

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

1. **Name:** State full name (include any former names used).

Roberto Antonio Lange.
I generally am known as Bob Lange.

2. **Position:** State the position for which you have been nominated.

United States District Judge for the District of South Dakota.

3. **Address:** List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

206 West 14th Street, Sioux Falls, South Dakota, 57104.

4. **Birthplace:** State year and place of birth.

1963; Pamplona, Spain.

5. **Education:** List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

1985-1988, Northwestern University School of Law; Juris Doctorate *cum laude*; 1988

1981-1985, The University of South Dakota; Bachelor of Arts *magna cum laude*, 1985

6. **Employment Record:** List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

1989 - present
Davenport, Evans, Hurwitz & Smith, LLP
206 W. 14th Street
Sioux Falls, SD 57104
partner-owner (1993 to present)
associate attorney (1989 – 1992)

1998 – 2002
Family Service, Inc.
2210 Brown Place
Sioux Falls, SD 57105
non-profit board member

1992 – 2002
Delta Gamma Chapter of Delta Tau Delta
114 N. Pine
Vermillion, SD 57069
non-profit board member

1988 - 1989
The Honorable Donald J. Porter
Chief Judge, U.S. District Court for the District of South Dakota
225 S. Pierre Street
Pierre, SD 57501
law clerk

May-Aug 1988
Faegre & Benson
2200 Wells Fargo
90 S. Seventh Street
Minneapolis, MN 55402
summer associate

May-Aug 1987
Davis, Polk & Wardwell
450 Lexington Avenue
New York, NY 10017
summer associate

May – Aug 1986
Bell, Boyd & Lloyd, LLP
70 W. Madison Street
Chicago, IL 60602
summer associate

May-Aug 1985
South Dakota Division of Insurance
445 E. Capitol Avenue
Pierre, SD 57501
intern

7. **Military Service and Draft Status:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have no military service. I registered for the selective service.

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

I attended Northwestern University School of Law on a full tuition scholarship as a Wigmore Scholar. While at Northwestern University School of Law, I received the Shapiro Prize for academic excellence, was named to the Northwestern University Law Review, and was chosen to represent the school on the Jessup International Law Moot Court Team. I was on the Dean's List every graded semester. I graduated with a Juris Doctorate degree, cum laude, with the honor of Order of the Coif (top 10% graduate).

I received various scholarships while at The University of South Dakota. I received the McGovern-Abourezk Human Rights Award one year. I had other honors such as Omicron Delta Kappa, Phi Beta Kappa, and dean's list every semester. I graduated with a Bachelor of Arts degree, magna cum laude with a University Scholar designation.

9. **Bar Associations:** List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

American Bar Association

South Dakota Bar Association

Minnesota Bar Association

South Dakota Trial Lawyers Association

South Dakota Defense Lawyers Association

South Dakota Civil Pattern Jury Instruction Committee (June 2006 to June 2008)

South Dakota Continuing Legal Education Committee (2003 to 2005)

South Dakota Negligence and Tort Law Committee (1996 to 2004, including as chairman from 1998 to 2001.)

10. **Bar and Court Admission:**

- a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

State Bar of South Dakota; April 1989

State Bar of Minnesota; January 1991

There have been no lapses in membership.

- b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

Supreme Court of the United States, 2004
United States Court of Federal Claims, 1999
United States District Court for the District of Minnesota, 1995
United States Court of Appeals for the Eighth Circuit, 1991
United States District Court for the District of South Dakota, 1989

There have been no lapses in membership.

11. **Memberships:**

- a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Family Service, Inc., 1998 – 2002, non-profit board member

Delta Gamma Chapter of Delta Tau Delta, 1992 – 2002, non-profit board member

Defense Research Institute, 1995 to present

Sioux Falls Area Running Club, 1997 to present

50 States and D.C. Marathon Group USA, 2003 to present

- b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

None of the above listed organizations invidiously discriminate on the basis of race, sex, or religion, or national origin.

12. Published Writings and Public Statements:

- a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

October 2006, "Credit Card Update" published by my law firm in its *Financial Institution Bulletin*.

