

Chapter 6

Screening and Investigation



The commission's organizational meeting will have provided necessary groundwork for the screening and investigation of applicants. During that meeting the commission will have prepared or refined an applicant questionnaire and discussed important evaluative criteria. After having given notice of the vacancy and engaged in the active recruitment of qualified candidates, a commission will begin screening and investigating the candidates.

The objective of the commissioners at the screening and investigation stage will be to determine which applicants will be interviewed. In essence, this objective can be met by identifying the most qualified applicants. Identifying those most qualified can be a three step process: (1) preliminary screening, (2) investigation and (3) selecting the interviewees.

Preliminary Screening

In its *Manual of Procedures for Judicial Nominating Commissions*, Utah articulates the rationale for screening:

The objective of the commission in screening applicants is not to retain for further investigation and interviews all applicants who may conceivably be qualified, but to retain enough applicants so as to be reasonably certain that the best qualified applicants are among them, given the information available to the commission at the time, the number of vacancies to be filled, and the overall quality of the applicant pool.¹

Commissions that regularly encounter a large pool of applicants often have the chair or a special subcommittee conduct a preliminary screening of the applications. Where the applicant pool exceeds by several times the number of names required to be submitted to the appointing authority, it may be advisable to employ a preliminary screening device. By reducing the number of applicants under consideration, a preliminary screening sets the stage for more efficient screening and investigation by the full commission.

Any preliminary screening criteria should be determined in advance. If the commission outlines minimum prescribed qualifications ahead of time, when the applications are actually submitted, the chair or designated committee may quickly sort through the applications, weeding out those who clearly will not survive the rigors of the nominating process. Those applicants not meeting the minimum legal qualifications for the judicial position can easily be discounted.

To preserve commissioner involvement and preclude selection by a single person, a commission may wish to supply each commissioner with a list of the applicants recommended for elimination by the chair or screening committee. If desired, each commissioner could then request that a certain listed applicant's credentials be considered by the entire commission.

As an alternative, the commission could consider the following screening-vote procedure used in Utah:

The commission members review the application materials available, discuss the qualifications of the applicants, compare the information with the evaluation criteria, and vote to retain or eliminate an applicant....Voting is by confidential ballot. Each commissioner is provided a ballot with the names of all applicants to be voted upon in alphabetical order. Next to each applicant's name is a space designated *Yes* and a space designated *No*. The commissioner casts an affirmative or negative vote for each applicant. The votes are tallied by the staff person and chair of the commission. All applicants receiving at least four affirmative votes shall be retained for further consideration.²

By allowing for this two-step procedure, a commission can maintain a check on the preliminary screening of applicants, while reducing the screening burden on the commission as a whole. Those candidates who have been eliminated for failure to meet the minimum requirements should be informed of their status by letter while the commission proceeds with the investigation of applicants remaining under consideration.

Investigation

Regardless of the detail and precision of the applicant questionnaire, a thorough and complete evaluation of an applicant cannot be conducted solely on paper. Each applicant who has survived preliminary screening should be further investigated by commission members, or if available, a commission staff person.

Dividing investigatory responsibilities. To further reduce the burden of investigating each qualified applicant, most commissions receiving numerous applications find it helpful to divide their investigatory responsibilities. The Berkson study of the United States Circuit Judge Nominating Commissions revealed several effective methods of delegating investigatory responsibilities.³ A state commission may wish to consider the following options:

- Each commissioner may investigate all of the applicants, although this is duplicative and may not be the best use of the volunteer commissioners' time. Furthermore, this process would be impractical with a large number of applicants.
- Certain commissioners may be assigned particular sources. A report on all applicants would be compiled summarizing the information gathered from these sources. Under this scheme, the same type of information would be collected for each applicant.

