

## **MEMORANDUM OF UNDERSTANDING BANKRUPTCY JUDGE VACANCY PILOT PROGRAM**

This is a Memorandum of Understanding (MOU) between the Judicial Councils of the Eighth Circuit and the Fifth Circuit.

### **A. Introduction**

For years, budget restraints have not favored requesting additional bankruptcy judgeships or extending the lapse dates of existing temporary bankruptcy judgeships. As of September 30, 2017, there were 349 authorized bankruptcy judgeships – 33 temporary and 316 permanent. Of the 33 temporary positions, 22 expired on May 25, 2017, without legislation to extend or convert them, and the next vacancies in the affected districts may not be filled.

Since 1994, the Judicial Conference Committee on the Administration of the Bankruptcy System (Bankruptcy Committee) has studied options to align available bankruptcy judgeships with districts having consistently high weighted filings per judgeship. In June 2014, the Bankruptcy Committee voted to recommend the bankruptcy judge vacancy pilot program (Pilot) to the Judicial Conference. On September 16, 2014, the Judicial Conference approved the Pilot.

### **B. Summary of the Pilot**

The Eighth Circuit initially volunteered to allow two bankruptcy judgeships to be filled and to transfer the appointed judges to one district in the Eleventh Circuit (Middle District of Florida) and one district in the Sixth Circuit (Eastern District of Michigan), both having emergency need for judicial resources. This was accomplished through long-term intercircuit assignments under 28 U.S.C. § 155(a), and through MOUs prescribing the specific aspects of the Pilot. The Pilot has no effect on any right to recommendations for future bankruptcy judgeships in the borrowing Circuits. The Pilot has a maximum of two (2) bankruptcy judges appointed by the Eighth Circuit. The Federal Judicial Center (FJC) assesses and evaluates the Pilot during its term. This evaluation will be presented to both the Eighth and Fifth Circuit Judicial Councils, the Bankruptcy Committee, the Committee on Intercircuit Assignments, and the Judicial Conference within one year after the end of the Pilot.

### **C. Purpose of the MOU**

Under the terms of the MOU between the Eighth and Eleventh Circuits, the pilot judge in the Middle District of Florida was selected for appointment to a vacancy in the bankruptcy court in that district. Accordingly, this MOU now formalizes the specific terms and agreements between the Eighth Circuit, which will fill a bankruptcy judgeship in the District of South Dakota, and the Fifth Circuit, which will borrow the selected judge for service in the Northern District of Mississippi.

## **D. Selection of the Bankruptcy Judge**

### **1. Notice of Filling a Vacancy**

The Eighth Circuit will notify the chair of the Bankruptcy Committee and the Director of the AO before filling the bankruptcy judgeship in the District of South Dakota. *Guide to Judiciary Policy*, vol. 3, § 310(c).

### **2. National Announcement**

The Eighth Circuit will nationally advertise the vacancy in the District of South Dakota with consultation and assistance from the Fifth Circuit. The announcement will comply with the Judicial Conference regulations and procedures listed in the *Guide to Judiciary Policy*, vol. 3, § 320.20. The announcement will include the requirements in this MOU sufficient to ensure that applicants understand the mobile nature of the Pilot, the rules governing aspects of court governance, the budget restrictions for the Pilot, and the requirements for FJC assessment and evaluation.

### **3. Intercircuit Selection Committee**

An Intercircuit Selection Committee (ISC) will perform the duties of a Merit Selection Panel in the *Guide to Judiciary Policy*, vol. 3, § 320.30.

Before the position is advertised, the Eighth and the Fifth Circuits each will appoint three members to the ISC, which will recommend individuals whose character, experience, ability, and commitment to equal justice under the law qualify them to serve as U.S. bankruptcy judges. Members of the ISC will not receive compensation for their service, but may be allowed reasonable travel expenses, including per diem in lieu of subsistence, as authorized by law.

Three members of the ISC will be residents of the Eighth Circuit and three members will be residents of the Fifth Circuit. A member of the ISC from the Eighth Circuit will serve as Chair of the ISC.

The ISC will provide a report consistent with the requirements in the *Guide to Judiciary Policy*, vol. 3, § 320.30.40, to both the Eighth and Fifth Circuit Judicial Councils. The Eighth Circuit Judicial Council will submit a list of nominees to the Eighth Court of Appeals using the Judicial Conference procedures in the *Guide to Judiciary Policy*, vol. 3, § 320.40.10.

