities, 2009; Issues for Mixed Use/Mixed Ownership Developments—Facing the Realities for Troubled Times, 2011.

Southern Nevada Planning Association: Nevada Land Use Law, 2010; Nevada Subdivisions, 2010.

Community Associations Institute: Rights and Responsibilities, 1995; Legislative Update, 1997; Contemporary Ethics in Association Management, 2010.

Law Seminars International: Advanced Conference on Real Estate Purchases and Sales, 1994; Development Agreements, Easements and CCRs, 2007, 2008.

Lorman Education Services: Title Work in Nevada, 2004, 2005.

CLE International: Commercial Real Estate Purchase and Sale, 1996; Real Estate Finance, 2000.

Landfair: "One Action and Fair Value: Where It's Been and Where It's Going", 1990; "Nevada Real Estate Law in the '90's", 1996.

ALTA/ACSM Nevada Association of Land Surveyors Seminar: Lenders' Perspectives, 1990

Valley Bank of Nevada: "Legal Drafting", Forms Retreat Workshop and Seminar, 1990.

Nevada Society of Certified Public Accountants: Gaming Industry Financing, 1984.

Professional Education Systems: Real Estate Transactions, 1987, 1988.

32. **List educational, military service, service to your country, charitable, fraternal and church activities you deem significant. Indicate leadership positions.**

Stillpoint Center for Spiritual Development. Trustee 2004 – present; chair, 2006 - 2014, Stillpoint was founded in 2004 by Roisin O'Loughlin, with the support of Delise Sartini and Mary Alice Nielson, as "a gathering place that is hospitable to and nourishing of the spiritual life." Stillpoint sponsors nationally known speakers on matters of faith and spirituality and hosts programs at the Center on a variety of topics and practices, including scripture study, centering prayer and spiritual direction. Stillpoint also makes its space available for private retreats. This September Stillpoint is sponsoring Richard Rohr at a series of Las Vegas events. Rohr, a Franciscan priest and head of the Center of Action and Contemplation in Albuquerque is one of the most well know Catholic teachers in the US. Past speakers have included Thomas Keating, a Trappist monk and author of numerous books on Contemplative Prayer, in the tradition of Thomas Merton.

Cristo Rey Feasibility Study Committee: January 2016 - present. Cristo Rey Network is an affiliation of 32 Catholic high schools throughout the United States. The Network has gathered a group of interested community leaders to explore the feasibility of opening a Cristo Rey school in Las Vegas in the fall of 2018. Cristo Rey is geared for low income families and is able to provide low-cost tuition through a unique work-study program by

which four high school students share one full time white collar job. My work has consisted of organizing the Nevada non-profit corporation and preparing and filing the 501(c)(3) application with the IRS, which was approved in August.

Father Max Oliva, S.J. Advisory Group. Father Max Oliva is a Jesuit Catholic priest residing in Las Vegas, whose ministry involves ethics in business. (Website is found at http://www.ethicsinthemarketplace.com/.) Father Max is the author of numerous books, including *Beatitudes in the Workplace* and formerly taught at Regis University. He is a frequent speaker to local business groups. Several years ago, Father Max assembled an advisory group of men and women involved in local businesses and nonprofits as well as several attorneys (including myself) to assist him in planning and implementing his ministry in Las Vegas. The group meets about quarterly.

Our Lady of Las Vegas Catholic Church. Parishioner (since 1968). Lector and Eucharistic Minister, 1998 – present.

UNLV. Lecturer in upper division real estate class. Spring 1987, Fall 1989.

City of Las Vegas Neighborhood Services Workshops: Lecturer: Non-profit Corporations, 1997; Rights and Responsibilities of Homeowner Associations, 1997

Catholic Engaged Encounter: 1984-1991. My wife, Cathy and I, presented as the "junior couple" (along with a "senior couple" and a Catholic priest) at weekend retreats for engaged couples (about two per year) getting married in the Catholic Church. Cathy and I, along with the other couples, developed policies and procedures for Engaged Encounter in Las Vegas.

HELP of Southern Nevada: Board of Trustees, 1985 – 1991; President, 1987 -1989; Advisory Board, 1991 – 2005. United Way non-profit providing information and referral and other services throughout Las Vegas.

HELP Las Vegas Housing Corporation, Member, Board of Directors, 2007 – 2009. Non-profit providing affordable and structured housing for homeless vets. The organization withdrew from Las Vegas around 2009.

