September 12, 2018

VIA E-MAIL ONLY
The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

VIA E-MAIL ONLY
The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Nomination of John M. O’Connor to the United States District Court for the Northern, Eastern, and Western Districts of Oklahoma

Dear Chairman Grassley and Ranking Member Feinstein:

I write in support of the American Bar Association’s Standing Committee on the Federal Judiciary’s unanimous Not Qualified rating of Mr. O’Connor. I previously corresponded with both of you on August 21, 2018, to explain the Committee’s rating. We understand that the Judiciary Committee is scheduled to vote on the nomination of Mr. O’Connor tomorrow and wanted to offer this supplemental explanation of our rating for your consideration prior to the vote. This communication is a follow-up to our August 21, 2018, letter that briefly explained the basis for our rating and our August 24, 2018, email that responded to questions posed by the chief nominations counsel for the Majority with regard to the scope and methodology of our evaluation of Mr. O’Connor. Both prior communications are attached to this letter for your ready reference.

As has been our practice for more than six decades, the Standing Committee conducts comprehensive, confidential peer evaluations of the professional qualifications of nominees to the federal bench as a service to the executive and legislative branches of our government and to the public. In accordance with our procedures, I appointed a second evaluator to review the qualifications of Mr. O’Connor when the first evaluator apprised me that she was likely to recommend a rating of “Not Qualified.” Even though the appointment of a second evaluator significantly delays the time it takes for us to submit our rating to your Committee, we believe it is an essential procedural step in assuring the accuracy and fairness of our evaluation.

In anticipation of the upcoming markup and desirous of providing the Judiciary Committee with as much information as possible with regard to our rating, I requested that our two evaluators provide some additional explanatory information that I could share with your Committee that would not violate the Standing Committee’s promise to
maintain the confidentiality of the identity of all judges, lawyers, and other individuals who provide information regarding the professional qualifications of the nominee. The first evaluation was completed on July 7, 2018, by Shannon L. Edwards of Edmond, Oklahoma. The second evaluation was completed by Marcia Davenport of Helena, Montana on August 9, 2018.

Ms. Edwards commented as follows:

**Professional Competence**

The Senate Judiciary Committee Questionnaire, together with lists of trial lawyer groups in Tulsa County, Oklahoma County, and through the state of Oklahoma, provide the evaluators with a pool of attorneys to solicit input about the nominee’s trial experience. Attorneys who regularly practice in the Oklahoma federal and state courts and who chose to comment stated they did not consider the nominee to be a trial lawyer. They questioned his fitness to perform in multiple Oklahoma districts as a trial judge. Court records available on the Oklahoma Supreme Court Network and the federal court “PACER” system were utilized to provide additional information on the breadth and depth of the nominee’s experience. These records confirmed the opinions of many interviewees that Mr. O’Connor does not have experience trying jury cases in any court, has not appeared often in Federal Court in any capacity, and has no discernable criminal experience. Judges and attorneys both expressed concern that he will have a steep learning curve, given his lack of presence and presentation in a courtroom setting. Mr. O’Connor admitted he has little to no day-to-day interaction with the Federal Rules of Civil or Criminal Procedure or with the Federal Rules of Evidence. The Committee received court docket information in addition to comments to evaluate this criterion in an objective manner.

**Integrity**

A number of attorneys interviewed from around the State of Oklahoma had cases with the nominee or were retained to review time records submitted by the nominee to support an award of attorneys’ fees. The consensus among both groups was Mr. O’Connor’s requests for legal fees were excessive. These opinions were expressed in strong terms, including the belief that some time entries were dishonest. Mr. O’Connor was asked to respond to general and specific comments about his fee applications. His response was recorded and presented to Committee members.

Mr. O’Connor listed a number of cases involving insurance receiverships. He was purportedly retained to represent the receiver, the Oklahoma Insurance Commissioner, despite no experience practicing insurance law or as attorney of record for insurers or receivership claimants. Again, attorneys in these cases raised the issue of O’Connor and his firm charging fees for time that was
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unwarranted. Interviewees identified lack of experience and expertise to properly evaluate claims, a strategy to litigate every issue, presenting unsustainable positions, and repeated refusal to negotiate in good faith. There were numerous complaints that O’Connor’s fee requests were approved as a result of ex parte interaction with judges assigned to the cases, and without the opportunity for objection or ability to inquire about the reasonableness of the fees. The criticism extended to the attorneys’ seasoned clients. At least one requested counsel examine whether Mr. O’Connor was engaged in illegal/unethical representation given his relationship with the Insurance Commissioner and the facts surrounding his hire.

