QUESTIONS AND ANSWERS

Responses To Senator Richard J. Durbin's Questions for Thomas Michael Hardiman

1. **In your Senate questionnaire, you state that the most important case you have personally handled is *Dailey v. DeFazio*, in which you represented the Republican Committee of Allegheny County in a challenge to a redistricting plan. You are politically active and presently serve as the treasurer of the Republican Committee of Allegheny County. Are you prepared to recuse yourself in cases that come before you in which the Republican Party is a litigant?**

Response:

In my Senate questionnaire I listed the ten most significant litigated matters which I personally handled. The cases were organized primarily in chronological order, beginning with the most recent cases. In addition, I sought to provide a representative sample of cases, including federal, state, trial, and appellate cases. The most recent trial I included was *Dailey v. DeFazio*, in which I represented the Republican Committee and several individuals who claimed violations of, *inter alia*, constitutional rights. At the time I litigated the *Dailey* case, I served as Treasurer of the Republican Committee of Allegheny County, an office to which I was elected in 2000. I was nominated by President Bush on April 9, 2003 and the following day I resigned as Treasurer of the Republican Committee of Allegheny County. I am no longer politically active.

Title 28, Section 455 of the United States Code and Canon 3(C)(1) of the Code of Conduct for United States Judges provide: A judge "shall disqualify himself [or herself]in any proceeding in which [the judge's] impartiality might reasonably be questioned . . . ." Accordingly, if I am fortunate enough to be confirmed, I would follow the statute and the Code of Conduct in all instances when making recusal decisions.

2. **In your Senate questionnaire, you state that the second most important case you have personally handled is *Modrovich v. Allegheny County*. In this case, you defended on a *pro bono* basis the display of a large Ten Commandments plaque in the Allegheny County, Pennsylvania courthouse.**

   (a) **Do you believe that every American – Christian or non-Christian – has a right to have the tenets of his or her religious beliefs displayed in government buildings? Why or why not?**

   Response:

   Canon 5 of the ABA Model Code of Judicial Conduct provides that a judicial candidate shall not "make statements that commit or appear to commit the

candidate with respect to cases, controversies or issues that are likely to come before the court." In light of Canon 5 and its Commentary, I am not at liberty to express a personal opinion regarding whether every American has a right to post his or her religious beliefs in government buildings. I will carefully follow precedents of the United States Supreme Court and the U.S. Court of Appeals for the Third Circuit in deciding any case, including those arising under the Establishment Clause.

(b) How do you reconcile the official government action of publicly posting the tenets of a particular religion with the Establishment Clause of the Constitution?

Response:

In the *Modrovich* case, Allegheny County has argued that its purpose in accepting the donation of The Commandments Plaque was secular, *viz.*, to honor the rule of law and to remember those who perished fighting for the rule of law during World War I. This case has been stayed pending a decision of the U.S. Court of Appeals for the Third Circuit in another case involving the Establishment Clause. If confirmed, I would carefully follow binding precedents of the Supreme Court and the Court of Appeals for the Third Circuit, including those involving the Establishment Clause.

(c) Why did you choose to work on this case?

Response:

In *Modrovich*, I and a team of Reed Smith lawyers have represented Allegheny County since the firm was asked by our County Executive to undertake the matter on a *pro bono* basis after he received a large volume of correspondence from citizens urging the County to defend the case. Allegheny County has defended the case by arguing that The Commandments plaque, which was affixed to the County Courthouse in 1917 and is one of 20 plaques on that building, should be allowed to remain there despite the Plaintiffs' objections.

3. I would like to know your views on privacy rights.

(a) Do you believe in and support a constitutional right to privacy?

Response:

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court enunciated a constitutional right to privacy. As with all other areas of the law, if confirmed I

would faithfully adhere to the precedents of the Supreme Court and the Court of Appeals for the Third Circuit regarding the constitutional right to privacy.

(b) **If so, do you believe the constitutional right to privacy encompasses a woman's right to have an abortion?**

Response:

In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court held that the constitutional right to privacy encompasses a woman's right to have an abortion. The Court reaffirmed this holding in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). As with all other areas of the law, if confirmed I would faithfully adhere to the precedents of the Supreme Court and the Court of Appeals for the Third Circuit, including those precedents regarding abortion rights.

(c) **Do you agree with the recent comments of your home-state Senator Rick Santorum that "if the Supreme Court says that you have the right to consensual [gay] sex within your home, then you have the right to bigamy, you have the right to incest, you have the right to adultery?" Please explain.**

Response:

Although I am not familiar with the full context of the remarks quoted above, I understand that they were made with respect to the case of *Lawrence v. Texas*, which is now pending before the Supreme Court of the United States. As a nominee, it would be inappropriate for me to comment on a case currently pending before the Supreme Court. However, if confirmed, I would be bound to follow and would follow all decisions of the Supreme Court.