33. List honors, prizes, awards, or other forms of recognition.

Best Lawyers in America®, Real Estate Law, 1987-2017
Chambers USA, Leading Lawyers for Business, 2013-2016
Mountain States Super Lawyers®, Real Estate, 2007-2016
Legal Elite, Nevada Business Magazine, 2015
Nevada's Best Lawyers®, 2013
Volunteer of the Year, State Bar of Nevada, 2013
Who's Who Legal: The International Who's Who of Business Lawyers, 2013
Top Lawyers, Vegas Inc., 2013
Mountain States Super Lawyers®, Top 100 Attorneys, 2012

International Who's Who of Real Estate Lawyers, 2012
Top 100 Attorneys in the Mountain States, Salt Lake Magazine, July 2012
Mountain States Super Lawyers®, Top 75 Attorneys, 2011
AV® Preeminent™ Peer Review Rated (the highest rating available), by Martindale-Hubbell

34. Have you at any time in the last 12 months belonged to or do you currently belong to any club or organization that in practice or policy restricts (or restricted during the time of your membership) its membership on the basis of race, religion, creed, national origin or sex?
If so, detail the name and nature of the club(s) or organization(s), relevant policies and practices, and whether you intend to continue as a member if you are selected for this vacancy.

No

35. List books, articles, speeches and public statements published, or examples of opinions rendered, with citations and dates.

Nevada Lawyer, State Bar of Nevada. Author, "Words Matter, So You Better Understand What They Mean," June, 2016

The Abstract, American College of Mortgage Attorneys. Author, "The Meaning of Equal Priority," Fall 2016.

Thomson Reuters, Practical Law: Author (2016): Managing Commercial Real Estate Leases: Nevada (http://us.practicallaw.com/w-000-5745); Real Estate Brokerage Laws and Customs Q&A (http://us.practicallaw.com/w-000-5728).

International Council of Shopping Center Publication, 1999. Author (Nevada portion), "Good Faith and Fair Dealing in Commercial Real Estate Transactions."

American College of Mortgage Attorneys, *Mortgage Law Summary*. Co-author, 2015 – 2016 (Nevada portion).

36. During the past 10 years, have you been registered to vote? Have you voted in the general elections held in those years?

Yes

37. List any vocational interests and hobbies.

Walking, Running (working up to my 10th half marathon). Reading, Writing, Gardening, Traveling. Family history. Listening to music (rock, jazz, classical).

Conduct

38. **Have you ever been convicted of or formally found to be in violation of federal, state or local law, ordinance or regulation? Provide details of circumstances, charges and dispositions.**

    No

39. **Have you ever been sanctioned, disciplined, reprimanded, found to have breached an ethics rule or to have acted unprofessionally by any judicial or bar association discipline commission, other professional organization or administrative body or military tribunal? If yes, explain. If the disciplinary action is confidential, please respond to question 71.**

    No

40. **Have your ever been dropped, suspended, disqualified, expelled, dismissed from, or placed on probation at any college, university, professional school or law school for any reason including scholastic, criminal, or moral? If yes, explain.**

    In Spring Quarter, 1969, I was placed on academic probation for poor grades at UCLA. I came out of probation the next quarter I attended, Fall, 1970.

41. **Have you ever been refused admission to or been released from any of the armed services for reasons other than honorable discharge? If yes, explain.**

    No.

42. **Has a lien ever been asserted against you or any property of yours that was not discharged within 30 days? If yes, explain.**

    No involuntary lien, just home loans.

43. **Has any Bankruptcy Court in a case where you are or were the debtor, entered an order providing a creditor automatic relief from the bankruptcy stay (providing in rem relief) in any present or future bankruptcy case, related to property in which you have an interest?**

    No

Other

44. **If you have previously submitted a questionnaire or Application to this or any other judicial nominating commission, please provide the name of the commission, the approximate date(s) of submission, and the result.**

N/A

45. **In no more than three pages (double spaced) attached to this Application, provide a statement describing what you believe sets you apart from your peers, and explains what particular education, experience, personality or character traits you possess or have acquired that you feel qualify you as a good supreme court justice. In so doing, address both the civil (including family law matters) and criminal processes (including criminal sentencing.)**

46. **Detail any further information relative to your judicial candidacy that you desire to call to the attention of the members of the Commission on Judicial Selection.**

Hilton Travels. In his capacity as a trustee of the Hilton Foundation and the Hilton Fund for Sisters, my father, Robert Buckley, a medical doctor, traveled extensively on behalf of the foundations to inspect Hilton-funded projects. Between 1998 and 2003, I traveled with my father to inspect Hilton projects in Ghana, Mali, Poland, Vietnam, Brazil and Haiti. These were amazing experiences which words cannot adequately describe.

Sabbatical. In 1991, I took a one year sabbatical approved by Jones, Jones. My wife and I and our four children drove across the southern and eastern part of the US, ending in New York. We lived in Saffron Walden, Essex, England. The three older children attended St. John's College School in Cambridge. During school breaks we traveled, visiting France, Germany, Switzerland, Italy and Ireland in our VW Van. On return we drove across the northern part of the US before arriving home in the summer of 1992. The year is chronicled on line at:

https://www.blogger.com/blogger.g?blogID=8674750470946831587#overview/src=dashboard.

Participant: Aspen Institute, Justice and Society Seminar, 1988. Week-long gathering of judges, law professors, lawyers and writers from throughout the country to read about and discuss basic principles of justice.

Lawyers: During 2008, when my practice slowed considerably, I took the time to make a list of attorneys who had worked at Jones, Jones/Jones Vargas, during my time with the firm. Incredibly, the number was 132.

Education. All four of our children graduated from Jesuit Universities (LMU, Seattle, Santa Clara and Loyola Chicago). Our daughter, Mara, obtained a Masters in Theological Studies from the Franciscan School of Theology at the Graduate Theological Union in Berkeley, California. I was happy to assist Mara in preparing her thesis synthesizing Catholic social teachings and the environment.

47. **Attach a sample of no more than 10 pages of your original writing in the form of a decision, "points and authorities," or appellate brief generated within the past 5**

years, which demonstrates your ability to write in a logical, cohesive, concise, organized, and persuasive fashion.

- - INSERT PAGE BREAK HERE TO START SECTION II (CONFIDENTIAL INFORMATION) ON NEW PAGE - -

Attachment A
Employment History

Please start with your current employment or most recent employment, self-employment, and Periods of unemployment for the last 20 years preceding the filing of this Application.

Current or Last Employer: Fennemore Craig, P.C

Phone Number: 702-692-8000

Address: 300 South 4th St., Suite 1400, Las Vegas, Nevada 89101

From: July 1, 2012 To: Present

Supervisor's Name: N/A

Supervisor's Job Title: N/A

Your Title: Attorney/Director/Shareholder/Vice President

Specific Duties: Full time lawyer practicing in transactional real estate and other commercial areas.

Reason for Leaving: N/A

Previous Employer: Jones Vargas (Dissolved in about 2013)

Phone Number: N/A

Address: Most recent: 3773 Howard Hughes Parkway, Third Floor South, Las Vegas, Nevada 89169

From: June, 1975 To: June 30, 2012

Supervisor's Name: N/A

Supervisor's Job Title: N/A

Your Title: Attorney/Shareholder/Director/Vice President/ Chair, Business and Real Estate Practice Group

Specific Duties: Full time lawyer practicing in transactional real estate and other commercial areas.

Reason for Leaving: Firm discontinued business.

Question 45. (Michael Edward Buckley)

I began law school with great expectations. I knew from experience, through my father and his lawyer, in his case against Howard Hughes, the practice of law would require long hours, dedication and attention to detail. As an English major, I had come to new understandings of the human condition through close readings of great poems and stories, but what struck me most that first year was the cases I read were about real people and real situations. As I memorized the elements of the common law crimes and worked to understand the historical reasons for the real property rules and the twin concepts of law and equity, it seemed to me that if I understood law, I would understand how the world worked.

I acquired knowledge, discipline and critical thinking through the Jesuits in high school. At UCLA I came to a deep appreciation of words and their meaning. Law was more, it was about the wisdom of experience and the application of the rules necessary for individuals and society to operate.

I performed extremely well my first year and continued to do well, but after my clerkship at Jones, Jones I found the excitement of experiencing "the law" was replaced by an understanding of the importance of working for real people with real problems in Las Vegas. That summer, researching and applying the skills I had learned and getting paid to do it, I knew I'd found my calling. I was ready for school to be over.

One of my first assignments was handling a contested child custody case on behalf of a well-known, male gambler. I had little supervision. As a young lawyer, working on a high profile case against an experienced opponent, I was thrown directly into the fire of domestic law. I learned the importance of advocacy and the seriousness of our cases. Families and individuals

were either shattered or salvaged as a result of my work. I've never forgotten that, and as a Justice, holding those early experiences close would lend wisdom to any decision I would render.

A year or so after I joined the firm, our top criminal lawyer left. Many of his criminal cases were assigned to me. Making my Due Process or 4th Amendment argument in Justice Court, with my client in shackles, gave new meaning to the foresight of our founders in crafting the constitution. Rights affected human beings. This lesson has never been lost on me.

In 1976, Herb Jones asked for my help. The Aladdin Theater for the Performing Arts was being built on a parcel of property surrounded by the hotel/casino. Our mission was to craft an easement, acceptable to the owner and its two lenders, that would secure access to the Theatre if either lender foreclosed. We flew to St. Louis to negotiate an easement. Achieving success, I next found myself on a plane to New York to work on a deed of trust. With Valley Bank as our client, I soon became a lender's lawyer, updating the bank's time-honored loan documents with what I learned from the big city firms. These experiences led me to the path that followed as a real estate lawyer, and, later, as a Planning Commissioner, a Commissioner for the State CICCH Commission and one of the founders of the Real Property Section.

So, how is it that a real estate lawyer, who never goes to court, should be a Supreme Court Justice? Love of the law and its prudent application is my primary reason for seeking this seat. Real estate transactional lawyers are bound by the law as much as any other lawyers, even more so in recent years given the economic downturn and the litigation it produced. My 2015 Annual Meeting presentation provided a narrative for recent real estate finance cases. I have been and remain a student of the law: its history, its application and its future. These traits are of utmost importance for a Justice.

As a volunteer lawyer I have drafted legislation in NRS Chapters 40, 107 and 116. As a CCICCH Commissioner I drafted many of the Commission's regulations. The effort required a great appreciation of when and when not having written rules makes sense. As a drafter or a commissioner, I came to understand that a particular injustice does not always mean that systemic problems exist or that a new law or regulation can fix the problem. Bad facts do indeed make bad law, whether court decisions, statutes or regulations. This background will serve me well as a Justice. Considering when and how a decision will work once it is written is the foundation of good rulemaking. I have also seen firsthand how bureaucracies work, and learned that commissioners, not unlike judges, must require of themselves a deeper understanding of the application of rules to different sets of facts.

I have an innate sense of fairness and justice, instilled in me from childhood, through law school and through my many years of practice and, at times, public service. Not surprisingly, planning commission or CICCH agenda items could be extremely contentious. As a commissioner, I listened to proponents and opponents with an open mind, attempting to understand not only the legal positions but the emotions and motivations at work, then working with my fellow commissioners, often as chair, to reach equitable results based on the law and the facts. I remain in awe of the twin aspects of law and equity, justice and mercy.

I have often wished to become a judge. While I have "given back" to the profession through public service, the greatest honor would be to give back at the highest level, as a Supreme Court Justice. I would daily engage in such service with the reverence required of the position.

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QUESTION 47

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CLERK OF THE COURT

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company, Plaintiff, v. U.S. BANK NATIONAL ASSOCIATION, as Trustee FOR BAFC 2006-I, a national association; COMMUNITY ONE FEDERAL CREDIT UNION, a federal credit union; DINO J. PETRONE, an individual; Defendant.	**CASE NO.:** A-13-678858-C **DEPT NO.:** XX **AMICUS CURIAE BRIEF OF THE REAL PROPERTY SECTION OF STATE BAR OF NEVADA IN OPPOSITION TO U.S. BANK NATIONAL ASSOCIATION'S MOTION TO DISMISS**

A. INTRODUCTION

By its letter of June 5, 2013, the Court invited the Common-Interest Committee, Real Property Section, State Bar of Nevada (the "*Section*") to consider the filing of briefs in *amicus curiae* to assist the Court on a particular issue in the present proceeding, a Motion to Dismiss Amended Complaint ("*Motion to Dismiss*") filed by Defendant, U.S. BANK NATIONAL ASSOCIATION ("*US Bank*"). The issue, whether a first security interest on real property is extinguished by operation of law as a result of an association's foreclosure of its assessment lien pursuant to NRS 116.3116 *et seq.* (the *"Lien Priority Issue"*), is of substantial interest to the members of the Section. Accordingly, the Section, through its Executive Committee, sought and obtained approval of the State Bar of Nevada (*"State Bar"*), pursuant to Section 7.11 of the Bylaws of the State Bar, to file this brief. This brief is not intended to take the side of either party to this proceeding but to assist the Court in deciding the Lien Priority Issue.

B. BACKGROUND

1. Status of Proceeding. Pursuant to its Amended Complaint (*"Amended Complaint"*), Plaintiff, SFR Investments Pool 1, LLC (*"SFR"*), seeks (a) a judicial determination that it is the owner of a home it acquired (the *"Property"*) through an association foreclosure sale, free from any lien or other interest claimed by defendants, (b) to prevent US Bank, as the holder of a first deed of trust lien against the Property, from foreclosing on the Property and evicting the current tenant and (c) to recover certain monetary damages from the defendants. US Bank's Motion to Dismiss contends that the association's foreclosure sale did not extinguish the bank's lien and that it continues to have a valid first mortgage[1] against the property. SFR and US Bank have each filed papers supporting and opposing the motion.

2. Facts. For purposes of this brief, in accordance with the authorities noted by SFR in its Opposition to Motion to Dismiss,[2] the factual allegations contained in the

[1] The terms "mortgage" and "deed of trust" are used interchangeably in this brief.

[2] Opposition to Motion to Dismiss (herein, "*Opposition*"), page 5, lines 20 — 27.

Amended Complaint will be deemed to be true. The facts and "inferences in favor of the moving party"[3] contained in the Amended Complaint relevant to the Lien Priority Issue are as follows:

(a) Prior to June 2005: The Property is made subject to the jurisdiction of Southern Highlands Community Association (*"Southern Highlands CA"*) and a declaration (the *"Master Declaration"*) recorded in the Official Records of the Clark County Recorder (*"Official Records"*). While not entirely clear, the Property also appears to be subject to the jurisdiction of Defendant Foothills at Southern Highlands Homeowners Association, which seems to be a "sub-association" within the Southern Highlands CA.

(b) June 27 2005: Defendants Dino J. Petrone and Connie L. Petrone purchase the Property and give PHH Mortgage Corp. (*"PHH"*) a first deed of trust on the Property (the *"First DOT"*). US Bank is the successor in interest to PHH.

(c) March 5, 2010: Southern Highlands CA records Notice of Delinquent Assessment Lien against the Property.

(d) September 12, 2012: Southern Highlands CA conducts a foreclosure sale of its statutory assessment lien (the *"Southern Highlands Foreclosure"*) at which SFR is successful bidder.

(e) September 24, 2012: A deed is recorded in favor of SFR based on the Southern Highlands Foreclosure.

(f) March 12, 2013: Notice of Trustee's Sale recorded with respect to the First DOT.[4]

(g) March 26, 2013: SFR files Amended Complaint.

3. The Issue. As requested by the Court, the purpose of this brief is solely to

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[3] *Id.*

[4] The Amended Complaint alleges certain discrepancies involving the identification of the trustee and the beneficiary under the First DOT. For purposes of this brief, the notices required to initiate and conduct a trustee's sale under the First DOT are presumed to have been valid.

assist the Court in deciding the effect of a foreclosure by an "association" (NRS 116.011) of its statutory lien pursuant to NRS 116.3116 *et seq.* on a first priority "security interest" (NRS 116.087, 116.3116(2)(b)).[5] The Lien Priority Issue concerns the interpretation and effect of language in NRS 116.3116(2) which defines the relative priority of the liens of an association for unpaid assessments and a first deed of trust. In particular, NRS 116.3116(2) carves out for special treatment "assessments for common expenses based on the periodic budget adopted by the association . . . which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien." This lien is commonly referred to as the "super priority" lien.[6]

Although the Amended Complaint seeks to quiet title in the plaintiff against the holder of a second deed of trust and the sub-association, these issues are not before this Court in the Motion to Dismiss, which is limited to the competing interests of (a) the purchaser at an association foreclosure sale and (b) the holder of an existing first mortgage.

This brief does not address the amount of the super priority lien. The Section is aware that different interpretations exist under NRS Chapter 116 regarding whether collection costs are part of the super priority. The Section takes no position on this issue.

4. Assumptions. In order to facilitate the discussion in this brief, and narrow its focus, we have assumed the following:

(a) The Southern Highlands Foreclosure was based on unpaid general assessments for common expenses, i.e., based on the association's periodic budget.

(b) The First DOT was "recorded before the date on which the assessment sought to be enforced [by the Southern Highlands Foreclosure] became delinquent." (See NRS 116.3116(2)(b).)

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[5] Unless otherwise provided, terms which are defined in NRS Chapter 116 have the same meanings when used in this brief.

[6] NRS 116.31032 also gives "super priority" status to certain amounts expended by an association to maintain abandoned units or abate certain nuisances. This so-called "abatement lien" is not intended to be addressed by this brief.

(c) The holder of the First DOT was properly notified of the Southern Highlands Foreclosure.

(d) There exists no language in the Master Declaration or the First DOT or in any other agreement between the association and the holder of the first deed of trust nor has there been any conduct by or between the parties that would resolve or otherwise affect the Lien Priority Issue.

5. Section Position. While not all amounts owed to an association are included within the association's super priority lien, the Section agrees with the Plaintiff that an association has a *first* priority lien in an amount equal to the super priority. Accordingly, the Southern Highlands Foreclosure operated, as would the foreclosure of any other senior lien, to extinguish all junior liens. Accordingly, the Motion to Dismiss should be denied.

C. DISCUSSION

1. The Effect of Lien Priority. Fundamental to the Lien Priority Issue is the effect of foreclosure on existing liens. The rule is clearly stated in Restatement Third, Property (Mortgages) §7.1 (the "*Restatement of Mortgages*"):

> A valid foreclosure of a mortgage terminates all interests in the foreclosed real estate that are junior to the mortgage being foreclosed and whose holders are properly joined or notified under applicable law. Foreclosure does not terminate interests in the foreclosed real estate that are senior to the mortgage being foreclosed.

The Nevada Supreme Court appears to take this result as given in *Brunzell v. Lawyers Title Insurance Corporation*, 101 Nev. 395, 396-97, 705 P2d. 642, 644 (1985) and *Erickson Construction Co. v. Nevada National Bank*, 89 Nev. 350, 352, 512 P.2d 1236, 1238 (1973), but it is worthwhile noting that both *Brunzell* and *Erickson* involve priority determinations between a deed of trust and a statutory mechanics' lien, thus confirming that the general rule applies to both security interests and statutory liens, which include not only mechanics' liens under NRS 108.221 *et seq.*, but also association liens under NRS 116.3116.

Accordingly, if Southern Highlands CA's lien is prior to the lien of the First DOT, the Southern Highlands Foreclosure extinguished the lien of the First DOT. As noted below[7] the holder of a first mortgage has the opportunity to prevent this result by payment to the association of the super priority amount.[8]

2. **Statutory Construction.** SFR and US Bank both cite authorities supporting the basic principle of statutory construction, namely, if the statute is clear the court should not go beyond the language of the statute to determine its meaning.[9] The Section believes the meaning of NRS 116.3116(2) is clear on its face. The Section also, however, can supply additional support for that "plain meaning."

3. **UCIOA.** NRS Chapter 116 (sometimes referred to herein as "*NUCIOA*") was originally introduced in 1991 with the stated purpose of "adopt[ing] the Uniform Common-Interest Ownership Act [herein *"UCIOA"*]."[10] In 1991, the only version of

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[7] See discussion at C. 12 below.

[8] At this point it deserves mentioning that a "super priority" exists only in the context of a foreclosure sale by the association or the first mortgagee. That is, at the time the association forecloses its lien it is foreclosing a first priority lien in the amount of the super priority. Similarly, a first mortgagee may pay off the super priority amount at the time of its foreclosure and cause title to be conveyed free and clear from association delinquencies not included in the super priority. Payment to the association of an amount equal to nine months of assessments outside the context of a foreclosure sale does not result in the extinguishment of super priority. This is no different than the situation in which holder of a second mortgage cures a default under a prior mortgage in order to avoid becoming "sold out." Unless the holder of the junior lien fully satisfies the prior lien, the prior lien can once again become delinquent, placing the holder of the junior lien in the same position as it was before. New assessments continue to accrue following a foreclosure by either the association or the first mortgagee, and the association lien is not extinguished (even by payment of the super priority) as long as the common interest community continues to exist. The remedies of the holder of a junior lien which is unable to fully satisfy a senior lien are noted in *Comment a.* to §7.6 of the Restatement on Mortgages:

> Where subrogation to a mortgage is sought, the entire obligation secured by the mortgage must be discharged. Partial subrogation to a mortgage is not permitted. . . . While a subordinate mortgagee who makes partial payments on a prior mortgage . . . may not have subrogation, such a mortgagee may add the payment to the balance owing on the subordinate mortgage, and may recover it in foreclosure or in an action on the debt or for reimbursement of the payment, as appropriate.

[9] Motion to Dismiss, p. 7, lines 15-20; Opposition. p. 6, Footnote 3.

[10] Preamble of AB 221, introduced January 24, 1991; statement of introduction of AB 221, Minutes of the Assembly Committee on Judiciary, February 20, 1991. See also, *D.R. Horton v. Eighth Judicial Dist. Court*, 125 Nev. 449, 215 P.3d 697 (2009)

UCIOA was the original act ("*1982 UCIOA*"), approved by the National Conference of Commissioners on Uniform State Laws (the *"Uniform Law Commissioners"*) in 1982.[11] The Uniform Law Commissioners approved amended versions of UCIOA in 1994 (*"1994 UCIOA"*) and 2008 (*"2008 UCIOA"*). UCIOA synthesizes common principles previously contained in the Uniform Condominium Act, the Uniform Planned Community Act and the Model Real Estate Cooperative Act, which were separately applicable to the three different forms of ownership referred to in UCIOA as "common-interest communities" (NRS 116.021). These three forms are condominiums, planned communities and cooperatives; each involves ownership of a separate "unit" (NRS 116.093), membership in an "association" (NRS 116.011) which is responsible for maintaining "common elements" (NRS 116.017) and payment for certain "common expenses" (NRS 116.019).[12]

4. The Association Lien. NRS 116.3116(1)-(4), which creates the association lien and establishes the super priority, is based on 1982 UCIOA § 3-116(a)-(d) with no changes other than section numbering, minor language ordering, and optional other exemptions not adopted. Since 1991, NRS 116.3116 has been amended, among other reasons, to include construction penalties, add abatement charges to the association's lien and change the number of super priority months from six to nine. While these amendments have expanded the scope and content of an association's super priority lien, none of the changes have altered the existence or priority of the association's lien described in those sections.[13]

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[11] The title page of 1982 UCIOA identifies the members of the Committee who drafted the act. Those named include Carl Lisman, mentioned below at C.12. The title page further identifies advisors who participated in the preparation of the Uniform Condominium Act, the Uniform Planned Community Act and the Model Real Estate Cooperative Act, upon which UCIOA is based. Advisors included representatives from, among others, the National Association of Home Builders, Veterans Administration, Mortgage Bankers Association of America, Department of Housing and Urban Development, American Land Title Association, Federal Home Loan Mortgage Corporation (i.e., Freddie Mac), Federal National Mortgage Association (i.e., Fannie Mae) and National Association of Realtors.

[12] While not particularly important to the case before the Court, the Southern Highlands CA is most likely a "planned community" (NRS 116.075) in which the "unit" is a legally subdivided lot and the "common elements" most likely consist of certain common landscaping or recreational facilities owned by the association.

[13] Certain members of the Section's Common Interest Committee (not the Committee or the Section itself) worked successfully with the 2011 Legislature to update NRS Chapter 116 with most of the 1994 and 2008 changes to UCIOA. The group avoided suggesting legislative policy changes, including 1994 UCIOA changes to NRS

> expense assessments, as reflected by the project's operating budget, to have such priority over first mortgage liens.[34]

14. A First Mortgage Does Not Survive An Association Foreclosure. U.S. Bank is correct in stating that a foreclosure of the first mortgage wipes out "any existing assessment lien . . . save for the super-priority portion thereof." On the other hand, US Bank's contention that the "Super-Priority Lien, therefore, does not eliminate the first mortgage, but simply creates a new lien on the property at the moment the first mortgage forecloses"[35] has no support in the statute. NRS 116.3116(4) clearly states that recordation of the declaration creates and perfects the lien; the association's super priority lien predates the lender's lien and does not depend for its existence upon the foreclosure of the first mortgage.

Moreover, NRS 116.31166(3), which is almost identical to NRS 107.080(5) pertaining to trustee's sales, states, "The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the unit's owner *without equity or right of redemption.*" [Emphasis added]. The Court, in *In re Grant*, 303 B.R. 205, 209 (Bankr. D. Nev. 2003) stated:

> The Nevada Supreme Court has held that sales without equity or right of redemption vest the purchaser with absolute title:
>
> [T]he law authorizing the mortgagee to sell is, in our opinion, so thoroughly settled that it cannot now admit of a question. Such being the right of the mortgagee, it follows as a necessary consequence that the purchaser from him obtains an absolute legal title as complete, perfect and indefeasible as can exist or be acquired by purchase; and a sale, upon due notice to the mortgagor, whether at public or private sale, forecloses all equity of redemption as completely as a decree of court." (quoting *Bryant v. Carson River Lumbering Co.*, 3 Nev. 313, 317-18 (1867).)

At least one Nevada court has determined that foreclosure of an association super priority lien does not extinguish a first security interest, but instead, creates a lien "*in*

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[34] See, e.g., p. 23, The Secondary Market (FHA, VA, Fannie Mae, Freddie Mac) Requirements for Condominium Unit Loans. http://www.aksnlaw.com/documents/matrix201306June10.pdf

[35] Motion to Dismiss, P.3, lines 20-26.

parity" with the first security interest, such that when the first security interest is foreclosed, the association super priority lien is also not extinguished. If that were correct, then an association super priority lien and a first security interest would have equal priority. However, had the drafters of the UCIOA, and the Nevada Legislature when it enacted NRS Chapter 116, intended that the two interests be of equal priority, they would have said so, as they did in the situation in which two or more associations have liens for assessments. 1982 UCIOA § 3-116(c) states: "*Unless the declaration otherwise provides, if 2 or more associations have liens for assessments created at any time on the same property, those liens have equal priority.*" This language appears verbatim (except that "2" was changed to the alphabetical "two") and exists without amendment today as NRS 116.3116(3). Since the Nevada Legislature knew how to create "*equal priority*" or liens "*in parity*," but chose to state that the association super priority lien is "*prior to*," it can be assumed it knew the difference.

D. CONCLUSION

As illustrated by the *Diakonos* case referred to in Footnote 23 above, much confusion exists regarding the actual creation of an association's lien. NRS 116.3116(4) clearly provides that the lien is created upon the recording of the declaration, not upon the giving or recording of a notice of delinquent assessments. Moreover, since a first mortgage on a unit within a common interest community can never be given until the common interest community is created by the recording of a declaration, the association will always have a perfected lien a portion of which is prior to a first security interest.

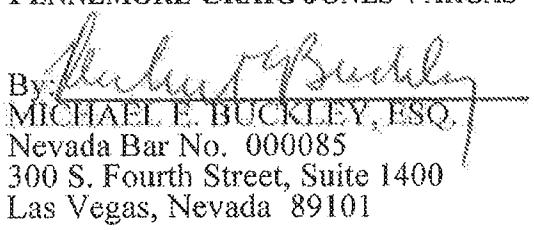
In the same way that the commencement of work on a parcel of real property gives rise to mechanics' liens and that municipal tax obligations give rise, in each case, to liens that can be enforced later for unpaid amounts, the recording of a declaration puts the world on notice that a perfected association lien exists which can be enforced later accruing unpaid assessments. The drafters of the UCIOA believed that association assessments, much like municipal taxes, are critical to fulfillment of an association's duty to maintain common elements for the benefit of residents in a common interest

community. As a result, they created a striking new proposal, giving an association assessment lien a limited priority over a first mortgage.

As the Comments to UCIOA and Carl Lisman's recollection show, the thought that a first mortgagee would do nothing when faced with an association foreclosure was not something even considered by the drafters. It was assumed that the first mortgagee would protect its interest in the property. Events of the Great Recession dramatically changed the residential housing landscape, resulting in delayed mortgage foreclosures and suffering associations.[36] Yet neither dramatic economic circumstances nor the acts of the parties can change the plain language of the law. An association has a first lien in an amount up to the super priority. US Bank and authorities it cites reveal a fundamental misunderstanding of NRS Chapter 116 in their assertion that an association foreclosure does not extinguish a first mortgage or somehow gives rise to a new lien. An association super priority lien is prior to a first security interest pursuant to the express language of the statute, and a basic principle of lien law is that foreclosure of a prior lien extinguishes all junior liens. An association foreclosure sale which includes its priority lien results in a new title, free of all junior claims.

In sum, if an association super priority lien is not satisfied prior to foreclosure sale by the association, the association foreclosure extinguishes a first security interest on that real property by operation of law. Accordingly, US Bank's Motion to Dismiss should be denied.

RESPECTFULLY SUBMITTED:
FENNEMORE CRAIG JONES VARGAS



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[36] An excellent discussion of the current state of association finances resulting from the great number of mortgage defaults throughout the country may be found in Community Collateral Damage: A Question of Priorities, Andrea J. Boyack, 43 Loyola University Chicago Law Journal 53-140.