An article regarding my participation in a 100 mile race was published as a series in the Sioux Falls Area Running Club newsletter, *The 27th Mile*.

- b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

I was active in writing or re-writing pattern jury instructions "Owners and Occupiers of Land" in 2006

- c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

None.

- d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

When I speak in or out of court, I typically use a short outline which I do not retain afterwards.

Banking Seminar of Davenport, Evans, Hurwitz & Smith, L.L.P.

April or May of 2009, 2008, 2007 and 2006;

Case law affecting South Dakota banks; I have no copy of notes or outline.

South Dakota Law Seminar for Midwest Family Mutual Insurance Company
March of 2009, South Dakota law summary. I have no copy of notes or outline.

“Preparing Young Leaders of Tomorrow” program of Briar Cliff University,
Sioux City, IA; summer of 2007 and 2008; dispute resolution, trial and
techniques, work of lawyers

Second Circuit Bar Association; February 2005; experience of appearing before
Supreme Court the United States; I have no copy of notes or outline.

Trade Association of Insurance Agents of South Dakota; February 1999; South
Dakota Law applicable to insurance agents; I have no copy of notes or outline.

“Law Day” Speeches at various Middle Schools in Sioux Falls; Various years in
the 1990s. These were given to middle school children to acquaint them with
how the legal system works; I have no copy of notes or outline.

- e. List all interviews you have given to newspapers, magazines or other
publications, or radio or television stations, providing the dates of these
interviews and four (4) copies of the clips or transcripts of these interviews where
they are available to you.

I have done my best to identify all items called for in this question, including
through a review of my personal files and searches of publicly available electronic
databases. I have located the following articles in which I was quoted:

Capital Journal, March 2, 2009, “Lange could be Pierre’s next federal judge.”

The Associated Press State & Local Wire; November 19, 2008; “Investors sue
Daktronics.”

Argus Leader (Sioux Falls, South Dakota); August 30, 2006; “3 other men sit on
state's death row.”

Aberdeen American News (South Dakota); May 24, 2006; “S.D. Supreme Court
asked to reinstate lawsuit on hospital pricing Hospital pricing lawsuits resurface
High court asked to review billing of uninsured ...”

The Associated Press State & Local Wire; June 14, 2005; “Wal-Mart wants
employee suit shifted to federal court.”

The Associated Press State & Local Wire; March 30, 2005; “Supreme Court sides
with death row inmate, says filing deadline may sometimes be suspended.”

Argus Leader (Sioux Falls, SD); April 11, 1999; "Law should protect pregnant women, mom says."

The Bismarck Tribune; March 29, 1996; Untitled

13. **Judicial Office:** State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have not held a judicial office.

- a. Approximately how many cases have you presided over that have gone to verdict or judgment? _____
 - i. Of these, approximately what percent were:
jury trials? ___%; bench trials ___% [total 100%]
civil proceedings? ___%; criminal proceedings? ___% [total 100%]
- b. Provide citations for all opinions you have written, including concurrences and dissents.
- c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).
- d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.
- e. Provide a list of all cases in which certiorari was requested or granted.
- f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.
- g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

- h. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.
 - i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.
14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:
- a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;
 - b. a brief description of the asserted conflict of interest or other ground for recusal;
 - c. the procedure you followed in determining whether or not to recuse yourself;
 - d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

I have not served as a judge.

15. **Public Office, Political Activities and Affiliations:**

- a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

I have held no public offices. I have had no unsuccessful candidacies for elective office or unsuccessful nominations for appointed office.