- The commission may be divided into subcommittees of three or more members who are then assigned certain applicants to investigate. These subcommittees could then recommend to the entire commission which applicants warrant interviews. This method avoids investigatory overlap while providing an opportunity for extensive consideration of each applicant.
- Or, two-person teams could be arranged. In these subcommittees, composed of one lawyer and one non-lawyer, each team would be assigned a certain number of applicants. This method allows for consideration from both the lawyer's and lay member's perspectives while dividing responsibilities effectively.
- If there is adequate staff support from, for example, the state court administrative office, individual commissioners or subcommittees could contact the references, and court staff could order credit reports and professional discipline and criminal background information from the appropriate agencies.

Several factors will affect a commission's decision to adopt one of these options: (1) the size of the commission, (2) the number of applicants to be investigated, (3) the ratio of lawyer commissioners to non-lawyer commissioners and (4) the extent of investigation to be undertaken.

Investigative methods. Once the investigative responsibilities have been delegated, commissioners can begin the process of active investigation. Commissions will once again find it helpful to have adopted methods ahead of time. Uniform investigative methods will help ensure thorough and comparable investigations of judicial candidates.

First, a commission may wish to establish a master list of outside agencies to be contacted. Sources most likely to be familiar with the applicant's qualifications include:

- state/local bar associations;
- professional colleagues;
- applicant's opposing counsel/co-counsel;
- judges before whom an applicant has appeared
- representatives of social, civic, sports-related, cultural, charitable and other groups to which the applicant belongs;
- state and local law enforcement agencies;
- F.B.I.;

- judicial discipline body;
- bar discipline body.

The commission should also establish a standard set of investigative questions.⁴ Individual responses to the applicant questionnaires may suggest additional questions for information sources and interviews. Uniform methods for contacting the agencies and references would also prove helpful, taking the form of phone conversations, written inquiries or personal meetings. Finally, time parameters for the process should be agreed upon. By establishing standard questions and a uniform method of investigation within a prescribed time schedule, the commission will assure a fair and thorough screening of each applicant.

Going beyond reference checks. In practice, some judicial nominating commissions do more than check references supplied by applicants. Two examples are given below.

- *Bar polls.* If it is feasible, the commission may wish to consider surveying all attorneys, or a statistically reliable sample, in the jurisdiction. Alaska and Idaho conduct such surveys, and their survey forms can be found in Appendix C. A well-designed bar survey provides broadly based information for the commission to consider, but the commission still should follow up with references who can attest to the applicants' professional and personal qualifications.
- *Public comment.* A number of commissions (e.g., Alaska, Nebraska, Tennessee) make public the names of applicants and hold a hearing at which public comment is invited. Newspaper notices and press releases may also be used to solicit comments. The information received may or may not be helpful. For example, an applicant's friends may attend to make positive remarks, or disgruntled litigants or others may participate in order to make negative comments. However, the process may be as important as the results. Commissioners hold a position of public responsibility and trust and, as representatives of the public, make important decisions about judicial candidates. It can be argued that the more transparent the process, the more likely members of the public will be to trust and support it.

Whatever the information-gathering method, the goal is to provide the commission with enough information to compile a list of interviewees. Reports can be written or oral. Written reports often ensure greater accuracy than oral reports and can serve as a basis for drafting individualized interview questions. However, if this part of the process is confidential, written reports may also increase the chance that investigative information will find its way into the public arena. When commissioners feel strongly that confidentiality cannot be maintained once

reports are reduced to writing, the commission may want to rely on oral investigative reports. Whatever their form, investigative reports should indicate the reliability of the information by including a statement of the source's relationship to the applicant.

To further ensure accurate and thorough investigations, each applicant should be informed of the investigative procedures. Awareness by the applicant of the scrutiny an application may undergo will serve as both a gesture of courtesy and a means for obtaining the applicant's permission to research his or her background. In fact, many commissions require applicants to waive any privilege which they may have against receipt of credit, tax, criminal, or professional discipline information. In most jurisdictions, waivers are contained in the applicant questionnaire.

Selecting Interviewees

After a comprehensive investigation and a full report to the commission, commissioners will be ready to continue the screening process by selecting the applicants to be interviewed. Only those applicants clearly qualified for the judicial position should be interviewed.

