



AMERICAN COLLEGE
OF TRIAL LAWYERS

HOW TO CONDUCT THE INITIAL INVESTIGATION OF A CANDIDATE FOR FELLOWSHIP

The investigation of a person for fellowship in the College consists primarily (but not exclusively) of contacting the judges, Fellows and other lawyers identified in the trial list that is part of the *Confidential Biographical Data* (Form I). Confidentiality is a critical part of the nomination process, and especially during the investigation portion when judges and lawyers who are not Fellows in the College are interviewed. Your investigation report should also address the other information needed by the State Committee and Board of Regents when they deliberate on the nomination. The end product of an investigation is the report you submit to your State or Province Committee with your recommendation on whether the candidate should be approved or not. This memo provides you with guidelines on how to conduct the investigation, and what should be in the report

The Investigation

First, you need to familiarize yourself with the qualifications for fellowship, which are posted on the ACTL website in the Committee Toolkit. The Board of Regents has made it clear that there is no minimum number of trials required. The focus is on the quality of the lawyer and the quality of the lawyer's body of work. Seven or eight lengthy and complex trials may be more meritorious than 20 short, routine trials.

Next, familiarize yourself with the candidate. Information you will need about the lawyer to complete the Confidential Biographical Data and Trial List form can be found on his or her firm's website, and bar websites can provide information about a lawyer's reported cases. You may also find additional information about awards the candidate has received, or because he or she is on the faculty of a law school, etc.

Next, you should interview the judges, co-counsel and opposing counsel identified in the trial list. If interviews with a representative sample of judges and adverse counsel over the years all yield outstanding (or negative) results, the investigator should be able to bring the investigation to a close. Conversely, if the investigator is getting mixed results, more interviews would be necessary.

You should also make sure to call any judges and Fellows listed in the *Confidential Biographical Data* form that are not on the trial list. If you have trouble getting judges to return your call, talk to your State or Province Chair about enlisting the aid of a Judicial Fellow that may know the judge you're trying to interview and convince that judge to return your call. In the alternative, you might enlist the aid of a Fellow that has a close personal relationship with the judge.

Comments by Fellows will have great impact on the State Committee, so it is important to interview as many as you can. Unfortunately, the nomination form often doesn't list many and there may not be many on the trial list. You should contact a reasonable number of Fellows located in the candidate's hometown who may know the candidate. Often, they are familiar with the candidate's reputation even if they have not had cases with him or her.

You should not submit your report until you have spoken with enough judges, Fellows and other lawyers that you believe you have a clear picture of the candidate and enough information to make a recommendation, and for the Committee to make its decision.

The Investigation Report is the most crucial part of the nomination file. Our Regent and many State Committee members may not know the candidate and will rely heavily on your investigation report. Here are tips to make sure your investigation report covers all the necessary information for the Committee to make its decision, and the Regent to conduct his or her investigation.

A good report will contain the following information:

- a. Summary or highlights of the nominee's biographical information, (e.g. education, employment, other honorary organizations, total number of trials, and nature of the nominee's practice). We look primarily at first-chair trial work, although second-chair trial work can be helpful. For example, weight can be given to a second-chair lawyer who conducted cross-examination of experts, done opening statements or closing arguments, or selected a jury. Less weight is given to a second-chair lawyer who did nothing other than the direct examination of a lay damages witness in a personal injury case.
- b. Brief overall summary of the interviews, i.e., number of judges interviewed, number of lawyers, number of fellows, and general tenor of comments.
- c. The meat of the report is the section recounting your interviews. It helps to arrange by Fellows (FACTL), judges and other lawyers. Some of these may have given you permission to use their names in connection with their comments, but the general rule of the College is that they remain anonymous. However, the Regent will conduct his or her own investigation, and it will help the Regent do his or her job if you keep a list of who you spoke with along with phone numbers and emails and provide this confidential list to the Regent.

- d. A section containing non-case information such as whether advertising meets College standards; verification that there is no public disciplinary, sanctions or malpractice history; and other significant activities such as leadership in State Bar or other legal organizations. The ACTL Statement on Advertising can be found in the Committee Toolkit on the College's website.
- e. End with the investigator's opinion as to whether the nominee is worthy of fellowship. ***Your opinion is important! Don't leave it out!***

Confidentiality The investigator should bear in mind that the very existence of the investigation – much less its content – is confidential. 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. 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.'

"Top 1%" Somewhere in the past the notion that a lawyer must be in the "top 1%" of trial lawyers took hold. THAT IS NOT THE RULE OR CRITERIA, AND IT SHOULD NEVER BE USED. The ACTL does calculate the total number of Fellows that any State or Province may have by multiplying the *total* number of lawyers in the state (*not* the total number of *trial* lawyers) by 1%. But that is the only way the number is used. Asking a judge or lawyer that you interview if the lawyer is "in the top 1%" poses an unfair question asking the interviewee to try to quantify the unquantifiable, and it is not the standard. Instead, the standard is often expressed as "among the best in their state or province."