The Oklahoma Bar Association reported two bar complaints about Mr. O’Connor charging excessive fees. The issue raised in one matter involved two fee agreements with one client arising out of his representation, and whether an account purportedly opened by Mr. O’Connor in an Oklahoma bank was evidence of a formal fee arrangement that was later denied. Due to the passage of time, bar investigators were unable to obtain bank records which could have substantiated claims that Mr. O’Connor had asked his client for permission to withdraw set-aside funds to allow him to participate in a real estate investment. The case is available online through the Oklahoma Supreme Court network and was heard on distinct issues by the Oklahoma Supreme Court. In addition to attorney comments received, both evaluators examined certain public documents filed in the lower court case and the Oklahoma Supreme Court opinion which contains certain recitations about the alleged facts. The series of events reported through interview and examination of documents were discussed extensively with the nominee, and the issues and his responses were included in the Committee Report.

Attorneys who had direct professional dealings with the nominee cited other examples of his dishonesty and disregard of ethical and professional obligations. These accounts were documented verbatim in the first evaluator’s report and provided to the second evaluator, who undertook follow-up outreach as warranted under the Committee’s guidelines. The second evaluator conducted another interview with the nominee where specific facts and opinions were presented. Mr. O’Connor was afforded the opportunity to counter or explain his own view of the matters presented.

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Ms. Davenport commented as follows:

**Integrity**

Two judges had cut Mr. O’Connor’s fees for being excessive, one in an adoption matter and the other a receivership matter. Mr. O’Connor acknowledged courts have cut his fees as excessive.

One judge indicated Mr. O’Connor had attempted to have an *ex parte* communication three years ago to approve attorneys’ fees in a receivership matter. Mr. O’Connor indicated he had not had *ex parte* communications with a court for five years since the issue was raised in another case where it was alleged he had *ex parte* communication with a judge who then recused herself.

In one matter on appeal for excessive fees, two interviewees indicated that a statement in a Petition in Error signed by Mr. O’Connor which stated that his firm was not aware of a Court’s Order was not truthful. The second evaluator’s investigation revealed information to support Mr. O’Connor’s firm was aware of the Order and had informed the court the cause number was not correct. The second evaluator asked Mr. O’Connor if his firm had received the Order by email and informed the court that the cause number was incorrect, and he answered, “Probably, yes.” The second evaluator asked if it was really true that his firm was not aware of the Order until the firm picked it up on January 24, 2018. Mr. O’Connor discounted the statement, indicating the statement was provided to address the timeliness of the appeal to show they had not missed any deadlines.

Mr. O’Connor had two bar complaints filed against him. Both indicate they were for excessive fees. Mr. O’Connor explained that one of the bar complaints against him was an act of retaliation by another attorney because that attorney had a bar complaint filed against him and had been suspended. The bar complaint at issue against Mr. O’Connor was received by the Oklahoma State Bar on January 2012. The bar complaint against the attorney who submitted a bar complaint against Mr. O’Connor was received by the Oklahoma State Bar in June 2012, and that attorney was suspended in November 2012—after the bar complaint against Mr. O’Connor was filed.

In 1994, Mr. O’Connor agreed to represent an injured party, through a guardian, to collect on two insurance policies. Mr. O’Connor initially agreed to charge 25 percent, and the same day changed the fee agreement to 40 percent because he allegedly realized the difference would go to the insurance company in subrogation claims not for the benefit of the injured party. The guardian alleged Mr. O’Connor had agreed to refund the difference in the two fee agreements.

In 2004, after the injured party no longer needed a guardian, a lawsuit was filed against Mr. O’Connor seeking a return of money for the difference in the fee
agreements. In the case, the contemporaneous notes were produced of the
guardian about her conversation with Mr. O’Connor related to an account at
Stillwater Bank that allegedly held money for the benefit of the injured party. Mr.
O’Connor denied the conversation took place in an interrogatory answer. During
the interview with the second evaluator, Mr. O’Connor confirmed he had opened
up an account in his firm’s name at Stillwater Bank to hold money for the benefit
of the injured party so Mr. O’Connor would not spend it. Mr. O’Connor also used
a sentence in speaking with the second evaluator that was nearly identical to the
guardian’s recorded notes of her alleged conversation with Mr. O’Connor, stating
that whether to provide any money from the account at Stillwater Bank for the
benefit of the injured party was voluntary on his part. During the interview with
the second evaluator, Mr. O’Connor could not remember if the conversation took
place with the guardian due to the passage of time, which is different than his
interrogatory answer that the conversation did not occur.

