



Hon. Gary A. Fenner

Senior U.S. District Judge, Western District of Missouri

by Katherine Bourk



Katherine Bourk is a judicial intern for Hon. Stephen R. Bough, U.S. District Court Judge for the Western District of Missouri.

Judge Gary A. Fenner is fair minded, empathetic, and understanding,” says Michael Fenner, long-time professor and dean of Creighton Law School.

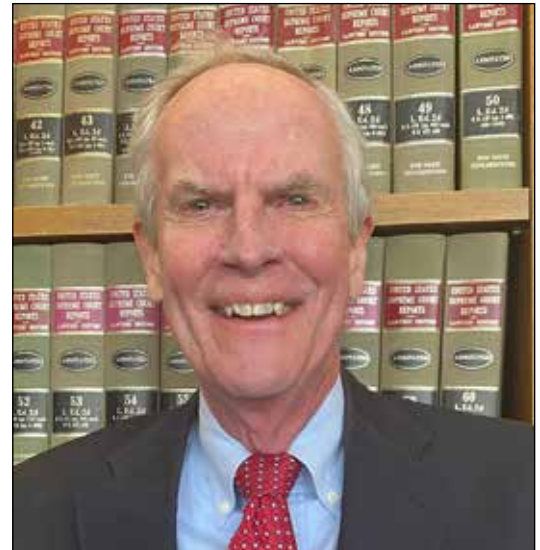
He is respectful of others. I’ve known him all his life—known him to be like that all of his life. Overarching all of that, he believes in the law, he understands his place in the law, and he is not in the position he now holds for the prestige of the federal bench. I know most of his law clerks—all but two were students of mine: Every one of them comes away from his chambers with the highest respect for “their” judge and count their time with their judge as a highlight of their education and their careers.¹

Origins

In 1947, Judge Gary A. Fenner was born to George and Mary Ann Fenner in St. Joseph, Mo., about one hour north of Kansas City. The middle of three brothers, Judge Fenner was an active Boy Scout and explored St. Joseph freely on his bike throughout his childhood. Besides the influence of his parents, Judge Fenner credits this freedom to explore his community with his ability to be strong, independent, and confident in his decisions—characteristics he has embodied throughout his life and career. In his words, Judge Fenner “had a wonderful childhood with loving and supportive parents and two great brothers.”

Judge Fenner’s parents felt he and his brothers had the opportunity to make meaningful contributions to their community and pushed them to do so. All three Fenner brothers attended parochial schools, including Christian Brothers High School, where they continually motivated each other to succeed academically.

In 1965, Judge Fenner began his higher education at Kansas University in Lawrence, Kan., where he studied personal administration. During school breaks, Judge Fenner worked at his family’s wholesale dairy operation in St. Joseph to support himself financially through college. Working alongside the



assembly workers at the dairy, Judge Fenner gained a strong work ethic and an appreciation for doing a job right. He received his bachelor’s degree in 1970.

Legal Beginnings

After completing his undergraduate degree, Judge Fenner attended law school at the University of Missouri at Kansas City, earning his J.D. in 1973.

His first job out of law school was working in private practice for Daniel Czamanske in Platte County, a rural county just north of Kansas City. Although he established legal connections in the Kansas City area, Judge Fenner always knew he wanted to return to St. Joseph and make a meaningful contribution to the community, as his parents wished for him. So, when a position opened up at the St. Joseph City Attorney’s Office, he did not hesitate to apply.

In November 1973, Judge Fenner began as one of three attorneys acting as legal counsel for the city of St. Joseph. Though being a trial lawyer was not his primary interest during law school, Judge Fenner ended up loving trial work and was very successful. After only nine months, he moved from handling the cases in municipal court to handling all of the city’s civil litigation in the Missouri circuit courts.

St. Joseph Practice

As his work progressed in the St. Joseph City Attorney's Office, Judge Fenner was charged with acting as the legal counsel to the St. Joseph City Council. He answered the council's legal questions, helped draft ordinances, and attended city council meetings. This experience allowed him to meet everyone on the city council, and he became influential in this sphere. When a city councilman's election to the Missouri legislature created a midterm vacancy, Judge Fenner was the natural choice.

Working with the St. Joseph City Council as a city attorney sparked a passion for politics, so when he was approached about filling the council vacancy, Judge Fenner felt the position aligned with his career path. He decided to resign from the City Attorney's Office and enter private practice. After successfully gaining the support of the majority of the council members, Judge Fenner was appointed to the city council in 1977 at the young age of 30. Reflecting on this experience, Judge Fenner notes that it was a "great honor to have the confidence of the other members of the City Council in selecting [him] for the position."