4. **You are a member of the Federalist Society. Do you agree with the following excerpt from the Federalist Society's statement of purpose? Please explain.**

> **"Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law."**

Response:

I am a member of the Federalist Society, which is a large organization with a diverse membership. The Federalist Society provides fora for debate on a wide variety of topics and works hard to ensure that a broad spectrum of views are represented at its events. The Federalist Society does not lobby, takes no political positions, and does not engage in litigation. I am a

member because I believe that the organization is committed to fair, reasoned, and civil debate on matters of importance to all Americans. During the past thirteen years I have spent very little time on law school campuses. I have been to the University of Pittsburgh School of Law and the Duquesne University School of Law to interview students seeking employment and, on occasion, have attended programs. (The only programs I recall included three held at Duquesne University to hear Archibald Cox, Kathleen Kennedy Townsend, and Justice Sandra Day O'Connor). Based on my time spent at the law schools, I have not discerned any ideology -- liberal, conservative, or otherwise. With respect to the legal profession, I have not experienced any dominant ideology. Rather, I have heard a diverse range of opinions on all matters, legal and otherwise, from the hundreds of lawyers with whom I have come into contact during my years of practicing law.

5. **According to its mission statement, one of the goals of the Federalist Society is "reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law." Which priorities, if any, do you believe need to be reordered? What is your belief about the role of federal judges and the courts in reordering such priorities? On which traditional values should there be a premium, and why?**

Response:

I believe Article III jurists hold a unique place within our constitutional government. Unlike the legislature, which enacts laws that reflect a variety of public policy judgments, the judiciary's role is primarily interpretive. The inferior federal courts are duty-bound to interpret the laws as written and to adhere to the precedents of the Supreme Court. I do not believe it appropriate for federal judges to "reorder priorities"; that task belongs to the legislative branch of government, which reflects the will of the people.

6. **During the last presidential election, President Bush pledged that he would appoint "strict constructionists" to the federal judiciary, in the mold of Supreme Court Justices Clarence Thomas and Antonin Scalia.**

(a) **How would you describe the judicial philosophy of Justices Scalia and Thomas?**

Response:

In deference to sitting members of the Supreme Court, I do not believe it appropriate for a nominee to an inferior federal court to comment upon the judicial philosophies of sitting Justices of the Supreme Court. Nor am I sufficiently familiar with the full body of work of either Justice Scalia or Justice Thomas to describe adequately their judicial philosophies. I understand, however, that Justice Scalia has described himself as a textualist.

(b) How would you describe your own judicial philosophy, and how do you believe it is different from or similar to Justices Scalia and Thomas?

Response:

Although I have never been a judge, based upon my experience adjudicating matters on behalf of the Disciplinary Board of the Supreme Court of Pennsylvania and the National Association of Securities Dealers, I would characterize my judicial philosophy as follows: First and foremost, all parties to the controversy are entitled to a full and fair hearing. Second, there must be mutual respect and professionalism among the tribunal, the litigants, and their counsel. Third, my obligation in deciding the matter is to hear all the evidence, weigh it carefully, and decide the facts according to the weight of the evidence. Finally, I must read the controlling legal authority, understand it, and apply it honestly to the facts of the case. In sum, I believe district court judges should decide each case honestly and fairly on the merits.

(c) As a judge, would you interpret the Constitution strictly according to its original understanding in 1789?

Response:

If confirmed, I would interpret the Constitution as written and as interpreted by the Supreme Court during the past 214 years

(d) Do you think that the Supreme Court's most important decisions in the last century – *Brown v. Board of Education, Miranda v. Arizona, Roe v. Wade* – are consistent with strict constructionism? Why or why not?

Response:

Brown, Miranda, and *Roe* are all important precedents of the Supreme Court to which I would faithfully adhere if confirmed as a district court judge. *Brown* served as the basis for landmark civil rights legislation in the 1960's. *Miranda* recently was reaffirmed in the *Dickerson* case, and *Roe* was reaffirmed by *Casey*. The phrase "strict constructionism" is subject to various understandings. Certain provisions of the Constitution are more amenable to "strict construction" than others. For example, the age requirements for Representatives (twenty-five), Senators (thirty) and President (thirty-five) and the Sixth Amendment right to a jury trial in criminal cases are straightforward. Other constitutional provisions, most notably the Equal Protection Clause and the Due Process Clause, require deeper analysis and have evolved over many decades of precedents. Furthermore,

the doctrine of *stare decisis* plays an important role in cases involving constitutional provisions that have been the subject of numerous cases over long periods of time.