**Professional Competence**

The information under Integrity is also applicable to professional
competence.

Mr. O’Connor’s last jury trial was in 1997.

Mr. O’Connor has very limited federal court experience.

Mr. O’Connor has virtually no criminal law experience.

Mr. O’Connor’s work has been mostly with divorces, adoptions, and more
recently, receivership cases.

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In accordance with our established rules, whenever any adverse information is obtained
about a nominee that is considered by the Standing Committee in the course of its evaluation and
rating, that information is presented to the nominee for rebuttal. During the personal interview
with the nominee, the evaluator discloses as much of the underlying basis and context of the
adverse comments as reasonably possible, consistent with the promise of confidentiality made to
the interviewees. This procedure was closely followed during both evaluations of Mr. O’Connor.
Each evaluator raised all of the concerns discussed above with Mr. O’Connor, and his responses
were inadequate to change their recommendations or the ultimate vote of the Standing
Committee. As we reported to you August 21, the vote was unanimous by the fifteen-member
Committee that Mr. O’Connor is “Not Qualified” on the basis of integrity and professional
competence.
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One of the unfortunate aspects of post-nomination review of the professional qualifications of judicial nominees by the Standing Committee is the need to report, in a public forum, adverse information that has been gathered in accordance with our long-established investigative practices. However, the interests of the American people can only be served by presenting our objective findings to the Senate Judiciary Committee and the United States Senate. What is at stake is a lifetime appointment to the federal bench.

As you both know, in this instance, the Senate Judiciary Committee held its hearing on the nominee prior to receipt of our rating. As a result, your Committee also was deprived of the opportunity to have us testify in person to explain our rating and answer any questions. We believe this procedure is inadvisable concerning a lifetime appointment to the federal judiciary; we want to emphasize that in the future, in instances where our evaluation results in a “Not Qualified” rating, we remain willing to testify at the nominee’s hearing to explain the basis of our rating,

Thank you for the opportunity to present the Committee’s views on Mr. O’Connor.

Sincerely,

Paul T. Moxley

PTM/me

cc:  John M. O’Connor (via e-mail and U.S. Mail)
    Donald F. McGahn, II, Esquire (via e-mail only)
    Mike Davis, Chief Counsel for Nominations, United States
    Senate Committee on the Judiciary (via e-mail only)
    Lola A. Kingo, Chief Nominations Counsel, Office of Legal Policy,
    U.S. Department of Justice (via e-mail only)
    ABA Standing Committee on the Federal Judiciary (via e-mail only)
    Denise A. Cardman, ABA Standing Committee on the Federal Judiciary,
    Staff Counsel (via e-mail only)
    Shannon Edwards (via e-mail only)
August 21, 2018

VIA E-MAIL ONLY
The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Nomination of John M. O’Connor to the United States District Court for the Northern, Eastern, and Western Districts of Oklahoma

Dear Chairman Grassley and Ranking Member Feinstein:

I write in support of the American Bar Association’s Standing Committee on the Federal Judiciary’s unanimous Not Qualified rating of Mr. O’Connor. As I have discussed with Senate Judiciary Committee staff member Steve Kenny, the Committee’s rating is based on the ABA Standing Committee’s criteria as set forth in the Committee’s Backgrounder, available at: http://ambar.org/fjcbackgrounder.

Regarding professional competence, which encompasses such qualities as intellectual capacity, judgment, writing and analytical abilities, knowledge of the law, and breadth of professional experience, the Committee found Mr. O’Connor to be not qualified. The consensus based on confidential peer review is that Mr. O’Connor lacks sufficient litigation experience, going to the depth and breadth of his law practice to date. His judgment was also found to be deficient.

The Committee also evaluated the integrity of Mr. O’Connor by considering his character and general reputation in the legal community as well as the nominee’s industry and diligence. In this category as well, Mr. O’Connor was found to be not qualified. The confidential peer review revealed several instances of ethical concerns, including candor with the court, evidence of overbilling of clients and billing practices criticized by courts, an improper ex parte communication with a court, and improper contact with adverse parties in litigation.

Please respond to:
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VIA E-MAIL ONLY
The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510
Thank you for the opportunity to present the Committee’s views on Mr. O’Connor.