If a commission should decide not to limit the number of interviews, it may run the risk of a very lengthy interview schedule. A lengthy interview schedule can cause commissioners to lose their focus, resulting in difficulty distinguishing among various applicants. As the interviews blur together, commissioners will be less able to effectively compare and evaluate each of the judicial candidates. So too, interviews that span too many days may adversely affect the quality of the interview. Interviews that may take place as much as a week after the first interview will also restrict the commissioner's ability to effectively compare the candidates.

Where the pool of applicants remains large even after full investigation, commissioners may find it helpful to reduce the number of applicants by setting a maximum number of interviews. Setting a maximum will allow the commissioners to spend more time probing into various applicants' qualifications. Higher quality interviews will result. In short, interviews will be most effective where the candidates remain distinct individuals in the minds of the interviewers, and are subject to comparison, strict scrutiny and meaningful evaluation.

Choosing a Method. After a commission has determined that it wishes to restrict the number of applicants to be interviewed by the full commission, it must choose a method for selecting the interviewees. In some situations a con-

sensus may exist, while in others a vote of the commission will be required. A consensus may be achieved by reading applicants' names, asking whether any commissioner favors an interview for that applicant, and eliminating those applicants without the support of a single commissioner. Where a vote is required, a simple majority vote cast either by secret ballot or openly will prove most effective. The number of votes required for an applicant to obtain an interview should be predetermined. Depending on the number of applicants and the number of interview slots, either a majority or one less than a majority of *yes* votes may be required. Requiring a majority vote will effectively reduce a very large pool of applicants.

When a large number of applicants remain after screening and investigation, another option is for subcommittees of the commission (e.g., three commissioners, including at least one attorney and one layperson) to conduct preliminary interviews of a specified number of applicants. The panels report back, recommending any number for the final interview with the full commission. While this approach can provide additional information about applicants, some commissions may not be able to do this because of statutory time constraints.

However commissions determine their final list of interviewees, it is important to promptly and courteously notify those not invited.

Ethical Considerations

At the screening and investigation stages, commissioners will be faced with questions of disclosure and confidentiality. The problems are numerous and include:

- Whether investigating commissioners should reveal their sources to other commissioners, the appointing authority or applicants,
- Whether a commissioner who has a personal relationship with an applicant and access to special information that may affect the screening and investigation of that applicant should share the information with the entire commission, and
- Whether there is a duty to disclose (or a prohibition against disclosing) evidence of ethical or criminal conduct uncovered during investigation to other agencies, such as disciplinary commissions or law enforcement authorities.

Each of these concerns should be dealt with separately at the organizational meeting. At that meeting, commission discussion should be targeted at developing either a rule or a policy defining the duties and limits of disclosure by commissioners.

In addition to deciding whether disclosure will be appropriate, the commission must also determine to whom the disclosure will be made. For example, if an investigation reveals criminal activity by an applicant, should the investigating commissioner reveal this information only to the commission chair, to the commission as a whole, or to the appropriate disciplinary and law enforcement authorities? The commission should recognize the possibility that this disclosure may limit the willingness of sources to respond.

Conclusion

The screening and investigation of applicants may prove to be one of the most significant steps in the selection process. It is at this point that each commissioner has a voice in determining which individuals are viable candidates for judicial office. Having screened, actively investigated and fully reported on the applicants, commissioners will have the information necessary for meaningful interviews and better selection deliberations.

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- 1 *Manual of Procedures for Judicial Nominating Commissions* 13 (Utah Judicial Council, April 24, 2002).
 - 2 *Supra* note 1 at 13; [Note: Each commission has seven voting members and an ex officio nonvoting member who is the Chief Justice or his or her designee].
 - 3 Larry C. Berkson and Susan B. Carbon, *The United States Circuit Judge Nominating Commission: Its Members, Procedures and Candidates* 73-76 (Chicago: American Judicature Society, 1980).
 - 4 For samples, see the appendix to this chapter, which includes suggested questions for various sources, the standardized reference inquiry forms used in Nebraska and the attorney surveys utilized by the Alaska and Idaho commissions.