7. **List three Supreme Court cases (other than *Plessy v. Ferguson* and *Dred Scott v. Sandford*) with which you disagree, and explain why.**

Response:

District court judges are required to decide cases on the factual and legal records presented to them. During my study of Supreme Court jurisprudence, I was never privy to a complete record before the Court. Accordingly, I cannot state with any degree of certainty the cases with which I disagree. More fundamentally, whether I disagreed with a decision of the Supreme Court is irrelevant because district court judges are bound to follow faithfully the precedents of the Supreme Court and the governing Court of Appeals. Finally, I would not want to comment on precedents to the extent that such comment could be construed as committing to rule a certain way in a case that might come before me. Nevertheless, if confirmed I would be required to decide cases in areas where precedents of the Supreme Court may be in tension. Subject to these inherent limitations, I cite the following:

(1) *Korematsu v. United States*, 323 U.S. 214 (1944). In *Korematsu*, the Supreme Court upheld the incarceration and dispossession of American citizens of Japanese ancestry. Without questioning the motives of the authorities who made this decision, query whether it comports with the current state of Supreme Court jurisprudence interpreting the Equal Protection Clause and the Due Process Clause.

(2) *Buck v. Bell*, 274 U.S. 200 (1927). In *Buck*, the Supreme Court upheld a Virginia statute authorizing the sterilization of inmates of state institutions who were deemed to be insane or imbeciles. Like *Korematsu*, query whether *Buck* remains good law in light of subsequent Supreme Court decisions.

(3) *Lochner v. New York*, 198 U.S. 45 (1905). In *Lochner*, the Supreme Court invalidated a New York Law seeking to protect the health and safety of workers. The Court's decision in *Lochner* has been criticized extensively and its validity is in question.

The foregoing cases are offered as examples of the process of judicial decisionmaking in seeking to reconcile cases when their validity may be called into question in light of subsequent precedents, intervening events, and the passage of time.

8 In terms of judicial philosophy, please name several Supreme Court Justices, living or dead, whom you admire and would strive to emulate on the bench.

Response:

If confirmed, I would be obliged to adhere to the decisions of the Supreme Court. Some of the Justices I admire include: John Marshall, Felix Frankfurter, Robert Jackson, and Byron White. Although I admire each of these Justices for different reasons, the role of a district court judge differs markedly from that of a Supreme Court justice. Thus, I cannot state that I would seek to emulate any of these justices should I be fortunate enough to be confirmed.

Responses To Senator Edward M. Kennedy's Questions for Thomas Michael Hardiman

1. **In Borough of Edgewood v. Cisneros, you represented plaintiffs in an unsuccessful challenge to a consent decree put in place to remedy illegal racial discrimination in public and federally assisted housing in Allegheny County (Sanders Consent Decree).**

   a. **In your questionnaire you describe your clients as the Borough Council of Edgewood and "two African-American residents." Did you pursue race discrimination claims on behalf of the African-American clients in this case?**

      Response:

      No.

      Did you represent any other clients in this case?

      Response:

      Yes. I represented all plaintiffs in the case, including the Borough of Edgewood, Bernard Robinson and Hudie Evans and seven of the Borough Councilmembers (Jay Bush, Jean Davin, Regis Griffin, Chris Kefalos, Joseph Young, James Yucas, and Stephen Zelenko).

   b. **In seeking to enjoin the Sanders Consent decree, you filed suit not only against the U.S. Department of Housing and Urban Development and Allegheny County, but also against the Neighborhood Legal Services Association. Please explain why you filed claims against the Neighborhood Legal Services Association.**

      Response:

      Under the Sanders Consent Decree, a representative of Neighborhood Legal Services Association ("NLSA") was a member of the Sanders Task Force. The Task Force was principally responsible for implementing all aspects of the Sanders Consent Decree, including the selection of "scattered site" housing. The NLSA delegate to the Task Force not only had a vote, but was the only party on the Task Force that possessed a veto over Task Force decisions. In our claim for injunctive relief (Count V), we sued all members of the Task Force, including NLSA, because our clients sought to enjoin the Task Force from purchasing homes in Edgewood.

c. **You indicated in your questionnaire that you "worked to broker a settlement" while the case was on appeal. Please describe the work that you did to broker the settlement, the nature of the settlement , if any, that was achieved in this case, and detail at what point of the litigation these settlement discussions took place.**

Response:

Prior to filing our Complaint in Equity, we initiated settlement discussions in an effort to resolve the dispute. Our initial offer was that Edgewood would purchase a few homes and gift them to families that were eligible for scattered site housing under the Sanders Consent Decree. There were two purposes for this offer: (1) it would keep the homes on the tax rolls and (2) by owning the homes, the families would maintain the properties better than the Housing Authority and the pride of ownership would conduce to a better environment for the neighborhood. We were told that these offers were rejected because "Sanders is not a home ownership program." After we filed the Complaint, the District Court dismissed the action for lack of standing and for failure to state a claim upon which relief may be granted. While our appeal to the Court of Appeals for the Third Circuit was pending, I initiated settlement discussions again in an effort to reach an agreement under which the County Housing Authority would purchase three homes in Edgewood rather than the eight that were originally planned. During the pendency of the appeal, the Allegheny County Housing Authority advised us that it had received approval from the Department of Housing and Urban Development to purchase only three homes in Edgewood. This oral representation was never memorialized in a formal, written settlement agreement.

d. **The district court dismissed your complaint in this case and the Third Circuit affirmed in an unpublished order. Please provide the district court opinion in this case.**

Response:

A copy is enclosed.

