



## STATE AND PROVINCE COMMITTEE NOMINATION BEST PRACTICES

### THE NOMINATION PROCESS

#### CONFIDENTIALITY

The process for becoming a Fellow goes through a number of discrete steps:

1. Proposal
2. Committee Investigation
3. Committee Presentation / Vote
4. National Office Review
5. Statewide Poll
6. Regent Investigation
7. Board of Regents Presentation
8. Board Vote
9. Statement of Qualifications
10. Regent Review / Final Approval
11. Invitation From President To Accept Fellowship
12. Election By Board Of Regents
13. Induction

It is not until the completion of step 8 (the Board vote) that the candidate is permitted to know that he or she is being considered; and even then, admission to Fellowship is not assured. It is rare, but not uncommon, for an issue to arise during step 9 when the candidate fills out the Statement of Qualifications – such as the disclosure of a pending disciplinary matter – that derails the candidate. And while it is even more rare, it has happened that a candidate who has hurdled steps 1 through 12 actually finds the number thirteen to be unlucky and fails to present him or herself for induction within three meetings of election.

***But at every step, the content of the investigation is maintained – forever – in the strictest of confidence.***

Because the standards of College Fellowship are exceptionally high, many fine lawyers will fail to qualify. Failure to receive an invitation to join the College is not a reflection of the ability or integrity of an excellent lawyer. However, declination, if known, could be misinterpreted by the candidate or others and could result in disappointment, unwarranted embarrassment and recrimination. For these reasons among others, the College maintains its strict concern for confidentiality.

Thus the candidate is not to be informed, directly or indirectly, that he or she is being or has been considered for Fellowship, until notification of approval is made to the candidate by the College's President after Board approval (step 8). A candidate's premature knowledge of his or her consideration for Fellowship

has the potential to engender a misguided “campaign” (e.g., lobbying and unduly influenced testimonials) that could prove fatal to the candidacy.

During the investigation phase, to encourage open and frank responses, persons interviewed about the candidate are assured that their responses will never be disclosed to the candidate and will not be disclosed with attribution to anyone – not even the Board. The only persons who will know the source and identity of commenters are the investigator and the Regent who conducts a follow up investigation.

All discussions, proceedings and materials incident to proposals and nominations for Fellowship that are pending before the Committee and the Board of Regents shall be held in strict confidence, whether the nominee is inducted or not.

### **NOMINATION TO FELLOWSHIP**

The core responsibility of the State and Province Committees is to identify, investigate and nominate qualified attorneys for Fellowship, either on the Committee’s own motion or at the suggestion of a proposer and two seconders.

To do that, of course, the Committee must have a sense of what the Board, which makes the final decision on admissions to Fellowship, believes “qualified” means. A review of the attached Qualification Requirements, Nomination Procedures and Rodney Acker’s 11 Frequently Asked Questions will help clarify the qualifications for fellowship.

It is also important to note that what constitutes a “trial” lawyer can vary from State to State and Province. In Texas, a trial lawyer usually works in front of juries; in Canada, jury trials are far less common. A New York lawyer may have bigger – and fewer – trials than an Arkansas lawyer. Each State and Province must assure that it is looking for the best trial lawyers in its area, as defined by the practice in that area.

The Committee should be proactive in looking for qualified candidates and actively ask the Fellows in the State or Province to make suggestions. Please see the sample Candidate Solicitation Email text to help you solicit potential candidate names from Fellows in your chapter.

In brief, only practicing trial lawyers who are licensed to practice law in the highest courts of their respective states or provinces, who have been licensed to practice for at least fifteen years at the time of election, and who meet and continue to meet at the time of election the qualification requirements established by the Board of Regents are eligible to be fellows. But the 15-year threshold is, for the Committee’s purposes, actually 14+ years. Because a nomination is acted upon at the next National meeting after being polled, and because the earliest a candidate typically can be elected is at the National meeting following that, the election is generally 5-7 months after a candidate is approved by the Board. So it is appropriate – indeed encouraged – for the Committee to consider candidates when they have been engaged in trial work for fourteen or more years.

Each State or Province Committee should identify and maintain a “watch list” of exceptional trial lawyers in their jurisdictions who are not yet Fellows, with an emphasis on minorities, women, lawyers under 45, and lawyers in under-represented trial specialties and geographic locations. Those who already meet the College’s qualifications should be investigated and put through the nomination process; those who do not yet meet the 15-year threshold or who need additional trial experience should be closely monitored.