Sincerely,

Paul T. Moxley

cc: John M. O’Connor (via e-mail and U.S. Mail)
    Donald F. McGahn, II, Esquire (via e-mail only)
    Lola A. Kingo, Chief Nominations Counsel, Office of Legal Policy,
    U.S. Department of Justice (via e-mail only)
    ABA Standing Committee on the Federal Judiciary (via e-mail only)
    Denise A. Cardman, ABA Standing Committee on the Federal Judiciary,
    Staff Counsel (via e-mail only)
    Shannon Edwards (via e-mail only)
Mike,

I write in response to your email of August 22. Please see responses to each of your requests, below.

1. Please provide the Senate Judiciary Committee the names and contact information for the ~180 people who the ABA attempted to contact related to the ABA’s evaluation of Mr. O’Connor.

As you know from the Standing Committee’s Backgrounder, as well as from past written statements, testimony, and responses to written questions posed by Senators post-confirmation hearing, a cornerstone of the Committee’s peer review process is confidentiality. The Standing Committee maintains the strict confidentiality of the identity of all judges, lawyers, and all other individuals who provide information regarding the professional qualifications of a nominee. The assurance of confidentiality given to each interviewee by the Committee is essential to its ability to obtain candid assessments of a nominee’s professional qualifications. The names and contact information of the individuals whom the ABA attempted to contact with regard to the professional qualifications of Mr. O’Connor are only disclosed to members of the Standing Committee.

2. Please provide the Senate Judiciary Committee an explanation of why the ABA chose to contact these ~180 people, as opposed to others, related to the ABA’s evaluation of Mr. O’Connor.

The evaluators adhered to the Standing Committee’s procedures, as outlined in our Backgrounder on pages 4-5. Our evaluation process requires each evaluator to conduct confidential interviews with a broad cross-section of lawyers and judges with personal knowledge of a nominee’s professional qualifications. They seek to interview persons identified in the nominee’s responses to the SJQ; federal, state, and administrative judges before whom the nominee has appeared; lawyers who have been co-counsel or opposing counsel in cases handled by the nominee; and, if the nominee is a former or sitting judge, other judges who have served with the nominee. In addition, interviews may be conducted with law school professors and deans, legal services and public interest lawyers, representatives of professional legal organizations, and community leaders and others who have information concerning the nominee’s professional qualifications. Finally, if the nominee identifies persons or provides documents or other information that can shed additional light on the adverse comments or on the nominee’s professional qualifications, the evaluator will conduct appropriate follow-up interviews and such further investigation as may be deemed necessary.

3. Please provide the Senate Judiciary Committee the names, contact information, and specific comments made by the 50+ people who spoke with the ABA related to the ABA’s evaluation of Mr. O’Connor.

Please see response to #1.
4. Please provide the Senate Judiciary Committee any emails or other documents created or maintained by Shannon Edwards, Marcia Davenport, or any of the members of the ABA’s Standing Committee related to the ABA’s evaluation of Mr. O’Connor.

In order to maintain strict confidentiality, no internal evaluation materials or reports are ever disclosed to anyone other than Standing Committee members.

In the two personal interviews with Mr. O’Connor, each evaluator presented all of the negative information obtained in the confidential peer review and each gave the nominee ample opportunities to rebut such information; however, he was unsuccessful in that regard.

Sincerely,

Paul T. Moxley

Cohné Kinghorn

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From: Davis, Mike (Judiciary-Rep) <Mike_Davis@judiciary-rep.senate.gov>
Sent: Wednesday, August 22, 2018 6:27 PM
To: Paul T. Moxley <pmoxley@cohenekinghorn.com>; Michelle Cerutti <mcerutti@cohenekinghorn.com>; Kenny, Steve (Judiciary-Rep) <Steve_Kenny@judiciary-rep.senate.gov>; Hearron, Marc (Judiciary-Dem) <Marc_Hearron@judiciary-dem.senate.gov>
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Subject: RE: ABA SCFJ - Support of Rating of John M. O’Connor, nominee to the United States District Court for the Northern, Eastern, and Western Districts of Oklahoma

Thank you for the follow-up email, Paul.

1. Please provide the Senate Judiciary Committee the names and contact information for the ~180 people who the ABA attempted to contact related to the ABA’s evaluation of Mr. O’Connor.

2. Please provide the Senate Judiciary Committee an explanation of why the ABA chose to contact these ~180 people, as opposed to others, related to the ABA’s evaluation of Mr. O’Connor.