When his term on the city council expired, Judge Fenner had to decide whether to run for reelection. While he was excited by the idea of running for another political position, he was also

ready for a new challenge. Judge Fenner ran for and was elected to the Fifth Judicial Circuit of Missouri as a circuit judge in 1978, and again in 1982.

Judge Fenner presided over many notable cases during his time in the Fifth Judicial Circuit. One of the most significant cases was a case in which the state sought the death penalty against a mob boss from St. Louis.² The case involved a retaliatory car bombing and was highly publicized, so the trial was Judge Fenner's first experience with extremely heightened security. Prior to trial, there had been death threats against several of the witnesses in the case who were in the federal witness protection program. During trial, the courthouse was searched every morning by bomb-sniffing dogs, metal detectors were used at the entrance to the courtroom, and, during the course of jury deliberations, two bomb threats were made against the jury. The jury returned a guilty verdict and recommended a penalty of life imprisonment. The case was affirmed on appeal.

Another notable case during Judge Fenner's time in Missouri's Fifth Circuit involved a defendant threatening his life. Judge Fenner was presiding over a divorce proceeding when the defendant became upset with his decision. As the defendant left the courtroom, he pulled a revolver out of his boot and threatened to shoot Judge

Fenner. The deputies present in the courtroom were able to disarm the defendant before anyone was hurt. The state then brought criminal charges against the defendant for the attempted assault of Judge Fenner. The defendant was ultimately convicted and sentenced to serve a year in county jail.

Court of Appeals to Federal Bench

In 1988, Judge Fenner was appointed by Missouri Governor John Ashcroft to the Missouri Court of Appeals in the Western District as part of the Missouri Nonpartisan Court Plan. With this appointment, Judge Fenner became the first judge from Missouri's Fifth Circuit to be appointed to the Missouri Court of Appeals. He served in that position until 1996, writing hundreds of opinions in both civil and criminal cases. During that time, Judge Fenner enjoyed the opportunity to solve complex legal problems and found satisfaction writing opinions that held precedential value.

After serving on the appellate bench for eight years, Judge Fenner was ready to return to trial work. In 1991, two judges for the U.S. District Court for the Western District of Missouri—Judge Scott O. Wright and Judge Howard F. Sachs—assumed senior status. This left two vacancies for President Clinton to fill once he took office in 1993.

Because there was no Democratic senator from Missouri, the three Democratic representatives from the state created a nominating commission to take applications and select six candidates for consideration. Once the six candidates were selected, the three representatives were unable to agree on who to nominate, so all six names were submitted to the White House for President Clinton to make the final selection. Judge Fenner was one of the six submitted in June 1993, and after a long and difficult process, he was appointed to the federal district court on July 25, 1996.

Judge Fenner credits both his strong will to persevere and the support of his brothers and good friends for helping him achieve his goal of being appointed to the federal district court. "When I was in law school," Judge Fenner recalls, "I never imagined I would be a judge let alone a federal district judge appointed by the President of the United States. However, once I choose my path, I set goals and was very fortunate to have so many realized." Judge Fenner has now spent over 40 years—the vast majority of his legal career—serving our nation's courts.

While on the federal district court bench, Judge Fenner presided over many high-profile and noteworthy cases. He has presided over 11 death penalty cases during his tenure at the Western District of Missouri. Notably, he presided over the Lisa Montgomery capital case, which received extensive national attention.³ In that case, the defendant fatally strangled a pregnant woman, cut open her body, and kidnapped her unborn child. In October 2007, a jury found Montgomery guilty of federal kidnapping resulting in death and unanimously recommended a death sentence, which Judge Fenner

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imposed. Her conviction and sentence were affirmed on appeal, and her request for collateral relief was rejected by every court that considered it. Montgomery was executed on Jan. 13, 2021, and was the first woman executed by the federal government in 67 years.

On the civil side, Judge Fenner has handled at least one multidistrict litigation (MDL) case every year for the past 20 years. Recently, Judge Fenner presided over an MDL that involved allegations that Dollar General utilized deceptive tactics to market obsolete motor oil to unsuspecting and primarily low-income customers. Judge Fenner approved the \$28.5 million settlement in February 2021.⁴

In addition to the numerous MDL cases, Judge Fenner has handled many other complex and challenging civil cases. One significant case he handled through trial involved a dispute between Cerner Corp. and one of its main competitors regarding the patent of a system for remote monitoring of patients in the ICU by a physician known as an intensivist.⁵ The document presentation in the case was so intensive that the walls in Judge Fenner's courtroom were covered by Bankers Boxes stacked six boxes high, full of medical science and information technology documents. Judge Fenner saw the three-week trial to verdict, and the patent was set aside. The case was later upheld on appeal.