### **4. Appointment**

The selected judge will be appointed to a 14-year term of office by the Eighth Circuit Court of Appeals. 28 U.S.C. § 152(a). The selected judge must review and acknowledge this MOU in writing before appointment by the Eighth Circuit Court of Appeals. A copy of the appointment order will be sent to the Director of the AO and the chair of the Bankruptcy Committee.

If the judge returns to the Eighth Circuit, the District of South Dakota will then be subject to a continuing-need survey (and the Bankruptcy Committee's recommendation to the Judicial Conference whether to fill a future vacancy).

5. Intercircuit Assignment

The Fifth Circuit will request intercircuit designations for both the Northern and Southern Districts of Mississippi from the Committee on Intercircuit Assignments after the appointment of the selected judge, along with an executed copy of this MOU. All designations and assignments of the selected judge will be filed with the clerks of the Eighth and the Fifth Circuits and entered in their minutes. A copy of the designation orders will be sent to the Director of the AO and the chair of the Bankruptcy Committee.

6. Duty Station

The official duty station for the selected judge is in the District of South Dakota in the Eighth Circuit. 28 U.S.C. § 152(a). However, the normal reimbursement rules for the selected judge will apply as if the duty station for the selected judge is in the Fifth Circuit, Northern District of Mississippi. For the duration of the Pilot and for all other travel and initial relocation questions, the current regulations and guidance in the *Guide to Judiciary Policy*, vol. 19, will apply as if the selected judge is in the Northern District of Mississippi.

7. Administrative Details

The site of investiture, email addresses, security, and other administrative matters will be decided by agreement between the Circuit Executives in the Eighth and Fifth Circuits. Because such details are important in the assessment and evaluation of the Pilot, such agreements will be in writing (including saved emails) as a historical record of the Pilot available to the FJC.

**E. Term of the Pilot**

1. Length

The Pilot ends five (5) years after the date of the order appointing the selected bankruptcy judge. Should a bankruptcy judgeship vacancy arise in the Northern District of Mississippi or anywhere in the Fifth Circuit during the term of the Pilot (as extended), the pilot judge may apply and compete for the vacated judgeship.

2. Options at the End of the Pilot Term

a. The Eighth Circuit and the Fifth Circuit may renegotiate this MOU to keep the selected judge in the Fifth Circuit. Notice of intent to renegotiate will be sent by the Fifth Circuit to the Eighth Circuit at least one (1) year before the end of the Pilot term.

b. The selected judge may return to the Eighth Circuit and be assigned to a court where bankruptcy judges are needed. If the judge does not return to the original district of appointment, an intracircuit assignment may be made to an Eighth Circuit district in need of judicial resources.

c. The Eighth Circuit may transfer the selected judge to another circuit for a district that needs judicial assistance, by intercircuit assignment under 28 U.S.C. § 155(a).

3. Eighth Circuit Future Need for the Selected Judge

The selected judge may attend all scheduled Fifth and Eighth Circuit Judicial Conferences during the Pilot. Reimbursement for costs and expenses will be paid from the centrally held budget account for judges' travel. However, if the dates conflict during the term of the pilot, the judge should attend the Eighth Circuit Conference.

The Eighth Circuit will make every effort to complete the term of the Pilot as outlined in this MOU. However, if the weighted filings per authorized judgeship of the District of South Dakota increase to a level of 1,501 weighted filings (or more) for more than two (2) consecutive quarters in a fiscal year (as confirmed by the official AO data), the Eighth Circuit may terminate the intercircuit assignment order and end the Pilot. If the Eighth Circuit terminates the intercircuit assignment order, it must give written notice to the Fifth Circuit at least 180 days before terminating the intercircuit assignment order.

**F. Budget**

1. District of South Dakota

The District of South Dakota will receive its non-salary allocations, as adjusted by the Budget Division at the AO, for a vacant but statutorily authorized judgeship during the Pilot.

2. Northern District of Mississippi

The Northern District of Mississippi agrees the selected judge will use existing court and chambers space. The recurring salary and non-salary allotments to the Northern District of Mississippi will be adjusted as if the authorized judgeship and associated chambers authorized positions were allocated. Funding will be issued via supplemental allotments less the applicable financial plan reductions with 50 percent being issued with the interim allotments and the balance being issued with the final allotments each year for the duration of the Pilot.

3. Supplemental Budget Requests

Only the Northern District of Mississippi may make supplemental budget requests related to the Pilot.

#### 4. Procurement

Normal procurement rules in the Northern District of Mississippi will apply in conformance with the *Guide to Judiciary Policy*, vol. 14.

#### **G. Selected Judge**

The selected judge will agree to cooperate with the FJC as it assesses and evaluates the Pilot. The judge will receive no compensation for this cooperation but may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law.