Service as a judge or in capacities that do not contemplate trial work do not count toward the fifteen year threshold. Griffin Bell, a Past President of the College, was not credited with the time he spent as a Federal Appeals Court judge nor as Attorney General of the United States.

### **Nomination On The Committee’s Own Motion**

The Committee may nominate a candidate on its own motion – ***if he or she is not a partner, associate, or relative of a member of the Committee.*** The majority of nominations result from the independent initiative of the State or Province Committee, rather than from nominations and seconding letters from Fellows outside the Committee. The committee must complete Forms I & J for this type of nomination.

### **Nomination On A Fellow Proposal**

A Fellow may propose the nomination of an eligible lawyer for Fellowship. The proposal must be seconded by at least two other Fellows and supported by detailed letters of qualifications from the proposer and the seconders. Neither the proposer nor the seconders need be located in the State or Province where the candidate practices, but ***neither the proposer nor a seconder may be the partner, associate, or relative of the candidate.*** The committee must complete Forms H, I & J for this type of nomination.

Proposals by Fellows may be directly submitted to the Committee or to the National Office, which will forward any such proposals it receives to the Committee.

### **Nomination By The Adjunct Fellowship Committee**

It is the function of the Adjunct Fellowship Committee to consider and make recommendations with respect to nominations of lawyers whose trial experience and trial activities are not sufficiently known to the State or Province Committee of the particular state or province where the lawyer resides or maintains his or her office.

The Chair of the Adjunct Fellowship Committee may receive names of potential Fellows to consider from existing Fellows, as well as from other sources. Upon receiving the name of a potential Fellow, the Chair of the Adjunct Fellowship Committee will contact the Chair of the State or Province Committee where the potential Fellow resides or maintains his or her office to inquire whether it has in the past considered the candidate or whether it wishes to now consider the candidate.

Upon being contacted by the Chair of the Adjunct Fellowship Committee, the Chair of the State or Province Committee should bring the name of the potential Fellow to the attention of the entire Committee to determine whether the Committee wishes to move forward with

the candidate. If the State or Province Committee has considered the candidate in the past and decided not to move forward for reasons other than its lack of sufficient knowledge or indicates that it itself wishes to move forward with the candidate, the Adjunct Fellowship Committee will not take further action.

If the State or Province Committee has not previously considered the candidate and does not wish to move forward with the candidate the Adjunct Fellowship Committee will then conduct an investigation of the candidate. If the Adjunct Fellowship Committee determines that a candidate should be recommended for Fellowship, the background investigation of the candidate, together with the candidate's trial list, and nomination forms shall be forwarded to the National Office of The College for polling and completeness. In addition, the candidate should be polled in the State or Province where he or she resides or maintains his or her office. In addition, the National Office shall consult with the Chair of the Adjunct Fellowship Committee and the State or Province Committee as to whether polling should be done in any other State or Province.

#### **DETAIL OF NOMINATING INFORMATION**

The Bylaws require that nominations by Fellows be supported by "detailed letters of qualifications." In practice, the Board has determined that the requirement is satisfied by the submission of a Proposal for Fellowship (Form H) with seconding letters (which may be perfunctory). All committee nominations must include a Confidential Biographical Data (Form I) and Confidential Information Regarding Nominee (Form J). If a candidate is a partner, relative or associate of a committee member, the Proposal for Fellowship (Form H) must be included in the committee approved nomination packet.

Whether the candidate is proposed by a Fellow, by the Committee itself, or by the Adjunct Fellowship Committee, one of the most essential details that must be provided is the candidate's case list, which should include:

- Full case name;
- Court / Case number;
- Name, phone and email address of the presiding judge;
- Trial date;
- Length of trial;
- Description / Nature of case;
- If jury trial, bench trial, other;
- Disposition and Outcome of trial;
- Name, phone and email addresses of judges, opposing counsel, co-counsel, and Fellows familiar with the case.

Compilation of the case list requires extreme diligence and imagination and must ensure that the candidate and non-Fellows are not made aware that the individual is being considered for Fellowship. Ideally, the candidate will have a partner who is a Fellow who can compile the trial list from firm records without alerting

the candidate. In other circumstances, one or more local Fellows who are familiar with the candidate can assist to compile a list in confidence. Some jurisdictions will have public sources, such as jury verdict reports, that can be searched and gleaned.