Not only is Judge Fenner respected by those who appear in front of him, but he is also highly regarded among his judicial colleagues. Through all his cases, Judge Fenner's goal was to always be honest, conscientious, and well prepared, and his focus has continuously been to do the right thing. Because of his commitment to these principles, Judge Fenner has gained respect and admiration from his peers. Judge Fenner has served on both the Missouri Court of Appeals and the U.S. District Court for the Western District of Missouri with Judge Fernando Gaitan, who remembers Judge Fenner as someone who always wanted to do the right thing for the betterment of the court. Judge Gaitan fondly remembers Judge Fenner as "a valued, fair-minded colleague who gives everyone in his courtroom the opportunity to make their case."

U.S. District Court Judge David Gregory Kays recalls:

I knew about Gary Fenner's reputation long before I knew him person-

ally. He was the judge who always seemed to be presiding over the tough cases. I knew that while federal judges received their cases through a random draw, Judge Fenner always seemed to have the most complex or difficult. It seemed that he was always in trial. And the trial was a death penalty case or some complex civil matter. It is no wonder that when I arrived at the court in 2008, I spent many hours in his chambers asking him to help me develop the best practices, procedures, and protocols, for my own cases. I was fortunate that he was always gracious and patient with me in sharing the wealth of information he had acquired over the years. During this time, we also became close friends. And over the years, my wife Julie and I have been fortunate to become close not only with Gary, but also his wonderful wife Peggy.

One thing Judge Fenner has appreciated as much as anything in the course of his career has been working with his staff and law clerks. His judicial assistant, Lisa Mitchell, started with him at the Fifth Circuit in St. Joseph and has since worked with him for over 38 years. He has had 22 term clerks over the course of his time at federal court and describes working with them as the "most rewarding part of being a judge."

Outside the Courtroom

In his free time, Judge Fenner enjoys spending time with his family, including his wife, Hon. Peggy Stevens (McGraw) Fenner, and his two brothers—all of whom are also lawyers. Peggy retired from the 16th Circuit Court in Missouri after serving on the bench for 18 years. She and Judge Fenner enjoy discussing their experiences on the bench: "Gary has served almost his entire legal career in the Missouri Judiciary. As a retired judge myself, we have had many years of sharing the rewards and challenges. I know that Gary has always thought it was an honor to serve." In 2013, both judges jointly received the Kansas City Metropolitan Bar Foundation Jack L. Campbell Legacy Award for their dedication to the principles of liberty and justice through exemplary professional, civic, and community service.⁶

Judge Fenner's older brother, professor Michael Fenner, recently retired from

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Creighton University, where he was a law professor and dean for over 45 years. His younger brother, Robert Fenner, worked for 37 years as an attorney for the National Credit Union Administration, the last 27 of those years as chief legal officer. According to Michael, the brothers' success is rooted in having respect for those around them: "Our success is partly attributable to the fact that we are all hard workers and respectful to all whom we encounter. We got that from our father. I find that to explain in part how each of the three of us got to where we are."

When he's not in the courthouse or spending time with friends and family, Judge Fenner enjoys reading, exercising, and traveling.

Conclusion

Even after assuming senior status, Judge Fenner remains dedicated to his work of ensuring every litigant who appears in front of him is treated with respect and fairness. A public servant for over 45 years, Judge Fenner has touched the lives of many and continues to administer justice to all he encounters. ☉

Endnotes

¹The source material for this article includes an interview between journalist Mark Morris and Judge Gary Fenner; personal interviews with Judge Fenner and his family, friends, and colleagues; and Hon. Gary A. Fenner, Robert Fenner & G. Michael Fenner, *Three Perspectives of the Law: Advice to the Young Lawyer*, 31 CREIGHTON L. REV. 665 (1998).

²*State v. Leisure*, 772 S.W.2d 674 (Mo. Ct. App. 1989). This case came to the Fifth Judicial Circuit on a change of venue.

³*United States v. Montgomery*, No. 05-6002-CV, 2007 WL 2711511 (W.D. Mo. Sept. 13, 2007), *aff'd*, 635 F.3d 1074 (8th Cir. 2011).

⁴*In re: Dollar General Corp. Motor Oil Marketing and Sales Practices Litig.*, No. 16-02709-MD, 2021 WL 5546459 (W.D. Mo. Feb. 8, 2021).

⁵*Cerner Corp. v. VISIVU, Inc.*, No. 04-1033-CV-W-GAF, 2005 WL 2346987 (W.D. Mo. Sept. 26, 2005), *aff'd*, 469 F. App'x. 903 (8th Cir. 2012).

⁶*Liberty and Justice Campaign*, Kansas City Metropolitan Bar Foundation, https://kcmbf.org/Foundation/KCMBF_Website/Events/Liberty_and_Justice_Gala.aspx (last visited Apr. 22, 2022).



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