

**APPLICATION FOR THE
INDIANA SUPREME COURT**

(SPRING 2017 VACANCY)

PART ONE



Peter J. Rusthoven

February 2017



Indiana Judicial Nominating Commission

30 South Meridian Street, Suite 500
Indianapolis, IN 46204
(317) 232-4706

Application for the Indiana Supreme Court

The application for the Spring 2017 vacancy on the Indiana Supreme Court includes two parts. Both Part One and Part Two must be completed. Part Two *must* be provided separately as directed in the instructions. Answers in Part One and Part Two are a matter of public record and will be supplied to the media and public upon request. However, only answers in Part One may be posted online by the Indiana Judicial Nominating Commission.

Part One, Sections 1-11

1. Contact/General Information

A. Full legal name and any former names.

Peter James Rusthoven

B. State the full name (use initials for minor children), age, and relationship of each person residing in your household. For each adult living in the household (other than yourself), also state the person's occupation and employer.

Erin Jennifer Roth, age 41, spouse
Senior Vice President, General Counsel & Corporate Secretary
Wabash National Corporation

M.H. Rusthoven and E.G. Rusthoven, age 3, twin daughters

C. Business address, email, and telephone number.

Barnes & Thornburg LLP
11 South Meridian Street
Indianapolis, Indiana 46204
peter.rusthoven@btlaw.com
(317) 231-7299 (office direct)

D. Attorney number.

6247-98

E. Month and year you were admitted to the Indiana Bar.

October 1976

a. Indicate current law license status, i.e. active/inactive/retired.

Active

- b. If you are or have been a member of the Bar of any other state, identify the jurisdiction and provide date(s) of admission and current license status.

None

F. Date and place of birth.

August 12, 1951, Indianapolis, Indiana

G. County of current residence and date you first became a resident.

Boone County, Indiana, *circa* June 1, 2010

2. Secondary Education/Military Experience

- A. List all undergraduate colleges and universities you attended. Include the school name; dates enrolled; degree or certificate earned; and any academic honors, awards, or scholarships you received and when.

Harvard College, Cambridge, Massachusetts, 1969-1973

A.B. in Social Studies, *magna cum laude*, 1973

National Merit Scholarship (prior to admission)

Harvard Freshman Scholarship (on admission)

Whitaker Prize (academic performance in Freshman year)

John Harvard Scholarship (undergraduate academic performance)

Detur Prize (academic performance through Junior year)

Research Grant from Institute of Politics, John F. Kennedy School of Government, for work on Senior Honors Thesis (after Junior year)

Phi Beta Kappa (elected as a Junior)

- B. Include with your original application a certified transcript from each school named in Subsection 2A, and attach copies of each transcript to each application copy. (If your social security number is on your transcripts, redact it *before* copying.)

See attachment at **Tab A**

- C. If applicable, list any military service. Include the name of the military branch; dates of service; last rank achieved; and any honors, awards, or commendations received and when. Attach a copy of your Certificate of Release or Discharge from active duty ("DD 214" paperwork).

United States Navy Reserve, Judge Advocate General's Corps, 1982-1996

Last rank received: Lieutenant Commander

Copy of Honorable Discharge Certificate attached at **Tab B** (social security number redacted)

3. Post-Secondary Education

- A. List all law schools, graduate schools, and post-J.D. programs attended. Include the school name; dates enrolled; degree or certificate earned; class rank; and any academic honors, awards, or scholarships you received and when.

Harvard Law School, Cambridge, Massachusetts, 1973-1976
J.D., *magna cum laude*, 1976 (class rank not provided)

Harvard Law Review, 1974-1976 (Case Editor, 1975-1976)
Williston Contract Negotiating Competition, 4th Prize, 1974

- B. Include with your original application a certified transcript from each school named in Subsection 3A, and attach copies of each transcript to each application copy. (If your social security number is on your transcripts, redact it *before* copying.)

See attachment at **Tab C**

4. Employment

- A. Provide your employment history since graduation from college. Include name of employer, titles or positions, locations, and dates of employment.

Assistant to The Honorable Richard G. Lugar, Mayor of Indianapolis (1968-1975),
Summer 1973

Research assistant to Professor A. James Casner, Weld Professor of Law,
Harvard Law School, Cambridge, Massachusetts, Summer 1974

Summer Associate, Barnes, Hickam, Pantzer & Boyd, Indianapolis, Indiana,
Summer 1975

Associate, Barnes, Hickam, Pantzer & Boyd, Indianapolis, Indiana, 1976-1981

Associate Counsel to the President of the United States, The White House,
Washington, D.C., 1981-1985

Barnes & Thornburg LLP, Indianapolis, Indiana, 1985-present (Of Counsel, 1985-1986,
Partner, 1987-present)

- B. If applicable, describe the nature and extent of your practice of law (present and former), and provide the names of your partners, associates, office mates, and employers.

(1) As an associate at Barnes, Hickam, Pantzer & Boyd (1976-1981), my practice focused on trial and appellate litigation (including depositions, written discovery, briefing and courtroom work), as well as research, analysis and drafting legal memoranda on issues arising in litigation and other contexts (*e.g.*, regulatory and transactional matters).

Law firm colleagues during this period included Thomas Scanlon, Robert Ashby, John Houghton, Jerry Belknap, Lester Ponder, Shirley Shideler, Bruce Karr, Larry Stroble and Daniel FitzGibbon (all since deceased); and Robert Reynolds, James Strain (now with Taft Stettinius), Brian Tabler, Edward DeLaney (now a State Representative), Michael Conner, Michael Fruehwald, Kristin Fruehwald, Daniel McGill and David Powlen.

(2) As Associate Counsel to the President of the United States (1981-1985), my practice involved a wide variety of matters—some routine, others more important—related to the President’s performance of his duties. This work is discussed in Section 6D.

Colleagues included:

Counsel to the President Fred F. Fielding (later member of the 9/11 Commission and Counsel to President George W. Bush; now with Morgan Lewis & Bockius)

Deputy Counsel to the President Richard A. Hauser (later Gen. Counsel, U.S. Dept. of Housing & Urban Development; now Vice President & Asst. Gen. Counsel, Boeing Co.) Senior Associate Counsel to the President David B. Waller (later Deputy Director Gen.,

International Atomic Energy Agency; now advising on nuclear nonproliferation issues) Associate Counsel to the President John G. Roberts, Jr. (later Judge, U.S. Court of Appeals,

D.C. Circuit; now Chief Justice of the United States)

Associate Counsel to the President Wendell L. Willkie II (later Gen. Counsel, U.S. Dept. of Education, Gen Counsel, U.S. Dept. of Commerce, and Sr. Vice Pres. & Gen. Counsel,

MeadWestvaco Corp.; now Visiting Scholar, American Enterprise Institute)

Associate Counsel to the President H. Lawrence Garrett III (later Sec’y of the Navy and Exec. Vice Pres., Rolls-Royce N. Am.; now Chairman of the Board, Spirent Federal Sys.)

Associate Counsel to the President H.P. Goldfield (later Asst. Sec’y, U.S. Dept. of Commerce; now Sr. International Affairs Adviser, Hogan Lovells)

Assistant Counsel J. Michael Luttig (later, Judge, U.S. Court of Appeals, 4th Circuit; now Exec. Vice Pres. & Gen. Counsel, Boeing Co.)

(3) As an of counsel attorney (1985-1986) and partner (1987-present) with Barnes & Thornburg LLP, my practice has entailed work in several areas:

(a) Primary focus has been appellate litigation, as well as motions practice before Indiana trial courts and Federal district courts in Indiana and elsewhere.

State Appellate Practice – Indiana appellate experience includes over 20 cases in which our Supreme Court has accepted jurisdiction, with over 15 oral arguments (most recently *ESPN, Inc. v. Univ. of Notre Dame Police Dep’t*, 62 N.E.3d 1192 (Ind. 2016), discussed in Section 6A); writ practice before that Court (most recently *State v. Marion Super. Ct.*, 54 N.E.3d 995 (Ind. 2016) (mem.), discussed in Section 6D); over 35 other cases in which transfer to or review by that Court was sought; and over 75 cases before our Court of Appeals and Tax Court, with over a dozen oral arguments. Other State experience includes briefing a major products liability case before the Texas Supreme Court (*Whirlpool Corp. v. Camacho*, 298 S.W.3d 631 (Tex. 2009)).

Federal Appellate Practice – Federal appellate experience includes a dozen or more cases before the Seventh Circuit, with oral argument in most; cases and in some instances oral argument before the Third, Fifth, Eighth and Federal Circuits; and assisting on briefing and oral argument preparation in cases before the Fourth, Eleventh and D.C. Circuits. Have also prepared and responded to *certiorari* petitions to the U.S. Supreme Court, and assisted on Supreme Court briefing and oral argument preparation, including work on briefing and argument preparation in *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987), in which the Court upheld the constitutionality of change-of-control provisions of the Indiana Business Corporation Law.

My appellate practice has involved a wide range of legal areas, including contract, arbitration, tort, utility, gaming, products liability, public records, real estate, alcoholic beverage, employment, environmental, insurance, banking, estate, administrative, patent, corporate, professional conduct, limitations, tax and constitutional law. One of the joys of appellate practice is the constant variety of topics presented, and the opportunity to learn from colleagues who have expertise in different fields of the law.

Law firm colleagues on appellate and other litigation matters include Stanley Fickle, John Maley, James Strain (now with Taft Stettinius), David Hamilton (now Judge, U.S. Court of Appeals, 7th Circuit), Jeanine Gozdecki, Teresa Morton Nyhart, Jan Carroll, Robert MacGill, Randall Brown, Larry Mackey, Michael Conner, Randy Kaltenmark, Ken Inskeep, John Kyle III, Mark Crandley, Brian Casey, Terri Bruksch, Kari Jackson, Joseph Wendt, Andrew Detherage, Bart Karwath, Deborah Pollack-Milgate, Matthew Barr, Christopher Bayh and Paul Jefferson (now with McNeely Stephenson). Other lawyers who were co-counsel or represented aligned parties in specific cases include Thomas M. Fisher (Indiana Solicitor General), J. Lee McNeely (McNeely Stephenson), Maggie L. Smith (Frost Brown Todd), Wayne C. Turner (Hoover Hull Turner), Bryan H. Babb (Bose McKinney & Evans), Brian J. Paul and Anne K. Ricchiuto (Faegre Baker Daniels) and Lynne Liberato (Haynes and Boone, LLP, Houston, Texas).

(b) Corporate and Business Law – One aspect of this work was helping the Indiana Corporate Law Survey Commission in drafting the 1986 Indiana Business Corporation Law, then in drafting its Official Comments (discussed in Section 6D).

Another aspect is transactional work, such as mergers and acquisitions and tax-exempt bond financings, involving several different business enterprises, ranging from insurance to manufacturing to publishing to health care ventures.

Law firm colleagues on business law matters include Robert Reynolds, Richard Deer, Alan Levin, Frank Sullivan (later Associate Justice, Indiana Supreme Court; now Prof. of Practice, Indiana University Robert H. McKinney School of Law), James Strain (now with Taft Stettinius), Catherine Bridge, Steven Thornton and Kepten Carmichael.

(c) Governmental Regulatory and Related Work – This has focused primarily on gaming law and alcoholic beverage matters. Gaming work initially included representing applicants for Indiana riverboat licenses (including the successful applicant for the Lawrenceburg license), entailing Indiana Gaming Commission proceedings and numerous other matters (*e.g.*, negotiating agreements with local governments; land acquisition and zoning matters). Subsequent work has included representing companies (*e.g.*, The Majestic Star Casinos) and others (*e.g.*, non-profits receiving gaming revenue

under local agreements) in matters before the Commission, dealings with host municipalities, and various litigation matters.

Alcoholic beverage law work has included representing manufacturers (*e.g.*, Anheuser-Busch), wholesalers (*e.g.*, Indiana Wholesale Wine & Liquor; Southern Wine & Spirits) and retailers (*e.g.*, Big Red Liquors) in licensing, regulatory and compliance matters before the Indiana Alcohol & Tobacco Commission (f/k/a Indiana Alcoholic Beverage Commission). Another aspect has been litigation defending Commission actions, such as “sunset” of its Rule 28 “beer baron” rule barring exclusive beer wholesaler territories (*Little Beverage Co. v. DePrez*, 777 N.E.2d 74 (Ind. Ct. App. 2002)), and enforcing prohibitions on illegal gambling at clubs with alcoholic beverage permits (*American Legion Post 300 v. Heath*, 2006 WL 3207629 (S.D. Ind. May 24, 2006) (Hamilton, J.)).

Other regulatory work has included representing then-U.S. Senator Richard G. Lugar in Indiana Election Commission matters.

Law firm colleagues on gaming, alcoholic beverage and other regulatory matters and related litigation include Robert Grand, John Boyd, Brian Burdick, Larry Mackey, James Gutting, Deborah Pollack-Milgate and Paul Jefferson (now with McNeely Stephenson).

(d) Legislative Matters – A fourth practice area is work before Congress and the Indiana General Assembly on legislative issues. Federal matters include representing an Indiana ethanol producer, and preparing the CEO of a major Indiana company for Congressional investigative hearings. Indiana legislative activities include testimony and other work on alcoholic beverages, gaming, education, budgetary and constitutional issues.

Law firm colleagues on legislative work include Robert Grand, Joseph Loftus, John Boyd, Jeanine Gozdecki, Neal Steinbart, Brian Burdick and Robert MacGill.

5. Trial/Judicial Experience

A. Describe the extent of your jury trial experience, if any.

As an associate with Barnes, Hickam, Pantzer & Boyd (1976-1981), I had limited jury trial experience, including being second chair in representing a plaintiff in a personal injury case that settled during trial. Key lessons, invaluable in appellate practice, are not using 20-20 hindsight to second-guess choices trial practitioners must make in the midst of a jury case, and appreciating challenges faced by trial judges, who make difficult decisions, often on the spot and without benefit of lengthy reflection, research or thorough briefing.

My appellate practice often entails close work with colleagues handling jury and bench trials (*e.g.*, advising on likely appeal issues; assisting in trial court briefing and argument).

B. Describe the extent of your bench trial experience, if any.

Litigation practice with Barnes & Thornburg (1985-present) has included bench trial work and injunction and other trial court proceedings in many cases. Examples include a contested marital dissolution (*DeHaan v. DeHaan*, 575 N.E.2d 1315 (Ind. Ct. App. 1991)); defending, on behalf of a major brewer, the Indiana Alcoholic Beverage Commission’s “sunset” of its Rule 28 “beer baron” rule barring exclusive beer wholesaler territories (*Little Beverage Co. v. DePrez*, 777 N.E.2d 74 (Ind. Ct. App. 2002)); disputes between a host city

and a non-profit foundation (our client) receiving gaming revenue under local development agreements, with separate trial court cases (*Founds. of East Chicago, Inc. v. City of East Chicago*, 927 N.E.2d 900 (Ind. 2010), and *Founds. of East Chicago, Inc. v. City of East Chicago*, 933 N.E.2d 834 (Ind. 2010)); defending against a motion for an anti-suit injunction barring a client's case in another State, with the injunction vacated on appeal (*Cloverleaf Enter. v. Centaur Rosecroft LLC*, 815 N.E.2d 513 (Ind. Ct. App. 2004)); and defending against a motion for an injunction to compel payment of gaming revenues by a casino (our client) to a host city under contracts alleged to have been breached by the city (*City of Gary v. Majestic Star Casino*, 905 N.E.2d 1076 (Ind. Ct. App. 2009)).

Most recent bench trial experience is representing the State as plaintiff in a multi-week trial in its contract dispute with IBM over "modernizing" the Indiana Family & Social Services Administration's delivery of welfare services (discussed in Section 6D). *See State v. Int'l Bus. Mach. Corp.*, 964 N.E.2d 206 (Ind. 2012) (vacating trial court order to depose Governor); *State v. Int'l Bus. Mach. Corp.*, 51 N.E.3d 150 (Ind. 2016) (holding IBM materially breached contract as matter of law; remanding to determine State's damages); and *State v. Marion Super. Ct.*, 54 N.E.3d 995 (Ind. 2016) (mem.) (original action; granting State's petition to direct trial court to vacate order on remand denying State any damages and to grant change of judge). Latest proceedings were briefing and February 2017 hearing on State's damages claims before new trial judge on remand (Marion Superior Court Judge Heather Welch). Lead trial counsel has been my partner John Maley, with me as lead counsel on appeals and handling trial court argument on significant legal issues.

- C. If applicable, describe the nature and extent of your judicial experience (including as a judge *pro tempore*). Include a description of your experience presiding over jury trials, if any.

None (other than serving as a judge *pro tempore* to perform wedding ceremonies)

6. Professional Experience

Include as writing samples, four selections (in total) from the written materials listed below in Subsections 6A – 6C.

See attachments at **Tab D**

- A. If applicable, list up to five trial or appellate briefs and/or judicial opinions you have written. Refer to them by caption, case number, and filing date.

Brief of Appellant in *State v. Int'l Bus. Mach. Corp.*, No. 49S00-1201-PL-15, Indiana Supreme Court (filed Jan. 19, 2012). Interlocutory appeal directly to Supreme Court, under Appellate Rule 56(A), of order to depose Governor in contract case. Order reversed in *State v. Int'l Bus. Mach. Corp.*, 964 N.E.2d 206 (Ind. 2012). (Brief included at **Tab D2**; case discussed in Section 6D)

Appellee's Petition to Transfer in *ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, No. 71S05-1606-MI-359, Indiana Supreme Court (filed Apr. 14, 2016). Issue was whether private university police were "public agencies" under Access to Public Records Act ("APRA"). Public Access Counselors repeatedly said "no," but a new Counselor took opposite view when ESPN sought records on Notre Dame student athletes. Court of Appeals agreed, on theory that private campus police performed a "public function." Petition argued that

statute's language showed legislative choice that only government agencies were covered, and prevailed over any different judicial policy view. Supreme Court granted transfer, enforcing statute's language and holding private campus police were not subject to APRA. *ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192 (Ind. 2016). (Petition included at **Tab D3**)

Brief of Special Litigation Committee of Board of Directors of ITT Corp. in *In re ITT Corp. Derivative Litig.*, No. 94S00-0911-CQ-508, Indiana Supreme Court (filed Jan. 15, 2009). Certified question from U.S. District Court for Southern District of New York, under Appellate Rule 64, on Indiana Business Corporation Law's standards for being a "disinterested director" in the context of shareholder derivative actions. Supreme Court adopted ITT Special Litigation Committee's view of IBCL, which was contrary to Federal court's prior decision. *In re ITT Corp. Derivative Litig.*, 932 N.E.2d 664 (Ind. 2010).

Brief of *Amicus Curiae* Commercial Logistics Corp. in Support of Petition to Transfer in *Cooper Indus. v. City of South Bend*, No. 49S04-0711-CV-541, Indiana Supreme Court (filed July 23, 2007). Issue was whether limitations could run on environmental action before statute creating action was enacted. Federal district court (in case where our client was plaintiff) and Indiana Court of Appeals held limitations could run before statutory action existed. After appeal of Federal case to Seventh Circuit, I filed *amicus* brief supporting transfer in Indiana case, and participated in oral argument. Supreme Court agreed action could not accrue until statute creating action was enacted. *Cooper Indus. v. City of South Bend*, 899 N.E.2d 1294 (Ind. 2009). Seventh Circuit, which had stayed client's appeal, then reversed dismissal order. *Commercial Logistics Corp. v. ACF Indus.*, 316 Fed. Appx. 499 (7th Cir. 2009) (*per curiam*). (Brief included at **Tab D4**)

Brief of *Amicus Curiae* Indiana State Bar Ass'n in *Bankr. Law Offices of Mark S. Zucker-berg, P.C. v. State Bd. of Law Examiners*, No. 94S00-0512-MS-621, Indiana Supreme Court (filed Feb. 28, 2006). Court adopted ISBA's proposed resolution of Professional Conduct Rules issues on practicing law under "trade name." (Discussed in Section 7D)

- B. If applicable, list up to five legislative drafts or court rules you have written or to which you contributed significantly. Refer to them by official citation, date, and subject matter.

Assisted Indiana State Budget Agency and Indiana Finance Authority in drafting Balanced Budget Amendment to Indiana Constitution, approved by 119th General Assembly in 2015 (P.L. 259-2015); now pending before 120th General Assembly.

Assisted in preparing amendments to the Indiana Business Corporation Law adopted by the General Assembly in 2015 (P.L. 119-2015). (Discussed in Section 7D)

Statement of U.S. Senator Richard G. Lugar introducing Judge John G. Roberts, Jr. to the Senate Judiciary Committee at its confirmation hearings on Judge Roberts' nomination to be Chief Justice of the United States, September 12, 2005. (Statement drafted by me for Senator Lugar; included at **Tab D1** with his permission; discussed in Section 6D)

Official Comments to the Indiana Business Corporation Law, IND. CODE §§ 23-1-17-1 *et seq.*

(One of two co-drafters; discussed in Section 6D)

- C. If applicable, list up to five of your contributions to legal journals or other legal publications. Provide titles, official citations, and a brief description of the subject matter.

Contests for Corporate Control Under the Indiana Business Corporation Law, in RICHARD E. DEER, INDIANA CORPORATION LAW AND PRACTICE (Prentice Hall 1990)

Director Liability Limits and the Business Judgment Rule in Indiana, INSIGHTS (Aug. 1989)

Impact of the ADA on State and Local Governments, in THE AMERICANS WITH DISABILITIES ACT: PRIVATE AND PUBLIC COSTS (Nat'l Legal Ctr. for the Public Interest 1996) (co-authored with Steven R. Schultz)

Standing to Sue Under SEC Rule 10b-5, 89 HARV. L. REV. 262 (1975) (analysis of *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), in *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 1 (1975))

Note, *The Reliance Requirement in Private Actions Under SEC Rule 10b-5*, 88 HARV. L. REV. 584 (1975)

- D. Identify the five most significant legal matters entrusted to you, whether as a judge or lawyer, and describe why you believe them to be so.

1. Representing John E. Barnes III in *Barnes v. Barnes*, 603 N.E.2d 1337 (Ind. 1992)

This was significant because of the legal issues, but more so because my partner Stan Fickle and I were entrusted with rescuing a client's reputation after what we thought a miscarriage of justice. John Barnes, a prominent businessman, was charged in a civil action with raping his teenage daughter, who had serious mental problems and had made countless rape charges against many others (classmates, strangers, her grandmother) since early childhood. There was no criminal prosecution; but the daughter's attorney persuaded the trial judge to invoke the "rape shield" statute in a civil case, barring any mention of prior accusations. The attorney then presented testimony on her psychiatric problems, including post-traumatic stress disorder, and told the jury these "had to be" due to the father's abuse since it was "the only evidence in the case." One result was a multi-million dollar punitive award; another was shattering the father's reputation.

We were retained for the appeal. The more important issue, because it undermined the credibility of the charges and the verdict, was that excluding key evidence, accompanied by the trial tactics just described, was manifestly unjust. The other argument, which we debated raising but decided we had to under then-Indiana law, was that the action was barred by parental immunity. The Court of Appeals then reversed solely on parental immunity. This disappointed us despite the reversal, because the Court did not discuss the evidence issue, and there was a dissent saying a rapist father was escaping justice.

On transfer, our goal was for the Supreme Court to address the evidentiary issue and the trial's unfairness, even if it upheld the immunity rule. To highlight that the evidence issue was independent and—due to its impact on our client's reputation—more important, we divided oral argument (with me arguing immunity, and Stan Fickle arguing the evidence

issue). We were deeply gratified that the Court's decision, while declining to apply parental immunity, reversed the judgment due to the trial's fundamental unfairness, as made clear in Justice Dickson's opinion for a unanimous Court. The case was remanded for new trial, and later dismissed for want of prosecution.

Whenever asked what is the most important matter in my career, my answer is the *Barnes* case—because a client's future and reputation depended on our persuading the Supreme Court to set aside what we believed a huge injustice, and to explain clearly why it was doing so (as Justice Dickson forcefully did).

2. Assisting U.S. Senator Richard G. Lugar on Federal Judicial Selection Matters

Senator Lugar gave me the opportunity to assist him on several Federal judicial selection matters involving Indiana.

One aspect involved his recommendations to President George W. Bush on nominations to our Northern and Southern District Courts and "Indiana seats" on the Seventh Circuit. This included studying applications, interviewing candidates, and working with the Senator and the White House Counsel's Office on the nominations of Judges Simon, Springmann and Van Bokkelen in the Northern District; Judge Lawrence in the Southern District; and Judges Tinder and Simon to the Seventh Circuit (with the latter nomination made during a presidential election year, and never voted upon by the Senate).

Another aspect was nomination of John G. Roberts, Jr., who had been my colleague in the Reagan White House Counsel's Office, as Chief Justice of the United States. Judge Roberts and White House staff asked me to assist on confirmation; and Senator Lugar asked me to draft his statement introducing Judge Roberts to the Senate Judiciary Committee. That statement, attached at **Tab D1** with the Senator's permission, reflects his views and mine on the role of the judiciary, and the Senate's role in judicial confirmation.

A third aspect involved President Obama's nominating then-District Judge David Hamilton to the Seventh Circuit. Judge Hamilton had been a law firm colleague, giving me first-hand knowledge of his exceptional talent and character. I supported his confirmation when he was nominated by President Clinton to the Federal district court. On his nomination to the Seventh Circuit, then-Senate Judiciary Committee member Jeff Sessions (R-Ala.) opposed confirmation, mischaracterizing Judge Hamilton's district court decisions. At Senator Lugar's request, I did the research for his floor speech refuting these charges.

The high caliber of our Federal judiciary is vital to the Indiana bar and the clients it serves. Senator Lugar's asking me to play a part in helping maintain that caliber is among the most significant matters entrusted to me.

3. Drafting Official Comments to Indiana Business Corporation Law

In the 1980s, the Indiana Corporate Law Survey Commission (n/k/a Indiana Business Law Survey Commission) undertook total revision of our State's basic corporation law, replacing the General Corporation Act with a new statute, modeled on the 1984 Revised Model Business Corporation Act ("RMA") and enacted in 1986 as the Indiana Business

Corporation Law. Under the leadership of James Strain (now with Taft Stettinius), I was among the attorneys who worked closely on this project with the Commission (and with several Indiana-domiciled companies who supported it), including in identifying topics on which the IBCL should add to, modify or depart from RMA provisions.

The Commission believed Official Comments would aid courts and counsel in understanding and applying the IBCL, including its differences from prior law and the reasons for ICBL additions to, modifications of, and departures from RMA provisions. I was one of two attorneys who drafted the Comments, approved by the General Assembly in 1988.

The opportunity to assist in this project was significant due to its impact on corporation law and practice in our State. Have subsequently handled appellate litigation involving important IBCL provisions, including (1) *In re ITT Corp. Derivative Litig.*, 932 N.E.2d 664 (Ind. 2010) (standards for being a “disinterested director” in the context of shareholder derivative actions; discussed in Section 6A), and (2) *CBR Event Decorators, Inc. v. Gates*, 962 N.E.2d 1276 (Ind. Ct. App. 2012) (standards for “piercing the corporate veil” to impose individual liability on corporate officers and shareholders).

4. Service as Associate Counsel to the President of the United States, 1981-1985

Counsel to the President Fred Fielding gave me the opportunity to work with an outstanding group of colleagues in the White House Counsel’s Office. Work in this small (fewer than 10 lawyers), single-client office encompassed widely diverse assignments, including:

- Interview prospective cabinet and other appointees; ensure compliance with financial disclosure and other ethics requirements; address divestiture and other measures to resolve ethical compliance issues; review FBI background investigations; meet with chair and ranking member of Senate confirmation committee to review FBI reports
- Work on President’s legislative initiatives; review bills for signature or veto recommendation; review proposed signing statements or veto messages
- Coordinate with Justice Department and other agencies on Supreme Court and other significant litigation affecting President’s programs or policy positions
- Work with Justice Department and senior White House staff on Federal judicial nominations and confirmation hearings
- Work with National Security Council and other agencies on intelligence matters
- Review drafts of all Presidential speeches and remarks
- Assist other White House offices (*e.g.*, Legislative Affairs; Public Liaison; Counselor’s Office; Chief of Staff’s Office; Political Affairs) on matters with legal implications
- Handle numerous more routine tasks (*e.g.*, work on White House correspondence; security clearances and other White House personnel matters; ensure that disaster relief requests comply with law; review drafts of Presidential proclamations; work with Executive Clerk’s Office on messages to Congress, issuing commissions, *etc.*)

Assisting on legal issues related to the President's performance of his duties was a serious trust and responsibility. Among matters in which I was personally involved, the more important include (1) 25th Amendment issues, such as contingency preparation for transfer of the President's duties in the event of temporary disability, after the March 30, 1981 assassination attempt; and (2) liaison responsibility between the White House and the independent counsel investigating allegations against Counselor to the President Edwin Meese III when he was nominated to be U.S. Attorney General.

5. Representing State in Dispute with IBM on "Modernizing" FSSA Welfare Services

My partner John Maley and I were asked to take lead responsibility (John for trial work, me for briefing and appellate work) in representing the State of Indiana in its contract dispute with IBM involving the latter's responsibilities for "modernizing" the Indiana Family & Social Services Administration's delivery of welfare services to needy Hoosiers.

The reasons this is among the most significant matters entrusted to me include (1) the impact on Hoosier taxpayers of a suit involving an over \$1 billion contract, with hundreds of millions at stake; (2) the significant legal issues presented; (3) the work in preparing for and conducting a multi-week bench trial, and then engaging in mediation encouraged by the Indiana Supreme Court; (4) statutory and separation of powers issues arising from IBM's effort to depose Governor Daniels; and (5) most important, the impact of the dispute and its resolution on delivery of nutrition and other services to Hoosiers in need.

The statutory and separation of powers issues raised by IBM's effort to depose Governor Daniels, which the trial court ordered, were resolved on interlocutory appeal directly to the Supreme Court under Appellate Rule 56(A). After oral argument in the morning, the Court announced that afternoon its ruling vacating the order, followed later by its written decision. *State v. Int'l Bus. Mach. Corp.*, 964 N.E.2d 206 (Ind. 2012).

On the contract dispute, the trial court ruling that IBM had not breached the contract was reversed by the Court of Appeals, *State ex rel. Ind. Family & Social Servs. Admin. v. Int'l Bus. Mach. Corp.*, 4 N.E.3d 696 (Ind. Ct. App. 2014), and, after transfer was granted, by the Supreme Court, *State v. Int'l Bus. Mach. Corp.*, 51 N.E.3d 150 (Ind. 2016).

The Supreme Court remanded to determine the State's damages. However, on the day the Court's decision was certified, the initial trial court denied the State any damages. I was given the lead in asking the Supreme Court to set this aside, initiating an original action on the ground that the trial court had exceeded its jurisdiction. The Supreme Court agreed, ordering the trial court to vacate its damages ruling and grant the State's change of judge motion. *State v. Marion Super. Ct.*, 54 N.E.3d 995 (Ind. 2016) (mem.)

Briefing on the State's damages claims has now been completed before the new trial judge (Marion Superior Court Judge Heather Welch), who held a hearing on February 10, 2017. A ruling is expected within 90 days from the hearing.

7. Efforts to Improve the Legal System, Administration of Justice, or Society

- A. Describe your efforts, achievements, or contributions (including written work, speeches, or presentations) toward the improvement of the law, the legal system, or the administration of justice. Include a description of any management or leadership roles you undertook to achieve these goals, and describe any specific instances in which your collaborative efforts helped achieve these goals.

The following matters (discussed in Section 7D) helped contribute to improving the law, legal system, or administration of justice:

Amicus work for ISBA in *Zuckerberg* case, involving our Professional Conduct Rules

Service on Board of Legal Services Corporation of Indianapolis

Assistance in drafting 2015 amendments to Indiana Business Corporation Law

The following matters (discussed in Section 6D) helped make more significant contributions to improving the law, legal system or administration of justice:

Legislative, judicial selection and other aspects of work as Associate Counsel to the President of the United States (entailing leadership on selected tasks and projects, and collaboration with colleagues, other White House staff, Justice Department and other agency officials, and (at times) Senators, Representatives and their staffs)

Assisting Senator Richard G. Lugar on Federal judicial selection matters (entailing leadership in interviewing and evaluating judicial candidates, and collaboration with the Senator, his senior staff, the White House staff, and judicial nominees)

Drafting Official Comments to Indiana Business Corporation Law (lead role in drafting, collaboration with co-drafter and Indiana Corporate Law Survey Commission)

In addition, I am currently assisting my partner John Maley in his role as Co-Chair of the Indiana Bar Examination Assessment Task Force.

- B. Describe your efforts, achievements, or contributions (including written work, speeches, or presentations) concerning civic, political, or social issues. Include a description of any management or leadership roles you undertook in this area, and describe any specific instances in which your collaborative efforts in this area led to a successful result.

Several matters discussed in Sections 6D and 7D involved, in different ways, various civic, political, or social issues. Additional such matters include:

Bi-monthly “Taking Issue” columnist for *Indianapolis Business Journal* (2012-2015)
(alternating with Sheila Suess Kennedy)

Republican analyst for Indianapolis NBC affiliate, WTHR-Channel 13 (*circa* 2000-2015)
(working with WTHR’s Kevin Rader and Democratic counterpart Robin Winston)

Candidate for Republican nomination for U.S. Senator from Indiana (1997-1998)
(defeated in three-candidate primary election)

Addressing many classes of (1) Richard G. Lugar Excellence in Public Service Series for Hoosier women leaders in the business, professional, civic and public service arenas, and (2) Indiana Leadership Forum for young Hoosiers who show promise of future leadership (multiple occasions in each instance, starting in the 1990s)

State Media Director, Indiana Reagan for President Campaign (1979-1980)

Speechwriting for National Reagan for President Campaign (1980)
(in particular, work on Governor Reagan's 1980 convention acceptance speech)

Speechwriting for President Reagan after he left office (1985-1993)
(including his 1993 commencement address at The Citadel)

Speechwriting for then-Vice President George H.W. Bush (1982)
(address to the National Judicial College, Reno, Nevada)

Occasional articles for various publications on various topics (starting *circa* 1972)
(including *National Review*, *The American Spectator*, *The Indianapolis Star*,
The Saturday Evening Post, and Heritage Foundation's *Policy Review*)

Work for Republican candidates in numerous other campaigns for Federal, State and local offices (starting in high school and college), including some candidates for Circuit or Superior Court Judge in Marion County and Boone County

These and other activities, including other public speaking and TV and radio commentary on civic and political topics, have met with different degrees of success, probably best judged by others. A great many have involved collaboration with talented individuals, which is enjoyable, educational and quite rewarding.

- C. Describe your efforts, achievements, or contributions (including written work, speeches, or presentations) to improve your local, state, or national community through charitable work or public service. Include a description of any management or leadership roles you undertook in this area, and describe any specific instances in which your collaborative efforts in this area led to a successful result.

Government and other public service activities are described elsewhere in the application (*e.g.*, Sections 6D and 7D), as is involvement in various civic activities and non-profit organizations (*e.g.*, Sections 7B and 8B).

Charitable efforts my wife and I regularly support (in addition to those undertaken by our church) include Timmy Global Health, Project Home Indy, Giving Sum, United Way, and the annual Indianapolis K-9 Cancer Walk (which we have helped to organize and run, in a collaborative effort whose success has grown exponentially in just a few years).

- D. Describe the nature and extent of any *pro bono* legal services you have contributed.

Board of Directors, Legal Services Corporation of Indianapolis (1977-1979)

Served as Mayor William H. Hudnut III's appointee to the LSC Board. My focus was encouraging efforts to assist persons who needed but could not afford legal help in matters affecting their daily lives (*e.g.*, rent disputes, child services), rather than seeing the LSC as a vehicle for arguably political activities that could distract from and even

undermine the ability to fulfill its intended mission. In contrast to accounts of LSC experiences in some other places, our board members worked in a cooperative, friendly way, despite different political views and representing different constituencies.

Counsel to the Presidential Commission on the Space Shuttle *Challenger* Accident (1986)
Several weeks on leave from law firm to help get Commission staffed and operational, which I was asked to do due to recent service in White House Counsel's Office, and resultant familiarity with ethics and other requirements for Presidential commissions and relationships with people at the White House and Federal agencies. Tasks included guiding commissioners on financial disclosure, security clearance and related matters; liaison with NASA and other agencies; and arranging for "detailing" personnel from other agencies to help Commission (*e.g.*, legal and investigatory staff from the FBI and NTSB). While also assisting in initial public meetings and investigatory efforts (*e.g.*, visits to NASA facilities; interviews with component manufacturers), core assignment was to help get Commission up and running, so it could proceed with its investigatory tasks aided by those with the requisite scientific and investigatory skills.

Drafting Official Comments to Indiana Business Corporation Law (1986-1987)
While not in charge of any billing on this project (discussed in Section 6D), my recollection is that all or part of my work was on a *pro bono* basis.

Special Consultant, U.S. Attorney General's Advisory Board on Missing Children (1988)
Assisted Advisory Board in drafting annual report (partially *pro bono*)

Counsel for presidential elector in opposing attempt to remove presidential candidates from Indiana ballot (1988-1990)
Worked with Secretary of State, Republican and Democratic parties, and Bush-Quayle campaign, and intervened for presidential elector, in opposing third-party candidate's suit to remove major party presidential candidates from 1988 Indiana ballot. Dismissal by Judge Noland was then affirmed in *Fulani v. Hogsett*, 917 F.2d 1028 (7th Cir. 1990).

Counsel's Office, Bush-Cheney Presidential Transition (2000-2001)
Several weeks on leave from law firm to assist transition legal work, including security and other clearances for cabinet and other officers to be nominated and confirmed at the outset of the new administration. Effort was headed by Fred Fielding, former Counsel to President Reagan, who reassembled some of his White House Counsel's Office team because their familiarity with pertinent processes and issues would speed completing work during a very truncated transition (due to contested election results). Tasks included review of FBI background reports, assisting incoming officials on financial disclosure and other ethics requirements, and meetings with Senators whose committees had responsibility for hearings on cabinet and sub-cabinet nominees.

Testimony and memoranda on legislative issues before Indiana General Assembly
(various occasions since *circa* late-1980s/early-1990s)
Some work on Indiana legislative matters, especially on education issues, has been on full or partial *pro bono* basis (*e.g.*, for non-profits on education reform proposals).

Brief of *Amicus Curiae* Indiana State Bar Ass'n in *Bankr. Law Offices of Mark S. Zuckerberg, P.C. v. State Bd. of Law Examiners*, No. 94S00-0512-MS-621 (Ind. June 12, 2006)

Case involved Professional Conduct Rules on practicing under a “trade name,” at a time when ISBA committee was working on this. At request of then-ISBA president James W. Riley, Jr., I prepared *amicus* brief on constitutional and other issues, and asking Supreme Court to resolve case without preempting ISBA work on Rule revisions. The Court adopted ISBA’s proposal. See Peter J. Rusthoven, *Narrow Ruling Permits Work of ISBA Committee to Continue*, RES GESTAE (Aug. 2006) [report prepared at ISBA request].

Preparations for Oral Argument before U.S. Supreme Court in *United States v. Sanchez*, 553 U.S. 507 (2008) (argued Oct. 3, 2007)

Case involved whether conduct that was element of underlying crime could also be money laundering, subject to enhanced penalties. After firm successfully represented defendant in the Seventh Circuit, the Supreme Court granted *certiorari*, and I assisted in oral argument preparations. Supreme Court affirmed the Seventh Circuit.

Representing non-profit in defending appeal of dismissal in *Smith v. Salvation Army*, Civ. No. 3:13-cv-505 (N.D. Ind. Sept. 23, 2013) (mediated under Seventh Circuit program)

Assistance in drafting Indiana Business Corporation Law amendments adopted by General Assembly in 2015. Lead role was taken by my partner Steve Thornton, who serves on the Indiana Business Law Survey Commission. Amendments provide same flexibility in certain reorganization transactions as is available under the law of Delaware, with which our State competes as a preferred corporate domicile.

E. Indicate your experience teaching law. Provide the dates, names of institutions or programs, and a description of the subject matter taught.

Teaching Assistant, Harvard College, Cambridge, Massachusetts, in “Law and Social Order,” taught by Harvard Law School Professor Lloyd L. Weinreb (1975)

Speaker, Indiana Continuing Legal Education Forum Seminar, “The New Indiana Business Corporation Law” (1986)

Co-Chairman and Speaker, Indiana Continuing Legal Education Forum Seminar, “The Purchase and Sale of a Business” (1987)

Commencement Speaker, Valparaiso University School of Law (May 2000)

Presentation at Indiana State Bar Association Meeting, “Exclusive Wholesaler Distribution Territories and the Status of the ‘Rule 28’ Litigation” (2002)

Panelist, Appellate Judges Education Institute Summit, Dallas, Texas (2010)

Panelist, Indiana University Robert H. McKinney School of Law Forum, “Can We Have A Civil Conversation About RFRA?” (2015)

Speaker at Annual Barnes & Thornburg LLP Appellate Law Seminar (2000-2016)

Speaker at various other educational seminars approved for Indiana CLE credit

8. Memberships and Other Activities

- A. List any memberships and offices you have held in professional organizations, including dates and descriptions of the purposes of the organizations and of your involvement.