- b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have never been formally employed by a candidate or campaign, and have never had a title or held office with a campaign. I have provided pro bono service as election counsel to explain election law and to be available to address issues on election day for the campaigns of the following candidates:

John Billion (governor candidate); November of 2006

Kerry-Edwards Campaign; November of 2004

Senator Thomas Daschle; October and November of 2004

Senator Tim Johnson; November of 2002

16. **Legal Career:** Answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I served as a law clerk for the Honorable Donald J. Porter, then Chief Judge of the U.S. District Court for the District of South Dakota, from September of 1988 to September of 1989.

ii. whether you practiced alone, and if so, the addresses and dates;

I have never practiced as a sole practitioner.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

Davenport, Evans, Hurwitz & Smith, LLP
206 W. 14th Street
Sioux Falls, SD 57104
partner-owner (1993 to present)
associate attorney (1989 – 1992)

May-Aug 1988
Faegre & Benson
2200 Wells Fargo
90 S. Seventh Street
Minneapolis, MN 55402
summer associate

- iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have not served as a mediator or arbitrator.

b. Describe:

- i. the general character of your law practice and indicate by date when its character has changed over the years.

I have focused my practice on civil litigation at administrative, trial and appellate levels. When an associate attorney from 1989 through 1992, I handled more research and briefing assignments, small criminal cases, second-chairing large cases, and first-chairing smaller cases. Once I became partner in the beginning of 1993, my practice gradually shifted toward more complicated commercial litigation and higher stakes civil litigation. My specialty is civil litigation, with a focus on commercial and complex litigation. I presently am the litigation section head of the law firm of Davenport, Evans, Hurwitz & Smith, L.L.P.

- ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

I have specialized in civil litigation throughout my career in private practice. My clients are diverse. I have handled litigation for Sanford Health System and its affiliates in cases that are not routine collection matters or malpractice. I have represented many individuals in personal injury and other cases. I have done defense work for carriers including Acuity, a Mutual Insurance Company, Great West Casualty Company and Midwest Family Mutual Insurance Company. I have handled litigation for banks such as First Bank & Trust, CorTrust Bank, Richland State Bank, and Farmers & Merchants State Bank. I have represented product manufacturers like Daktronics, Inc. I have taken federal appointments, in habeas corpus cases and a drug conspiracy case. I have appeared in administrative matters before agencies like the South Dakota Banking Commission. I also have advised clients on contract matters, litigation avoidance and dispute resolution.

- c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

My practice is nearly 100% litigation or advice on how to avoid litigation or resolve disputes, with frequent court appearances.

- i. Indicate the percentage of your practice in:
 - 1. federal courts; about 15%
 - 2. state courts of record; about 75%
 - 3. other courts/tribunals; roughly 5%
 - 4. administrative agencies roughly 5%

- ii. Indicate the percentage of your practice in:
 - 1. civil proceedings; 95% or more
 - 2. criminal proceedings. 5% or less

- d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I believe that the number of cases that I have tried in various forums to verdict is in excess of fifty. Of those approximately 50 cases, I was lead counsel in all but six and sole counsel for the party I represented in the bulk of those cases.

- i. What percentage of these trials were:
 - 1. jury: 40-45%
 - 2. non-jury: 55-60%

- e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have handled one case before the Supreme Court of the United States. Rhines v. Weber, 125 S.Ct. 1528 (U.S. 2005). I was the sole attorney of record before the Supreme Court of the United States in this case. I wrote the Petition For Writ of Certiorari, authored the Appellant's Brief and Reply Brief and argued the case for the petitioner. This case is described in detail below, in response to question 17.

- 17. **Litigation:** Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- a. Dates of Representation:
- b. Court and Judges Involved :
- c. Opposing Counsel :

- i. *Rhines v. Weber*, 125 S.Ct. 1528 (U.S. 2005); U.S. District Court for the District of South Dakota (Judge Karen Schreier), U.S. Court of Appeals for the Eighth Circuit, Supreme Court of the United States; 2003-present

I was appointed in federal courts to represent Charles Russell Rhines in his federal habeas corpus proceeding to challenge his conviction and his sentence to death by lethal injection. I was the lone attorney of record before the Supreme Court of the United States in this case, although I had co-counsel at other levels.

Before District Judge Karen E. Schreier, the issue arose in the *Rhines* case as to what to do with a federal petition that included “mixed” claims, with some “exhausted” before state courts and other claims that had not been fully exhausted under the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”). Judge Schreier chose to stay Rhines’ federal petition, hold the petition in abeyance, and permit Rhines to return to state court in an effort to exhaust the claims that were not ripe for decision in federal court. The grant of “stay and abeyance” avoided a default under the one year statute of limitations enacted by the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”), in the wake of the United States Supreme Court decision in *Duncan v. Walker*, 533 U.S. 167 (2001), which had deemed the statute of limitation in the AEDPA not to be tolled during the pendency of a federal habeas filing.

The United States Court of Appeals for the Eighth Circuit reversed Judge Schreier’s decision following the pre-AEDPA United States Supreme Court case of *Rose v. Lundy*, 455 U.S. 509 (1982). *Rose v. Lundy* had decided that federal courts must dismiss habeas corpus cases filed under Section 2254 when there is a “mixed petition” of exhausted and unexhausted claims. Such a result would have forced Rhines to purge his petition of unexhausted claims, thereby sacrificing federal court review of those claims forever.

I wrote the Petition For Writ of Certiorari to the United States Supreme Court. I was the author of the Appellant’s Brief and Reply Brief and argued the case for the petitioner. The U.S. Supreme Court’s decision in *Rhines v. Weber* was unanimous in reversing the Eighth Circuit and approving of Judge Schreier’s issuance of the “stay and abeyance” order.

Opposing Counsel: Attorney General Lawrence E. Long and Deputy Craig M. Eichstedt, 1302 E. Hwy. 14, #1 Pierre, SD 57504, (605) 773-3215.

- ii. *Nygaard v. Sioux Valley Hospitals and Health System*, 2007 S.D. 34, 731 N.W.2d 184; Minnehaha County Circuit Court (Judge Gene Paul Kean) and Supreme Court of South Dakota; 2006-2007.

Sanford Health System, formerly Sioux Valley Hospitals and Health System, was one of the many hospitals sued by class action plaintiffs attorneys. The theory was that, by charging patients without insurance non-discounted charges for

service, hospitals were engaging in unfair and deceptive trade practices, discriminatory pricing, breaching implied contracts about charging reasonable amounts, breaching implied covenants of good faith and fair dealing, attempting to enforce unconscionable contracts of adhesion, and so forth. The Plaintiffs' attorneys in the *Nygaard* case perceived South Dakota as a good state in which to create precedent that such causes of action could proceed. I argued that the class action claims should be dismissed and that no case should proceed. The Supreme Court of South Dakota agreed and affirmed dismissal of the class action lawsuit.

Opposing Local Counsel : Steven S. Siegel, P. O. Box 2700, Sioux Falls, SD 57101 (605) 332-5999.

Counsel for Other Defendant : Thomas J. Welk, P. O. Box 5015, Sioux Falls, SD 57117, (605) 336-2424

- iii. *Kalda v. Sioux Valley Physician Partners, Inc.*, 481 F.3d 639 (8th Cir. 2007) and 394 F.Supp. 2d 1107 (D.S.D. 2005); U.S. District Court for the District of South Dakota (Judge Lawrence L. Piersol) and U.S. Court of Appeals for the Eighth Circuit; 2004-2007

The *Kalda* case was an ERISA governed case brought against my client Sioux Valley Physician Partners, Inc. now known as Sanford Clinic. I was lead counsel for the defendants. The predecessor in interest to Sanford Clinic—Central Plains Clinic—had stopped funding retirement plans to its employees due to cash flow difficulties. Central Plains Clinic administration, however, had made some statements about its intent to later fund the plans that allegedly led Central Plains Clinic employees to remain employed in anticipation of having the benefits funded in future years. When the finances of Central Plains Clinic did not improve, a Sioux Valley entity acquired the clinic.

Primarily for tax but also for business reasons, the Sioux Valley entity, in lieu of funding plan contributions for years that had closed, offered retention bonuses in the amount of the foregone plan contributions to those physicians and employees who chose to remain at Sioux Valley for certain periods of time. The Plaintiff group represented individuals who did not become employed at Sioux Valley and purported to represent all Central Plains Clinic employees to seek funding of several years of the suspended plan benefits. The consequence of an adverse verdict to Sioux Valley could have been several million dollars. Ultimately, Judge Piersol granted summary judgment to Sioux Valley Physician Partners, and the Eighth Circuit affirmed.

Lead Opposing Counsel : Dean N. Nasser, Jr., 204 S. Main Avenue, Sioux Falls, SD 57104, (605) 335-0001

- iv. *McGreevy v. Daktronics, Inc.*, 156 F.3rd 837 (8th Cir. 1998); U.S. District Court for the District of South Dakota (Judge Lawrence L. Piersol) and U.S. Court of Appeals for the Eighth Circuit; 1995-1998.

Daktronics, Inc., is a business started by two electrical engineering professors in a garage that has grown to become a worldwide leader in the manufacture of scoreboards and video displays. The *McGreevy* case involved claims of several million dollars against Daktronics, Inc., at a time when Daktronics was at a critical juncture in its business. I was lead counsel for Daktronics.

McGreevy had designed a product known as the “glow cube” which Daktronics used in growing from a regional business into an industry leader in scoreboards and displays. Daktronics had contracted to pay royalties to McGreevy on the numbers of glow cubes, but found itself producing far more than it sold because of the failure rates of and need to replace glow cubes periodically. Daktronics also had given McGreevy exclusive rights to market Daktronics’ products in Australia and New Zealand, where McGreevy was from, at a time when Daktronics was just beginning to enter certain international markets. However, when the Summer Olympics were awarded to Sydney and McGreevy appeared not to be moving toward securing contracts for installation at Olympic venues, Daktronics made sales directly to facilities in Sydney, Australia.

McGreevy and Daktronics had different interpretations of the contract on royalties and exclusive marketing rights. McGreevy sued for millions of dollars plus punitive damages. I learned that Daktronics indeed had underpaid McGreevy on glow cubes, and argued to the jury that, while there should be a verdict against Daktronics, it should be of a limited amount. The jury awarded the exact amount that I had suggested, several million dollars less than what the plaintiff sought, after a trial lasting close to two weeks. The case was appealed, and the Eighth Circuit affirmed the judge’s rulings and jury verdict in favor of Daktronics.

Lead Opposing Counsel : Charles “Rick” Johnson, now deceased.

- v. *City of Livonia Employees Retirement System*, 239 F.R.D. 476 (D.S.D. 2006); U.S. District Court for the District of South Dakota (Judge Lawrence L. Piersol)

This was a case in which I was the sole counsel for NorthWestern Corporation. There was counsel that represented the other individually named defendants with whom I worked closely.

The city of Livonia, on behalf of all shareholders of NorthWestern Corporation sought to compel NorthWestern Corporation to sell itself. The plaintiffs sought initially to compel Northwestern to sell itself to an entity known as MMPI and subsequently to a Black Hills Corporation. Judge Piersol sided with NorthWestern Corporation and its board initially in refusing to compel the company to sell to either entity. Through forestalling a forced sale and defending

the litigation, NorthWestern Corporation was able to more rationally evaluate strategic alternatives. Meanwhile, the stock price surpassed the offered prices for MMPI and Black Hills Corporation undercutting the issues that the plaintiffs had sought to address. There potentially was tens of millions of dollars at stake in the case.

Opposing Local Counsel : Timothy J. Dougherty, P. O. Box 2376, Sioux Falls, SD 57101, (605) 335-8586

- vi. Hall v. North American Company of Health and Life Assurance, Civ. No. 00-1427; Minnehaha County (Judge W. J. Srstka); 2000-2002

There is no published decision in *Hall*, but the case was one involving a claim of in excess of a million dollars. I was lead counsel defending the North American Company of Health and Life Assurance (“Nacolah”) and an agent who was accused of churning life insurance policies to the detriment of two elderly people. The case involved a large number of exhibits, an initial mistrial because of the conduct of a juror, and a very hard case. The plaintiffs’ lawyer requested a jury award of several million dollars in compensatory and punitive damages. The jury, however, found for my clients and awarded nothing. The case was tried cleanly, resulting in no appeal of the case.