APPENDIX TO CHAPTER 6

A. List of Suggested Questions for Information Sources

B. Nebraska Reference Inquiry Forms

C. Alaska and Idaho Attorney Surveys

A. List of Suggested Questions for Information Sources

Commissioners will find it helpful to personally contact information sources. Through a personal exchange, information obtained will be straightforward and responsive. If answers seem incomplete, commissioners can ask pointed follow-up questions.

State/Local Bar Associations

1. How long has the applicant been a member?
2. Has the applicant chaired any committees or otherwise actively participated in association activities? If so, what were they?
3. Is the applicant viewed as an effective leader by other association members?

Professional Colleagues, Opposing Counsel, Co-Counsel

1. What is your relationship to the applicant?
2. What has been your work experience with the applicant?
3. How would you characterize the applicant's professional skills?
4. Does the applicant possess any particular talents or expertise?
5. Have you worked with the applicant in a courtroom setting? If so, how would you characterize his/her comportment in a courtroom?
6. Has the applicant demonstrated efficiency and promptness in carrying out his/her professional duties? Give an example if possible.

Judges before Whom an Attorney Has Appeared

1. What type of case brought the applicant before the bench?
2. How would you characterize his/her comportment in the courtroom?
3. Did the applicant demonstrate diligence and courtesy in handling the matter?
4. Was the applicant prepared with the relevant facts and law?

Representatives of Social, Civic, Charitable, Sports-Related and Other Groups

1. Have you had a working relationship with the applicant? If yes, in what capacity?
2. Judges must treat everyone in the courtroom with respect, courtesy and patience. How would you assess the applicant's sense of fairness, willingness to listen courteously to those with whom he or she disagrees, and ability to work collaboratively with others?
3. If the applicant was involved in your organization's projects and activities, did he or she complete tasks on time? Was he or she reliable?
4. Has the applicant demonstrated a sense of social responsibility? If yes, in what manner?
5. Do you have any reservations concerning the applicant's ability to remain fair and impartial? If yes, what is the basis for them?

F.B.I., State and Local Law Enforcement Agencies

1. Has the applicant been investigated for criminal activity? If so, what were the circumstances?
2. Has the applicant been associated with anyone under investigation for a felony? If so, what was their relationship?

Bar or Judicial Disciplinary Bodies

1. Has a complaint ever been filed with you against the applicant? If so, what were the grounds of the complaint?
2. Has the applicant ever been subject to discipline? If so, please give all the details of the disciplinary action.

B. Nebraska Reference Inquiry Forms

Judicial Nominating Commission Personal Reference Inquiry

Please return to:
State Court Administrator
Nebraska Supreme Court
P.O. Box 98910
Lincoln, NE 68509

Reference inquiry for _____ (Type or black ink only, avoid edge of page)
(name of applicant)

Today's date _____

1. How long have you known the applicant? What has been the nature of your association?

2. What do you consider to be the applicant's greatest strengths?

3. Please describe any weaknesses the applicant may have.

4. Please discuss briefly the applicant's qualifications in the following areas.

Integrity:

Ability to apply legal principles to specific cases:

Reference Inquiry page 1 of 2

Ability to work under pressure (heavy caseload, time deadlines):

Interpersonal skills and supervisory skills:

Time management ability:

Temperament, demeanor:

5. How well does the applicant follow through on work assignments?

6. Please add any comments you may have.

7. Overall, how would you rate the applicant's suitability to be a judge?

1	2	3	4	5	6	7
Unacceptable			Satisfactory		Outstanding	

8. Overall, how would you rate the applicant's suitability for the specific court for which she/he has applied?

1	2	3	4	5	6	7
Unacceptable			Satisfactory		Outstanding	

Signature

Name and Title (please print or type)

Reference Inquiry page 2 of 2

Judicial Nominating Commission Judge Reference Inquiry

Please return to:
State Court Administrator
Nebraska Supreme Court
P.O. Box 98910
Lincoln, NE 68509

Reference inquiry for _____ (Type or black ink only, avoid edge of page)
(name of applicant)

Today's date _____

I have had no recent experience with this applicant and do not wish to comment.