The selected judge will have court governance rights in the Northern District of Mississippi.

Although the selected judge's duty station will be in the District of South Dakota, the judge's time, as recorded on the B-102 form, will be statistically credited to the Northern District of Mississippi during the Pilot. For purposes of case assignment and docketing, the judge will be treated as a resident judge in the Northern District of Mississippi and may be required to enter time for the FJC and on the B-102 form, depending on the technology utilized by the FJC.

The selected judge will sign and date an acknowledgment of, and agreement to, this MOU before the execution of the appointment order by the Eighth Circuit Court of Appeals. By signing the acknowledgment and agreement, the selected judge waives all benefits, reimbursements, and all other applicable Judicial Conference regulations that conflict with this MOU. The selected judge also agrees to the terms detailed in the judgeship announcement for the Pilot and the requirements of this MOU and any agreements authorized by this MOU.

#### **H. Chambers Staff**

The appointed judge's chambers staff will be subject to all the hiring and personnel rules for the Northern District of Mississippi. All staff will be hired and stationed in the Northern District of Mississippi. Because of the length of the Pilot, the selected judge will be limited to term law clerks and may not hire career clerks.

#### **I. FJC Assessment and Evaluation**

Both circuits will cooperate fully with the FJC in assessment and evaluation of the Pilot. This cooperation will entail, for example, providing budget, financial, personnel, and case management records as requested by the FJC; making available for interview by the FJC, the circuit executives, bankruptcy clerks, bankruptcy judges, and other persons in the circuit; and supporting other data collection efforts such as FJC surveys of attorneys and observations of court meetings and proceedings. The selected judge will track time as requested by the FJC. The main point of contact at the FJC for the evaluation is Beth Wiggins, J.D., Ph.D., Senior Research Associate.

After the second year of the Pilot, the FJC will make an interim report to the Bankruptcy Committee and the Committee on Intercircuit Assignments. Within one (1)

year after the end of the Pilot, the FJC will make a final report to the same Committees. The Bankruptcy Committee, with the assistance of the FJC, will prepare a summary report for the Judicial Conference.

**J. Miscellaneous**

1. Cooperation

The Pilot and the administration of this MOU will require the maximum coordination and cooperation between the Eighth Circuit and the Fifth Circuit.

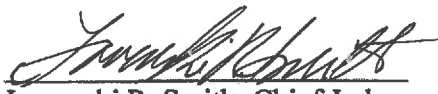
2. Contacts

All communications and notices under this MOU will be sent to:

- a. The Circuit Executive for the Eighth Circuit;
- b. The Circuit Executive for the Fifth Circuit;
- c. The Chief Bankruptcy Judge and the Bankruptcy Clerk for the Bankruptcy Court in the District of South Dakota;
- d. The Chief Bankruptcy Judge and the Bankruptcy Clerk for the Bankruptcy Court in the Northern District of Mississippi;
- e. The Director of the AO;
- f. The Chair for the Bankruptcy Committee; and
- g. The Director, Research Division, Federal Judicial Center.

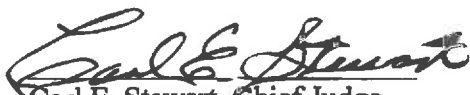
3. This MOU may be modified by written agreement of the Eighth and Fifth Circuits, with copies to all parties listed in paragraph J.2. above

Agreed to:



Lavenski R. Smith, Chief Judge  
(Eighth Circuit)

Dated: 12/12/17



Carl E. Stewart, Chief Judge  
(Fifth Circuit)

Dated: 11/8/2017

Millie B. Adams  
Millie B. Adams, Circuit Executive  
(Eighth Circuit)

Dated: 12/12/17

Paul B. Anderson, Jr.  
Paul B. Anderson, Jr., Circuit Executive  
(Fifth Circuit)

Dated: 11/8/2017

Charles L. Nail  
Charles L. Nail, Chief Bankruptcy Judge  
(District of South Dakota)

Dated: 12/13/2017

Jason D. Woodard  
Jason D. Woodard, Chief Bankruptcy Judge  
(Northern District of Mississippi)

Dated: 11/13/17

Frederick M. Entwistle  
Frederick M. Entwistle, Bankruptcy Clerk  
(District of South Dakota)

Dated: 12/13/2017

Shallanda J. Clay  
Shallanda J. Clay, Bankruptcy Clerk  
(Northern District of Mississippi)

Dated: 11/13/2017

**I acknowledge and agree to all terms of the MOU:**

\_\_\_\_\_  
**Nominee for Judgeship in  
the District of South Dakota**

**Date:** \_\_\_\_\_