2. **You have been involved in a number of cases involving real estate and housing matters.**
Please detail any cases (including the outcome) in which you have
(a) represented defendants in challenges brought under the Fair Housing Act or state and local civil rights statutes or

Response:

Alexander v. Riga, 208 F. 3d 419 (3d Cir. 2000): In this case I represented a husband and wife who were sued for violations of the Fair Housing Act and the Civil Rights Act of 1866. The case was tried to a jury in federal court and the jury returned a verdict which resulted in judgment for my clients. The case was appealed, however, and the U.S. Court of Appeals for the Third Circuit reversed the order of the trial court and judgment was entered for plaintiffs. We filed a Petition for Writ of Certiorari with the U.S. Supreme Court, which denied the Petition.

Staszak v. Pennsylvania Human Relations Comm., 564 Pa. 720 (2000): In *Staszak* I defended a man accused of discrimination based on disability. The Pennsylvania Human Relations Commission entered judgment against our client. We appealed and the decision was reversed by Commonwealth Court of Pennsylvania and a judgment was entered in our client's favor. The Commission filed a Petition for Allowence of Appeal with the Pennsylvania Supreme Court, which was denied.

Mary Jo Melton v. Penn Park Development, et al., U.S. Department of Housing and Urban Development, No. 03-92-0825-8: In this administrative matter I represented a corporation that performed credit checks for residential landlords. After investigating the matter, the Department of Housing and Urban Development found no probable cause against our client.

(b) represented plaintiffs bringing claims under the Fair Housing Act or state and local civil rights statutes.

Response:

I have not represented any plaintiffs who have brought claims under the Fair Housing Act or state and local civil rights statutes. However, I have represented several plaintiffs who have brought claims under federal civil rights laws for various violations of federal constitutional rights.

3. In your questionnaire, you indicate that you have handled 54 cases that have gone to verdict or judgment.

a. How many cases have you tried to judgment? Please briefly describe each case.

Response:

I have tried the following nineteen cases to judgment:

1. *Dailey v. DeFazio*, C.A. No. 02-0830 (W.D. Pa. 2001): In this case I represented several plaintiffs and the Republican Committee of Allegheny County in a challenge to a redistricting of councilmanic districts in Allegheny County. The case involved claims of violations of the Voting Rights Act, the Civil Rights Act, and state law claims. The trial court declared the redistricting plan invalid.

2. *Nudi v. DeFazio*, C.A. No. 02-0830 (W.D. Pa. 2002): After Allegheny County Council passed a third redistricting plan, we filed another case challenging its legality. The issues in this case, which were similar to the claims we raised in the first trial, were limited to constitutional claims for violation of the Equal Protection Clause and the Administrative Code of Allegheny County. The court upheld the redistricting plan in this case.

3. *Hudson v. Housing Authority for the City of Pittsburgh*, 2001 U. S. App. LEXIS 8648 (3d Cir. 2001). I was sole counsel to the Housing Authority in a case brought by a pro se litigant who alleged that the police violated his Fourth Amendment rights. The jury returned a defense verdict.

4. *Lucas Systems v. ESB Bank et al.*, No. GD01-9445 (Allegheny County). In *Lucas*, I was lead counsel to defendants in an action for specific performance brought by a technology company. The case involved issues regarding contract law, construction issues, and remedies. We received a very favorable result and post-trial motions are pending before the court.

5. *Alexander v. Riga*, 208 F. 3d 419 (3d Cir. 2000). In this case I was lead counsel to defendants who were sued for violations of the Fair Housing Act and the Civil Rights Act of 1866. After trial I handled the appeal to the Court of Appeals for the Third Circuit and a Petition for Writ of Certiorari filed with the Supreme Court.

6. *First City v. Hengelsberg*, No. GD99-4950 (Allegheny County). I represented the plaintiff in this action on a guaranty agreement. The court awarded judgment in our favor, and both parties filed appeals. I argued the appeal in Superior Court, which recently reversed and remanded the cae to the trial court.

7. *Stanley v. Steuben Woods Associates*, No. 99-CV-359 (Jefferson County, Ohio). In *Stanley*, I was lead counsel to several defendants involved in the development and construction of a condominium project that were sued for breach of contract, fraud, and violations of the Ohio Condominium Act. We prevailed on all counts except the Condominium Act claim on which the jury found one of our clients liable, but awarded no damages.

8. *Powell v. Housing Authority for the City of Pittsburgh*, No. SA99-746 (Allegheny County). In *Powell* I was lead counsel to the Housing Authority in a case involving safety in public housing which raised issues of federal administrative law. The plaintiff claimed that her eviction pursuant to regulations promulgated by the Department of Housing and Urban Development was illegal because the regulations were inconsistent with federal statutes regulating safety in public housing. We lost this case at the trial court and on appeal before Commonwealth Court. The Pennsylvania Supreme Court granted our Petition for Allowance of Appeal and unanimously reversed the lower court. I argued the case in the Court of Common Pleas, Commonwealth Court, and the Pennsylvania Supreme Court.

9. *Smith v. Coyne*, 722 A.2d 1022 (Pa. 1999). In *Smith*, I was lead counsel for a consortium of "mom and pop" landlords, which intervened in a constitutional challenge to Rule 1008(B) of the Pennsylvania Rules of District Justice Procedure. Plaintiffs claimed violations of federal and state constitutional rights. The trial court agreed and invalidated Rule 1008(B) as unconstitutional. We appealed to the Supreme Court of Pennsylvania as a matter of right and the Supreme Court unanimously reversed the trial court's decision. I argued the case in the Pennsylvania Supreme Court on behalf of all defendants and intervenors.

10. *Merlot Tarpaulin & Sidekit Mfg. Co., Inc. v. Refuse Transfer*, No. AD98-5213 (Allegheny County). In *Merlot*, I represented the plaintiff in a commercial contract dispute with a trucking company to whom my client had supplied several patented tarp systems for large trailers. The defendant filed counterclaims for breach of express and implied warranty. The court awarded damages to the defendant and the verdict was affirmed on appeal by Superior Court. I was counsel in both the trial and the appeal.

11. *Ravin v. First City Company*, 692 A.2d 577 (Pa. Super. 1997). I was sole counsel to a real estate management company and a partnership that were sued on ten counts involving claims for breach of contract, unjust enrichment, quantum meruit, and promissory estoppel. We prevailed on all claims and the case was affirmed by Superior Court.

12. *Dyer v. Hirsch*, No. AR95-5634 (Allegheny County). This case involved a purchase and sale agreement for residential real estate and construction issues related thereto. I represented the plaintiffs/sellers and the seminal issue in the case was whether the buyers could rescind the contract by aggregating "defects" to exceed the dollar value in the contract that triggered the buyers' right to rescind. The trial court ruled for the defendants and Superior Court affirmed. I conducted both the trial and the appeal.

13. *The A. G. Mauro Co. v. The Stadium Authority of the City of Pittsburgh*, No. GD94-10832 (Allegheny County). I served as second-chair to (now) Judge Cindrich of the Western District of Pennsylvania. This was an action for injunctive and declaratory relief in which we represented some thirty corporations that had suites at Three Rivers Stadium. The trial court issued a Declaratory Judgment in our clients' favor.

14. *Mutschler v. Kaye*, No. GD94-19312 (Allegheny County). In *Mutschler*, I served as co-counsel to the plaintiff in two cases in which our client made numerous claims, sounding both in tort and contract, against his former partners and employer. We received a judgment in the first trial and in the second trial, which was a garnishment action against an affiliate of the original judgment debtor. We are preparing for trial next month on a fraudulent conveyance claim against another affiliate of the judgment debtors in the first two cases.

15. *Goldman v. Ames Dept. Stores*, 1994 U.S. Dist. LEXIS (S.D.N.Y. 1994) (reported on appeal). In *Goldman*, I second-chaired a trial in the bankruptcy court in which we represented Ames Department Stores, which was a debtor-in-possession under Chapter 11 of the Bankruptcy Code. We successfully defended this case, which was brought by the owners of a shopping center in which Ames was a tenant.

16. *First City v. Chrysler Financial Corp.*, No. GD93-11298 (Allegheny County). In this case, I served as second-chair in an action to enjoin the Defendant from calling a letter of credit for over $2,000,000. The court granted our Motion for Preliminary Injunction.

17. *Comserv v. First City South*, No. GD92-15659 (Allegheny County). This case was a replevin action in which I represented the Defendant, which owned a shopping center. Plaintiff brought a tort claim for conversion of equipment. The trial court denied plaintiff's claim.

18. *Lokes v. Advance Gregg Security*, No. GD 91-10964 (Allegheny County, Pa.). I served as associate counsel in this case, defending a security firm that was accused of gender and age discrimination after it discharged the plaintiff. The trial court directed a verdict for our client.

19. *Rmax, Inc. v. Alliance General Ins. Co.*, No. GD88-00251 (Allegheny County). In this case I represented the plaintiff, which manufactured roofing membranes, in a bad faith claim against its insurance carrier. The trial court ruled that Alliance had acted in bad faith and judgment was entered in our favor.

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b. What is the length of your longest trial? Please describe the claims in the case.

Response:

My longest trial was *Lucas Systems v. ESB Bank et al.*, No. GD01-9445, which lasted eleven days in the Court of Common Pleas of Allegheny County. In this case, I was lead counsel to defendants in an action for specific performance brought by a technology company. The case involved issues regarding contract law, construction issues, and remedies. We received a very favorable result and post-trial motions are pending before the court.

My longest jury trial was *Stanley v. Steuben Woods Associates*, No. 99-CV-359 (Jefferson County, Ohio). The case lasted nine days and I was lead counsel to several defendants involved in the development and construction of a condominium project that were sued for breach of contract, fraud, and violations of the Ohio Condominium Act. We prevailed on all counts except the Condominium Act claim on which the jury found one of our clients liable, but awarded no damages.

Responses To Senator Patrick J. Leahy's Questions For Thomas Michael Hardiman

1. **In *Alexander v. Riga*, you represented landlords who violated the Civil Rights Act and the Fair Housing Act by repeatedly refusing to show an apartment to African-American applicants. The District Court found that your clients "represented that an apartment was not available for inspection or rental, when it was," displaying a "callous indifference" to federally protected rights. You argued that plaintiffs who have suffered discrimination should be required to make a separate showing of harm to collect damages despite the fact that a jury had established that your clients engaged in intentional racial discrimination. The Third Circuit stated that your argument "trivializes the role of civil rights law in eradicating discrimination."**

   a. **Please explain your understanding of the standard required for a victim of racial discrimination to collect nominal damages when a finding of discrimination has been established.**

   Response:

   The U.S. Court of Appeals for the Third Circuit held in *Alexander v. Riga* that a victim of racial discrimination is entitled to a jury charge that nominal damages are mandatory. The Court also wrote: "This entitlement [to nominal damages] is not automatic, however, 'but rather it is incumbent upon the plaintiff to make a timely request for nominal damages.'" *quoting Campos-Orrego v. Rivera*, 175 F.3d 89 (1st Cir. 1999). Accordingly, plaintiffs are entitled to a charge that nominal damages are mandatory when discrimination has been found, but this right is waivable. In *Alexander v. Riga*, I represented Maria and Joseph Riga, husband and wife, who were sued for violations of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1982 and the Fair Housing Act, 42 U.S.C. § 3601 *et seq*. Prior to the commencement of trial, the plaintiffs abandoned their claims under the Civil Rights Act of 1866 and advanced their claim under the Fair Housing Act. After an eight day jury trial, a jury of seven people returned Special Verdicts indicating that Mrs. Riga had discriminated against the plaintiffs, but found that discrimination was not the legal cause of harm. Accordingly, the jury awarded no damages to the plaintiffs. On appeal, the U.S. Court of Appeals for the Third Circuit found that the District Court abused its discretion when it failed to enter judgment in favor of the plaintiffs and when it failed to find that plaintiffs were "prevailing parties." *Alexander v. Riga*, 208 F.3d 419, 428 (3d Cir. 2000). The Court of Appeals affirmed the lower court's decision not to award compensatory or nominal damages, finding that plaintiffs' counsels' failure to object to the jury charges constituted a waiver. *Id.* at 428-29. Although the Court of Appeals upheld plaintiffs' waiver on the nominal damages

issue, the panel wrote: "The District Court apparently felt that this case involved 'merely' a violation of 'purely statutory rights,' and that, therefore, nominal damages were not required. In our opinion, this stance trivializes the role of civil rights law in eradicating discrimination." *Id.* at 429. The District Court's decision was based on a legal principle enunciated by the U. S. Court of Appeals for the Eighth Circuit on a matter which had not been addressed previously by the Court of Appeals for the Third Circuit. In *Walker v. Anderson Elec. Connection*, 944 F.2d. 841 (8th Cir.), *cert. denied*, 505 U. S. 1078 (1998), the Court drew a distinction between absolute constitutional rights for which nominal damages are mandatory and statutory rights for which such damages are discretionary. The Third Circuit took a different view of this issue in *Alexander v. Riga*.

b. **In a unanimous opinion, the Third Circuit found that Judge Standish of the U.S. District Court for the Western District of Pennsylvania committed an abuse of discretion when he adopted your argument and improperly advised the jury on the issue of nominal damages in this case. As you are aware, you are nominated to Judge Standish's seat. If you are confirmed to fill this seat, what assurances can you provide the Committee and the citizens of your district that you will enforce the current rights ensured by our anti-discrimination laws?**

Response:

I assure the Committee that if confirmed, I would faithfully adhere to all precedents of the United States Supreme Court and the U. S. Court of Appeals for the Third Circuit. Additionally, I would faithfully discharge the oath of office to: "administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties . . . under the Constitution and laws of the United States . . . ." Consistent with the oath, I would faithfully enforce all laws of the land, including our civil rights and anti-discrimination laws.