Suggested questions for your interview. You should first explain that you have been asked to conduct a review or investigation, or have been asked to investigate, the qualifications of ____ for a very important professional honor. If you must leave a message for the lawyer or judge, it is best to not give the name for several reasons – one being that the person will be curious about who the potential honoree is, and curiosity improves your chances of being called back. After the intro, here are some questions you can ask:

- If they were involved in a specific trial, ask what they remember about ____ from that trial.
- Ask if they had other dealings with ____, and if so, what they were.
- How would they rate ____'s abilities as a trial lawyer?
- Do you consider ____ to be an outstanding trial lawyer and one of the best in the state (or one of the best that he or she has seen)?
- How was ____'s conduct and relations with the judge and opposing counsel?
- Do you know whether ____ has been actively involved in other legal organizations or the community, and if so, what do they know?
- Do they know of any reason why ____ should *not* be considered for a significant legal honor?

If you have any questions about your report, don't hesitate to call the State or Province Chair. He or she will be happy to answer your questions.

The following is a template you may use for your investigation report:

[SAMPLE INVESTIGATIVE REPORT]

[Investigating Fellow's Letterhead]

[Date submitted to State/Province Chair]

[Address to State or Province Chair]

Re: [name of candidate]

Dear [name of chair]:

This is my investigative report for the nomination of [name of candidate].

Summary of practice

Mr./Ms. ____ was first licensed to practice law in ____, and he/she is currently ____ years old. He/she currently is a partner with the ____ firm in [name of city where he/she has primary office]. He/she attended ____ law school. *[If you have it, you can insert law school activities such as mock trial or moot court activities, law review, Order of the Coif, etc.]*. His reported trials involved claims of ____ *[describe types of cases, e.g. intellectual property, antitrust, medical malpractice, personal injury, breach of contract, etc.]* These trials lasted *[give description to provide context for evaluating trial experience; e.g. longest, shortest, typical length of trial, etc.]*. According to the data submitted with his nomination, he has tried ____ jury trials and ____ bench trials. His latest trial was a *[jury/bench]* in 20____. In addition, we have information about ____ arbitrations and ____ significant adversarial evidentiary hearings.

Summary of interviews

I was able to personally speak with ____ judges, ____ opposing counsel, and ____ FACTLs during my investigation. In general, the comments about [candidate] were ____ *[very favorable, mostly favorable, both favorable and unfavorable, etc.]*. In all interviews with judges and lawyers who were not Fellows, they were told that I was a member of committee that was investigating [candidate]'s suitability for a professional honor, the nature of which I could not disclose. Each was asked to regard the call as being confidential, and specifically, was asked not to tell [candidate] of the contact. Each of those interviewed was told that they would be quoted only to the small committee of which I was a member and that if they had anything to tell me anonymously, that I would respect that confidence. Those interviewed were asked to comment on [candidate's] 1) ability as a trial lawyer; 2) her/his competence in other aspects of the practice; 3) her/his adherence to ethical standards; 4) her/his relationship with other lawyers and the

courts; 5) and whether the judge or lawyer knew of any reason why the nominee was not worthy of receiving a prestigious professional honor. The following are summaries of my interviews with each:

Judicial interviews:

FACTL interviews:

Other Lawyer interviews:

I attempted to speak to the following judges or lawyers listed on the trial list, but they did not return my call:

Disciplinary history

Using the State Bar's resource, I have researched the candidate's disciplinary history and have found _____. I have also searched on Westlaw or Lexis for any reported cases involving the candidate. That research did/did not disclose [insert description of sanction and malpractice history, or lack thereof]

Advertising

I also reviewed the candidate's advertisement from [identify sources such as internet (including firm webpage as well as sites such as Findlaw, Martindale Hubble, Best Lawyers, Super Lawyers), television, billboards, etc.] I have reviewed these advertisements considering the ACTL's *Statement on Advertising*. I believe that all of the candidate's advertisements comply with these policies [or alternatively, I believe they violate these policies in the following respects:]

Legal Activities

I attempted to compile a list of [candidate's] significant activities in the State Bar and other legal organizations. My investigation found the following: [list activities, such as State Bar committees and offices, membership in Inns of Court, ABOTA, IATL, etc. and offices held in such organizations; etc.]

Conclusion

Based upon my investigation, I [believe, strongly believe, do not believe, etc.] that ____ is a worthy candidate to be a Fellow in the American College of Trial Lawyers. [if you have reservations, explain].

Sincerely,

[signature]