The most direct way to compile a list, of course, would be to ask the candidate. But because the entire process is confidential and a candidate cannot know that he or she is even being considered, that is an option that can only be used as a last resort and only in circumstances that do not alert the candidate. So if all else fails, the candidate can be asked to provide his or her own case list. But the request should not come from the Chair or a member of the Committee, whose association with the College might make the reason for the request easy to infer. Better to enlist a Fellow without any direct affiliation – maybe from out of state – to call and say “I have clients who may need to retain trial counsel when I have a conflict – could you get me a list of your trials so the clients can evaluate their options?”

### **INVESTIGATION OF CANDIDATES**

The Committee should initially determine if a proposed lawyer’s stated qualifications warrant commitment of the resources required by a full investigation. If the qualifications are patently insufficient, the Committee may decide to go no further. But if the proposal has sufficient merit, a Committee member (or, as noted above, another Fellow) should be assigned to conduct a full investigation.

The best source of information about a candidate is lawyers who have tried cases with or against the candidate, judges before whom the candidate has appeared, and individuals with personal knowledge of the candidate’s trial ability. Using the case list, the investigator should contact as many persons as possible, especially those involved in recent trials. The investigator should bear in mind that the existence of the investigation – much less its content – is confidential. And except for Fellows, who can of course be told, the judges and lawyers cannot be advised that the investigation is for the College. The investigator should say something like “This is a confidential investigation and the candidate will never be told that we talked; nothing you say will be attributed to you. Because it is confidential, all I am allowed to tell you is that the candidate is being considered for a high honor, and I hope you will candidly share your impressions of the candidate so that we make the right decision.”

Interviews should be conducted in person, ordinarily by telephone. Written correspondence (letter or email) is inappropriate; written inquiries increase the risk of a breach of confidentiality, and make it difficult to follow up.

There are organizations of trial lawyers that emphasize trial skills and trial number. But the College is unique in that the criteria for Fellowship can be thought of as a three-legged stool. Once the 15-year threshold is reached, ability, ethics, and collegiality all play an equal role in deciding upon the candidate. The investigator should, before recommending a candidate, be satisfied on all three scores.

## **POTENTIAL PROBLEM AREAS**

### **Advertising**

Advertising is not an automatic disqualification but it should be considered. The investigator should obtain copies of all print, television and other commercial advertisements for review by the Committee. Some state bar associations approve ads, which are retained on file. All advertising media should be analyzed within the context of the rules of the state or province where disseminated and under the College's Policy on Advertising and Social Media. If the candidate is recommended for nomination, the Committee should expressly state its view as to the suitability and compliance of the candidate's advertisements; in debatable cases, exemplars of the advertisements should be included with the nomination package.

### **Addiction, Bar Complaints and Miscellaneous Matters**

Issues related to addiction, personal legal matters, bar complaints, etc., should be fully documented, with history and current status provided for Committee discussion. If the Committee recommends a nomination notwithstanding the personal issues fully divulged, a recommendation to the Board of Regents should include the Committee's reasoning as to why the issue should not disqualify the candidate.

A lawyer who is the current subject of a disciplinary action – even when the Committee considers an issue ill-founded – should not be nominated until the matter is actually resolved. The Board has consistently refused to approve candidates under the cloud of a disciplinary action to avoid the embarrassment that an adverse decision would engender. It would be a disservice to the candidate to forward a nomination that has no viable chance of success; better to wait for the matter to be resolved.

### **Negative Comments**

A single credible negative report could defeat a nomination; conversely a candidate with multiple negative reports could be approved. There are no blackballs. But negative comments must be carefully considered and investigated with extreme care. Negative comments may be well taken; or they may be speculative or the product of unjustified ill will. Negative issues – even if certain – may be one-offs and explainable; or they may be part of a pattern.

While confidentiality is critical in all respects, it is all the more sensitive in the case of negative comments, so great care must be given to protecting sources from disclosure.

## **COMMITTEE ACTION**

The investigator should present the candidate to the Committee with a recommendation for approval or denial. The investigator should be careful in the presentation not to attribute comments. It is inappropriate to say "Judge Moran tells me that this candidate is spectacular" unless the investigator has been expressly authorized by the judge to make that attribution. Rather, the investigator should say something like "A judge we all know and respect told me that the candidate is spectacular."