1. Please briefly describe the applicant's qualifications in the following areas.

Ability to apply legal principles to specific cases:

Preparation for court hearings:

Management of cases in compliance with established court time frames:

Courtroom Demeanor:

Quality of written submissions:

Skills as an advocate:

Judge Inquiry page 1 of 2

2. What do you consider to be the applicant's greatest strengths?

3. Please describe any weaknesses the applicant may have.

4. Please add any comments you may have.

5. Overall, how would you rate the applicant's suitability to be a judge?

1 2 3 4 5 6 7
Unacceptable Satisfactory Outstanding

8. Overall, how would you rate the applicant's suitability for the specific court for which she/he has applied?

1 2 3 4 5 6 7
Unacceptable Satisfactory Outstanding

Signature

Judge's Name (please print or type)

Judicial Nominating Commission Legal Ability Inquiry

Please return to:
State Court Administrator
Nebraska Supreme Court
P.O. Box 98910
Lincoln, NE 68509

Reference inquiry for _____ (Type or black ink only, avoid edge of page)
(name of applicant)

Today's date _____

1. How long have you known the applicant? What has been the nature of your association?
2. What do you consider to be the applicant's greatest strengths?
3. Please describe any weaknesses the applicant may have.
4. Please discuss briefly the applicant's qualifications in the following areas.
Integrity:

Ability to apply legal principles to specific cases:

Legal Ability page 1 of 2

Ability to work under pressure (heavy caseload, time deadlines):

Interpersonal skills and supervisory skills:

Time management ability:

Temperament, demeanor:

5. How well does the applicant follow through on work assignments?

6. Please add any comments you may have.

7. Overall, how would you rate the applicant's abilities as a potential judge?

1 2 3 4 5 6 7
Unacceptable Satisfactory Outstanding

8. Overall, how would you rate the applicant's suitability for the specific court for which she/he has applied?

1 2 3 4 5 6 7
Unacceptable Satisfactory Outstanding

Signature

Name and Title (please print or type)

Legal Ability page 2 of 2

C. Alaska and Idaho Attorney Surveys

Ketchikan District Court, First Judicial District

Applicant's Name

Basis for Evaluation

A. Which of the following best describes the basis for your evaluation of this candidate? Direct professional experience is limited to direct contact with the applicant's professional work. This includes working with or against the attorney on a legal matter (i.e., a case, arbitration, negotiation. . .). (check one)

- Direct professional experience Professional reputation
 Other personal contacts Insufficient knowledge to evaluate this candidate (go to next candidate)

B. If you checked direct professional experience, which of the following best describes the amount of that experience?

- Substantial and recent (within last 5 years) Moderate Limited

C. Please rate the candidate on each of the following qualities by circling the number that best represents your evaluation. Candidates should be evaluated on each quality separately. Use the ends of the scales as well as the middle. The tendency to rate an applicant "excellent" or "poor" on every trait should be avoided since each person has strengths and weaknesses. If you cannot rate the candidate on any one quality, leave that one blank.