Moreover, I understand that the role of an advocate differs from that of a judge. As an advocate, I am required to represent my client zealously within the bounds of the law. As the ABA Model Rules of Professional Conduct states: a lawyer may make any argument if "there is a basis in law and fact for doing so, that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

2. **Also during the course of litigation in *Alexander v. Riga*, you issued a number of *ex parte* subpoenas in violation of Rule 45 of the Federal Rules of Civil Procedure.**

a. Are you familiar with the requirements imposed on counsel by Rule 45? What is your current understanding of the requirements imposed on counsel when subpoenaing information from third parties?

Response:

On September 6, 1996, we served a document subpoena upon OK Grocery by hand delivery upon its counsel. I erroneously neglected to ensure that we served a copy of this subpoena upon opposing counsel. To the best of my knowledge, this was the only occasion when I committed such an error. I am familiar with the requirements of Fed. R. Civ. P. 45 and in particular with the requirement regarding prior notice to the parties when serving subpoenas for the production of documents. Rule 45(b)(1) states: "Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b)."

b. What responsibilities do attorneys have to supervise their employees and ensure that their actions comport with the Federal Rules of Civil Procedure?

Response:

I believe that lead counsel on each case is responsible for conducting the litigation properly. The lawyer in charge on any case should try to ensure that those acting under his or her direction and supervision act professionally and represent the client's interests zealously within the bounds of the law.

c. Were you reprimanded for your actions in this case? Have you been referred to the Bar or any other disciplinary body for violations of the Federal Rules of Civil Procedure? Have you issued *ex parte* subpoenas without following the Rules in other cases?

Response:

I was not reprimanded for my actions. I am unaware of any complaint ever being lodged against me with the Bar or the Disciplinary Board for alleged violations of laws or any Rules of Professional Conduct. Other than the single instance in the *Riga* case, I am unaware of any other matter in which I or my colleagues issued subpoenas without serving them on opposing counsel.

d. **What role do you believe district court judges should play in monitoring the discovery process to ensure that the Rules are followed?**

Response:

I believe that district court judges play an important oversight role regarding the conduct of cases from inception to conclusion, including the discovery process. Whenever counsel have a discovery dispute they cannot resolve, district court judges should promptly make themselves available to resolve the matter to facilitate the efficient administration of justice.

3. **Over the past decade you have contributed significant financial support to Republican campaigns and have served in a number of Republican offices in the state of Pennsylvania. What can you say to assure this Committee and prospective parties that you will be a fair judge, an impartial adjudicator, who will not use the federal bench to achieve the legal, political or philosophical goals of your friends in the Republican party or of the party itself?**

Response:

During the past ten years I have made financial contributions to Republicans and Democrats for various reasons. However, I recognize a critical distinction between one's role as a private citizen on the one hand and the role of a judge on the other. On April 10, 2003, one day after my nomination by President Bush on April 9, 2003, I resigned as Treasurer of the Republican Committee of Allegheny County and I have ceased political activities. I am mindful of a judge's obligations to eschew any form of political activity and if confirmed, I would not engage in any political activity. Furthermore, I do not believe that judges should seek in any way to "achieve the legal, political or philosophical goals" of one's friends or a political party. Rather, the duty of a judge is to faithfully adhere to the precedents of the Supreme Court and the governing Court of Appeals without regard to one's own beliefs. I believe that those who know me best, people in the community in which I work, have confidence that I would be a fair, impartial adjudicator if I am fortunate enough to be confirmed. As an example, I have enclosed two letters of support from prominent Democrat members of the Allegheny County community. Finally, if confirmed, I would recuse from any case in which my impartiality might reasonably be questioned in accordance with Canon 3.C. of the Code of Judicial Conduct.

4. **On the eve of your Committee hearing, we received the American Bar Association's evaluation of your nomination to the Western District of Pennsylvania. As you are no doubt aware, some of the members on the Standing Committee on the Federal Judiciary concluded that you are "not qualified" for a lifetime appointment to the district court.**

   a. **Please share with the Committee any insights you have about why some attorneys in your community would suggest that you are "not qualified" to be a district court judge.**

   Response:

   I have no personal knowledge of any attorneys in my community who have opined that I am not qualified to serve as a federal district court judge. Despite the tensions inherent in litigation work, I have always worked hard to be collegial, professional, and pleasant. With very few exceptions, I have enjoyed excellent working relationships with opposing counsel. I am unable to speculate as to why the ABA provided the rating it did. The ABA has not explained why at least one of its members gave me the rating of "not qualified," while a substantial majority rated me "qualified."