If the candidate is a partner, associate, or relative of a Committee member, that member must physically depart the room, and be completely removed from all discussion and the subsequent vote.

If the candidate fails to receive a favorable vote by a majority of the committee members, the proposal fails and nothing further need be done. A majority of the total committee (all committee members on the committee roster, not just those in attendance of the meeting) must vote in favor of the nomination to be considered approved by the committee, but dissenting votes are red flags almost certain to require explanation at the Board of Regents level, so it is always helpful to reach consensus or, barring that, to provide an explanation for negative votes. An approved candidate should be submitted to the National Office with copies of the Proposal for Fellowship (Form H) if needed, the Confidential Biographical Data Form (Form I), and the Confidential Information Form (Form J).

The Chair may and should advise the proposer and seconders of the Committee's action. If the action is to forward the nomination, the Chair should remind the proposer and seconders that the matter remains confidential and that the candidate must not be advised that anything is in the works. If the action is to reject the nomination, the Chair is likely to be asked why the proposal failed. The best and safest answer is "I can't tell you that; as you know, the whole process is confidential." But if pressed, the Chair must take care to respect the confidences of both the persons who were interviewed during the investigation and the Committee members themselves. There is probably no harm in giving a reason if it is objective, such as "We didn't feel that one trial and two arbitrations was a sufficient body of trial work." If the reason was subjective, a good answer is "I can only say that the investigation turned up matters that concerned several Committee members."

### **POST-NOMINATION ACTIONS**

The next step in the process from the Committee's perspective is the circulation of the Statewide Confidential Poll. An email will be sent from the National Office to all Fellows eligible to vote when the polls open. The Chair may opt to also send an email to all Fellows in the State or Province reminding them of the importance of the Poll and encouraging them to participate in the poll.

After the Board approves a candidate, the President will advise the candidate with a copy to the Chair. That is the Chair's cue to contact the candidate to offer congratulations and to ensure that the nominee is aware that his or her invitation for induction is dependent on the Regent's final approval following completion, return and review of the *Statement of Qualifications*. The Chair should not advise any others of the Board's approval prior to the final approval of the *Statement of Qualifications*, when the nominee is formally invited for induction by the President of the College.

After the President has invited the candidate to be inducted as a Fellow in the College, the Chair should contact the candidate again to explain the requirement of appearance for formal induction. Nominees are invited to appear for induction at any one of the next three national meetings of the College. The National Office of the College will advise the nominee of the date and location of the next three meetings.

If a nominee is unable to attend any one of the next three meetings, the nominee may request an extension. But if the nominee fails to appear by the extended date, the invitation to appear for induction is considered withdrawn. The nominee will not later be eligible for consideration for Fellowship. The Chair should ensure that the nominee understands the induction options and the consequences for failure to appear.

The nominee should be invited to any State or Province meetings held between the invitation for induction and the induction meeting. Every effort should be made by the Chair or a representative of the Committee to attend the meeting when the induction occurs; if that is not possible, the Chair should ask the Fellows from the State or Province who are attending to look for the inductee and his or her spouse to make them as comfortable and welcomed as possible.

The College takes great pride in its Fellows and views induction to Fellowship as an opportunity for new Fellows to be identified with other highly respected and admired lawyers. Public appreciation and knowledge afforded the honor of becoming a Fellow is enhanced by a description of the College and its high standards. The image of the College is enhanced by its association with the outstanding inductees and other Fellows identified in the announcement.

In 2002, the Board adopted a resolution encouraging State and Province Committees to proactively encourage newly inducted Fellows to announce their induction as a means of enhancing both the new Fellow's stature and the image of the College. The National Office supplies the Board approved Sample Press Release text to each newly inducted Fellow and encourages them to distribute the announcement of their induction to all appropriate publications and media. The sample press release text contains a statement of the qualifications required for Fellowship and the standards, goals, purposes and activities of the College.

The College encourages the State and Province Committees to announce the induction of its new Fellows as a Committee notice in bar association publications and the legal press. Some Committees effectively utilize tombstone advertisements in doing so, and simultaneously congratulate and welcome the recent inductee. A statement of the requirements for Fellowship, the purposes and activities of the College can be included, as well as a list of the names of the Chair and members of the State or Province Committee. When feasible, all Fellows in the state, province or relevant locality may be listed. The Sample Tombstone Notice is provided for review.