Indiana State and Indianapolis Bar Associations (most years since 1976)

American Bar Association (*circa* 1976-1994)

Seventh Circuit Bar Association (since *circa* 2012; some prior periods)

Indianapolis Lawyers Chapter of The Federalist Society (various periods starting *circa* mid-1990s, including times of service on advisory board or its equivalent, with fellow members including Chief Justice Randall Shepard and Senator Richard Lugar)

St. Thomas More Society of Indianapolis (occasional periods *circa* late-1990s-early 2000s; speaker at 1999 Red Mass Dinner)

Legal Policy Advisory Board, Washington Legal Foundation (1989-*circa* late-1990s) (non-profit supporting conservative jurisprudential principles *via amicus* filings; other members had also served in Reagan and/or first Bush Administrations, *e.g.*, former U.S. Attorney General Dick Thornburgh, former U.S. Solicitor General Ted Olson)

- B. List any memberships and offices you have held in civic, charitable, or service organizations, including dates and descriptions of the purposes of the organizations and of your involvement.

Board of Directors, Benjamin Harrison Presidential Site (2012-present) (preserving historic home and museum of Indiana's only U.S. President; supporting related educational activities)

Senator Richard G. Lugar's U.S. Naval Academy Merit Selection Committee (2001-2012) (review applications, interview applicants, select students for nomination to Academy)

Board of Directors, Educational CHOICE Charitable Trust (*circa* 2000-2008) (providing need-based scholarships to give less-affluent parents school choices)

Adjunct Fellow, Hudson Institute (1989-1997) (international public policy research institution; presidents during this period were Mitchell E. Daniels, Jr., followed by Dr. Leslie Lenkowsky)

Senior Fellow, Indiana Policy Review Foundation, Indianapolis (1991-*circa* mid-1990s) (public policy research institution; president during this period was Michael R. Pence)

Board of Directors, Legal Services Corporation of Indianapolis (1977-1979) (Described in Section 7D)

Indianapolis Kiwanis Club (*circa* mid-1990s)

Smokey Hollow Homeowners Association, Carmel, Indiana (*circa* 1990-2005) (small neighborhood association)

Board of Directors and Treasurer, Golden Hill Inc., Indianapolis, Indiana (1978-1981)

(small neighborhood association)

- C. List any memberships you hold in social clubs or organizations. If any restrict its membership on the basis of race, sex, religion, or national origin, please describe your efforts within the organization to eliminate restrictions.

Reagan Appointees Alumni Association (*circa* 1985-present)

Columbia Club, Indianapolis, Indiana (*circa* mid-1980s-early 1990s)

- D. Describe your hobbies and other leisure activities.

Travel and other activities with family

Reading (history, biography, sports, religion, selected detective and historical fiction, and legal humor, such as A.P. Herbert books on fictional English cases)

Fantasy sports leagues (NFL, major league baseball, NASCAR)

Collecting major and minor league baseball caps

Following professional and collegiate sports (especially Indianapolis Colts, Indiana Pacers, Indianapolis Indians, Boston Red Sox, Cincinnati Reds and Dayton Dragons professional teams, Butler Bulldogs basketball and March Madness)

Gilbert & Sullivan operettas (reading libretti, commentary and biographies; watching videos; listening to recordings; attending live performances when possible)

Charitable "trivia team" fundraising competitions at local Catholic churches and schools

Word games (especially continuous "Words With Friends" wars with adult children)

9. Legal Proceedings

- A. List any lawsuits or legal proceedings in any jurisdiction, including but not limited to bankruptcies, dissolutions, and criminal matters to which you have been a party. Provide dates, case numbers, courts, names of other parties, and, if needed, a brief explanation. (If minor children are involved [i.e. an adoption], use initials only.)

In re Rusthoven, No. S685-464 (Marion Super. Ct. filed 1985) (dissolution)

In re Rusthoven, No. 29D04-0710-DR-1875 (Hamilton Super. Ct. filed 2007) (dissolution)

- B. If you ever have been arrested or cited for any violation of the law other than for routine traffic violations, provide dates, jurisdictions, and an explanation of the event and its resolution.

None

- C. If you have been disciplined or cautioned, formally or informally, by the Indiana Supreme Court Disciplinary Commission, by the Indiana Commission on Judicial Qualifications, by the Indiana Supreme Court, or by similar entities in any other jurisdiction, identify each instance by date, case number (if applicable), and describe the circumstances and the nature of the outcome or resolution.

None

If you have any outstanding federal, state, or local tax obligations, please itemize and explain.

None

10. References

- A. Provide the names of three attorneys who have been your professional adversaries in your practice or who have litigated substantial cases in your court and who would be in positions to comment on your qualifications for appointment to the Indiana Supreme Court (contact information to be included in Part Two of this application).

The Honorable Geoffrey G. Slaughter
Associate Justice, Indiana Supreme Court

David L. Johnson, Esquire
President and Chief Executive Officer
BioCrossroads &
Central Indiana Corporate Partnership

Brian J. Paul, Esquire
Faegre Baker Daniels LLP

- B. Provide the names of three professional references other than those listed in Subsection 10A (contact information to be included in Part Two of this application).

Jeanine M. Gozdecki, Esquire
Barnes & Thornburg LLP

The Honorable Fred F. Fielding
Morgan Lewis & Bockius LLP

J. Lee McNeely, Esquire
McNeely Stephenson

- C. Provide the names of three personal references other than those listed in Subsection 10A or 10B (contact information to be included in Part Two of this application).

The Honorable Richard G. Lugar
United States Senator (ret.)
The Lugar Center

The Honorable David F. Hamilton
Judge, United States Court of Appeals for the Seventh Circuit

John R. Hammond III, Esquire
Ice Miller LLP

11. State Police Release Form and Photograph

- A. Complete a State Police release form printed on green paper (you may obtain the release form by contacting the Nominating Commission Office at 317-232-4706). Include the release form with the original application only and not with the copies.

Completed form submitted with original application

- B. Attach a recent photograph of you to the front of the original application and to each copy of your application. (This allows the Commission members to put a face with a name if you are interviewed in person.)

See photograph on cover of application

February 27, 2017

Date

/s/ Peter J. Rusthoven

Applicant Signature

Peter J. Rusthoven

Printed Name