   b. **According to your Senate Questionnaire, you have tried at least 54 cases to verdict or judgment. Please indicate specifically how many of these cases were the result of default judgments and how many were the result of motions to dismiss. How many of these cases resulted in bench or jury trials? If any of these cases involved trials, please list the approximate duration of the trial proceedings and whether you served as chief or sole counsel in these trial proceedings.**

   Response:

   1. Of these 54 cases, 19 were verdicts entered after trial, 9 were judgments entered on a motion to dismiss, 0 were the result of default judgments, and the remaining 26 cases were cases decided on summary judgments or confessions of judgment upheld after depositions, briefing, and oral argument. Of the nineteen trials, I was sole or lead counsel in fourteen. These cases were of the following duration:
      11 days (one case)
      9 days (one case)
      8 days (one case)
      5 days (one case)
      4 days (two cases)

3 days (four cases)
2 days (four cases)
1 day (five cases)

c. **In your Senate Questionnaire, you indicated that as a law firm partner, your current private practice involves an "active civil and criminal litigation practice." Please indicate the number of cases during this timeframe that have involved criminal litigation. Have any of these criminal cases resulted in a trial to verdict and sentencing? If so, in how many of these cases did you serve as chief or sole counsel?**

Response:

I stated in my Senate Questionnaire that I have been engaged in an active civil and criminal litigation practice in federal and state courts. The majority of my practice has been civil in nature. Nevertheless, for several years I defended a corporation in a criminal and civil Medicare fraud case which I began as associate counsel and then became lead counsel. In addition, I was sole counsel to an individual in a criminal and civil securities fraud case. Other criminal defense work includes work as lead counsel for a client that I cannot disclose because the grand jury investigation is ongoing. I have also defended as sole counsel approximately 20 cooperating witnesses in grand jury proceedings. In addition, I was sole counsel to an individual in a rape case that was dismissed after the preliminary hearing. Finally, I have served *pro bono* as associate counsel on post-conviction matters for two men who committed multiple homicides.

d. **Considering that the vast majority of your litigation experience is in the specialized area of real estate, please describe what steps you will take, if confirmed, to prepare yourself for the complex issues of criminal law that will comprise a substantial portion of the docket handled by federal district courts.**

Response:

In my Senate Questionnaire, I indicated that I have specialized knowledge in real estate litigation. Nevertheless, I am a generalist who has undertaken a wide variety of cases. Apart from the criminal experience referenced above, I have handled cases involving federal laws regarding: civil rights, taxation, securities, labor, employment, as well as administrative, election, and bankruptcy law. I have brought and/or defended claims arising

under the First, Fourth, Fifth, Sixth, Seventh, Eleventh, and Fourteenth Amendments to the United States and/or Pennsylvania Constitutions. In addition, I have handled cases involving state law issues sounding in tort, contract, and quasi-contract. In sum, I have a broad spectrum of litigation experience. I believe this breadth of experience would serve me well if I am fortunate enough to be confirmed. As with all areas of the law, I will studiously evaluate the facts and the law of each case to try to reach a just result consistent with the precedents of the Supreme Court and the U. S. Court of Appeals for the Third Circuit. Finally, I will seek guidance from all sitting members of the bench as well as written materials I have received from the Administrative Office of the United States Courts.

5. **In your Senate Questionnaire, you noted that you appeared before two different Judicial Nominating Commissions for the Western District of Pennsylvania in 2001 and 2003.**

Who were the members of both commissions and which candidates did they recommend for nomination?

Response:

I do not know the identities of all of the members of the Nominating Commissions before which I appeared, but I recall the following persons: Karen Shapira, William Pietragallo, Diana Irey, George Miles, Christopher Gleason, Eugene Berry, Clyde Slease, Christopher Donahue, Nora Barry Fischer, and H. Woodruff Turner. I do not know all the identities of all the candidates recommended for nomination, but I believe that some of those recommended included: Joy Flowers Conti, David Cercone, Arthur Schwab, Terrence McVerry, Alexander Lindsay, Kim Gibson, Ronald Folino, William Ward, Mary Beth Buchanan, John McGinley, and Jill Rangos.

Please describe the types of questions that you were asked during these interviews.

Response:

During my appearances before the Nominating Commissions I was asked numerous questions, most of which I cannot recall. The questions I recall are: Why do you want to be a judge? What is your practice like? What is the most important thing you learned from your time in Mexico? Why are you willing to consider taking such a large pay cut? Are you prepared to serve for life? Do you have a problem with mandatory minimum sentences? Do you believe non-violent drug offenders should go to jail?

How did you learn of the judicial vacancy and the nominating commissions?

Response:

I learned of the judicial vacancy and the nominating commission through an advertisement in the Pittsburgh Legal Journal.

Were you recommended to the nominating commissions by your home state Senators?

Response:

No.

Were you asked to apply for this position and if so, by whom?

Response:

No.