Opposing Counsel : Mark V. Meierhenry and Clint M. Sargent, 315 S. Phillips Avenue, Sioux Falls, SD, 57104 (605) 336-3075

- vii. Yankton Sioux Tribe vs. Crowley & Vogel, P.C., no published opinion; Yankton Sioux Tribal Court (Special Judge John Simpson); 2003-2005.

The Yankton Sioux Tribe hired me to represent it in a plaintiff’s case against an accounting firm that, in my view, had grossly over billed the Tribe for work over a period of several years. I agreed to represent the Tribe after being appalled at what I saw of the bills and work product of the accounting firm. I was lead counsel for the Tribe.

I venued the case in Yankton Sioux Tribal Court, and there were tussles regarding the propriety of that court’s jurisdiction and venue. The case was hard fought and very difficult for a number of reasons. Shortly before trial, the case was settled contingent upon the consent of the Yankton Sioux Tribe. I addressed the entire Tribe at a general meeting about the merit of the settlement and defended the contingent fee agreement that my firm had entered into with the Tribal Council. After the better part of a day of debate, the members of the Tribe by an overwhelming vote approved of the settlement agreement.

Opposing Counsel : William C. Garry, P. O. Box 2498, Sioux Falls, SD, 57101, (605) 336-0828

- viii. *Ashker v. Class*, 152 F.3d 863 (8th Cir. 1998) and at 798 F.Supp. 590 (D.S.D. 1992), reversed by 5 F.3d 1178 (8th Cir. 1993), and at 534 N.W.2d 66 (S.D. 1995); U.S. District Court for the District of South Dakota (Judge John B. Jones), U.S. Court of Appeals for the Eighth Circuit, State Circuit Court (Judge Tim D. Tucker); 1994-1998.

District Judge John Jones appointed me to a habeas corpus case for a person convicted of murder. I was lone counsel. Upon reviewing the record, it struck me that there was a violation of Ashker's Confrontation Clause rights by the use of hearsay testimony that was very damning and, I thought, pivotal in securing the conviction.

Judge Jones agreed with my argument, granted habeas corpus relief, and required the retrial of the case. The United States Court of Appeals reversed, not because it did not believe a Confrontation Clause violation had occurred, but rather because the Confrontation Clause claim had not been properly exhausted in state court by previous counsel. I continued with representing Mr. Ashker through state and then subsequent federal proceedings, as a part of the ethical obligation to accept appointments from judges in areas where I am capable of doing the work.

Opposing Counsel: John Haak, P. O. Box 2638, Sioux Falls, SD, 57101, (605) 330-4400

- ix. *Richland State Bank v. Household Credit Services, Inc.*, 340 F.Supp. 2nd 1051 (D.S.D. 2004); U.S. District Court for the District of South Dakota (Judge Lawrence L. Piersol), 2002-2004

In this breach of contract case, I was lead counsel for the plaintiff bank in an action against a service provider that was to provide certain services on a credit card program and in collecting credit card debts. With a difficult plaintiffs' case, I survived a summary judgment motion and ended up with a very favorable settlement well into six figures close in time to the trial.

Opposing Lead Counsel: Steven Sanford, P. O. Box 2498, Sioux Falls, SD 57101, (605) 336-0828.

- x. *Russell D. Quinn v. Midwest Coast Transport, Inc.*, Civ. 06-409; Codington County Circuit Court (Judge Ronald Roehr); 2007-2008

I was lead defense counsel. Plaintiff Quinn sued my client Midwest Coast Transport, Inc. after a substantial motor vehicle accident on Interstate 29. This was a clear liability case, where, as lead counsel for defendant, my only defense was on proximate cause and damages. Plaintiff's counsel and I had very divergent views of the value of the case, with plaintiff's counsel seeking in excess of \$300,000, and with my suggestion to the jury that an award of \$30,000 would

be generous. The jury awarded \$25,000. The case was tried cleanly, and no appeal resulted.

Opposing Counsel: Lee A. Schoenbeck, P. O. Box 1325, Watertown, SD 57201
(605) 886-0010.

18. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

My practice has been litigation oriented. I have not counted how many cases and legal matters in which I have been involved, but suspect that the number likely approaches and perhaps surpasses one thousand. To the client, all such cases are significant. Part of my practice has been to assist clients to avoid the costs and risks of litigation. I have represented parents and spouses who have lost loved ones and helped them resolve their cases short of the stress of trial. I have helped businesses avoid trial and settle cases that threaten to have devastating consequences depending on the verdict. I have not performed lobbying work.

19. **Teaching:** What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

I have not as a formal matter taught a course.

20. **Deferred Income/ Future Benefits:** List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

None. When I leave Davenport, Evans, Hurwitz & Smith, LLP, the firm will purchase my partnership interest from me, and I will cease being entitled to further income from the firm.

21. **Outside Commitments During Court Service:** Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I have no such plans, commitments or agreements.

22. **Sources of Income:** List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding \$500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

See attached Financial Disclosure Report

23. **Statement of Net Worth:** Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement

24. **Potential Conflicts of Interest:**

- a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

My family members are not engaged in business or activities likely to present conflicts of interest, with the possible exception of my father Gerald F. Lange, who is a representative in the South Dakota House of Representatives. I intend to recuse myself on any case involving the constitutionality of legislation passed during his legislative tenure. I have worked for nearly twenty years for Davenport, Evans, Hurwitz & Smith, L.L.P. I intend to recuse myself from cases that were filed by that firm during my affiliation with it, and on all cases involving that firm or clients I served at that firm for a period of two years after I am sworn in as a judge and sever my relationship with that firm.

- b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I intend to resolve issues of my potential conflict of interest by referring to any applicable case authority and judicial canons. I intend to err on the side of recusing myself when faced with any legitimate challenge to my impartiality. In all cases, I will follow the Code of Conduct for United States Judges and applicable statutes, policies and procedures.

25. **Pro Bono Work:** An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

To serve the disadvantaged, I have taken cases, such as *Cid v. S.D. Dept. of Social Services*, 598 N.W.2d 887 (S.D. 1999), where the representation was entirely without pay to a person who could not afford counsel. I also have taken federal habeas corpus and criminal appointments at reduced hourly rates well below what rate my firm charges for my hourly work. For example, the entire pay from my representation of Charles Rhines on appointment by the Supreme Court of the United States was \$5,000, which was less than the amount that the printing firm charged to print what I assembled and wrote on the appeal. I have given talks free of charge to various organizations as listed in answer to question 12.d. above, including “law day” talks to middle school students. I have participated in the annual “Ask-A-Lawyer” program of the State Bar of South Dakota where lawyers answer questions anonymously from callers as a form of public service, among other things. I also served for years as counsel for Lutheran Social Services in its refugee resettlement program in Sioux Falls.

26. Selection Process:

- a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

I am not aware of any selection commission in this jurisdiction.

In December of 2008, federal district court judge Lawrence L. Piersol called me to encourage me to apply for the position opened by Judge Charles Kornmann taking senior status. Because I was interested in serving as a federal judge, I sent a letter dated December 19, 2008, with a curriculum vitae to Senator Tim Johnson. I received an e-mail message from the Chief of Staff for Senator Tim Johnson on January 28, 2009, posing a series of questions about my background and qualifications. I responded in detail to Senator Johnson’s questionnaire on January 30, 2009. I later had a lengthy interview with Senator Johnson’s Chief of Staff. After Senator Johnson recommended me for this position, I have worked with staff from the United States Department of Justice regarding completion of the nomination paperwork. I have had periodic conversations with Department of Justice staff regarding the nomination process. On May 13, 2009, I interviewed with staff from the White House Counsel’s office and the Department of Justice. My nomination was submitted to the Senate on July 8, 2009.

- b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

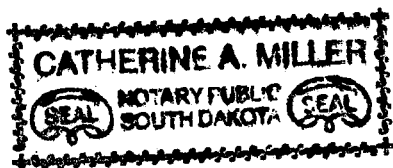
No.

AFFIDAVIT

I, Roberto A. Lange, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

June 15, 2009
(DATE)

Roberto A. Lange
(NAME)



Catherine A. Miller
(NOTARY)
Commission Expires: 11-03-2011