	1	2	3	4	5
1 PROFESSIONAL COMPETENCE	POOR Lacking in knowledge and/or effectiveness	DEFICIENT Below-average performance occasionally	ACCEPTABLE Possesses sufficient knowledge and required skills	GOOD Usually knowledgeable and effective	EXCELLENT Meets the highest standards for knowledge and effectiveness
2 INTEGRITY	POOR Unconcerned with propriety and/or appearance, or acts in violation of codes of professional conduct	DEFICIENT Appears lacking in knowledge of codes of professional conduct and/or unconcerned with propriety or appearance at times	ACCEPTABLE Follows codes of professional conduct, respects propriety and appearance of propriety at all times	GOOD Above-average awareness of ethics, holds self to higher standard than most	EXCELLENT Outstanding integrity and highest standards of conduct
3 FAIRNESS	POOR Often shows strong bias for or against some person or groups	DEFICIENT Displays, verbally or otherwise, some bias for or against groups or persons	ACCEPTABLE Free of substantial bias or prejudice towards groups or persons	GOOD Above-average ability to treat all persons and groups impartially	EXCELLENT Unusually fair and impartial to all groups
4 JUDICIAL TEMPERAMENT	POOR Often lacks compassion, humility, or courtesy	DEFICIENT Sometimes lacks compassion, humility, or courtesy	ACCEPTABLE Possesses appropriate compassion, humility, and courtesy	GOOD Above-average compassion, humility, and courtesy	EXCELLENT Outstanding compassion, humility, and courtesy
5 SUITABILITY OF THIS CANDIDATE'S EXPERIENCE FOR THIS VACANCY	POOR Has little or no suitable experience	DEFICIENT Has less than suitable experience	ACCEPTABLE Has suitable experience	GOOD Has highly suitable experience	EXCELLENT Has the most suitable experience possible for this position
6 OVERALL RATING FOR THIS POSITION	POOR Seldom meets standards of the profession	DEFICIENT Occasionally falls short of professional standards	ACCEPTABLE Consistently meets professional standards	GOOD Often exceeds professional standards	EXCELLENT Meets highest standards of the profession

**ATTORNEY QUESTIONNAIRE ON QUALIFICATION OF
APPLICANTS FOR APPOINTMENT AS MAGISTRATE OF
THE _____ JUDICIAL DISTRICT**

Pursuant to Idaho Code §1-2205(b), the Magistrates Commission of the _____ Judicial District is reviewing applications for appointment to fill the attorney magistrate judge vacancy in the _____ Judicial District, with residence in _____ County. The Commission requests your assistance in discharging its statutory responsibilities.

In order to assure proper evaluation of your response, please do the following before starting on the questionnaire:

1. Please print your name and address: _____

2. Please sign your name: _____

This cover sheet will be detached from the completed questionnaire by court administrative staff. The confidentiality of your response will be protected.

Complete this questionnaire only with respect to individuals whom you know sufficiently well, based upon personal contact and/or professional experience, to render a sound and informed opinion. The pattern of responses for each applicant, rather than the quantity of responses, will be the focus of the Magistrates Commission's review. (If you have additional remarks, write them on the back of the questionnaire. They will be read and discussed.)

The full names and addresses of the applicants are attached to the questionnaire itself. Select those on whom you will respond and then complete the questionnaire. When you are finished, please mail the questionnaire and cover sheet so that it is received no later than _____, to:

Magistrate Qualifications Questionnaire
Idaho Supreme Court
P. O. Box 83720
Boise, ID 83720-0101

ATTORNEY'S QUESTIONNAIRE
REGARDING APPLICANTS FOR THE POSITION OF
MAGISTRATE JUDGE

FOR _____ COUNTY, _____ JUDICIAL DISTRICT

INSTRUCTIONS:

Please rank each applicant on a scale of 0 to 4 in each category. a ranking of 4 is highly laudatory; 3 is above average; 2 is average; 1 is below average; and 0 is severely derogatory, requiring further explanation. If you do not know how to respond on a particular point, leave it blank. Lack of response will neither aid nor hinder an applicant. A response of "NO" to the question of whether you consider the applicant qualified for the position also requires a further explanation.

APPLICANT'S NAME	INTEGRITY AND MORAL COURAGE	LEGAL ABILITY AND EXPERIENCE	WISDOM	INTELLIGENCE	CAPACITY TO BE FAIR-MINDED AND DELIBERATE	INDUSTRIOUSNESS & PROMPTNESS IN PERFORMING DUTIES	COMPATIBILITY OF PERSONAL HABITS AND OUTSIDE ACTIVITIES WITH JUDICIAL OFFICES	CAPACITY TO BE COURTEOUS AND CONSIDERATE ON THE BENCH	LEGAL RESEARCH AND WRITING	DO YOU CONSIDER THIS PERSON "QUALIFIED" FOR THE POSITION? INDICATE BY "YES" OR "NO"
										Yes
										No

Explanation or Comments:

