



QUALITY JUDGES
INITIATIVE

A CREDIT TO THE COURTS

THE SELECTION, APPOINTMENT, AND REAPPOINTMENT
PROCESS FOR BANKRUPTCY JUDGES



INSTITUTE for the ADVANCEMENT
of the AMERICAN LEGAL SYSTEM



UNIVERSITY of
DENVER

12	6650	623	8960	789	
336	558	65	-78		
2345	467	678	665	6	
6789	234	5678	890	23	
335	355	886	908	234	
650	623	8960	652	62	
5	545	5511	-588	3759	
321	4598	552	5552		
9023	8734	564	654		
322	1112	789	283		
155	888	322	525		
15	5555	655	45		
15	455	222	222		

A CREDIT TO THE COURTS

THE SELECTION, APPOINTMENT, AND REAPPOINTMENT PROCESS FOR BANKRUPTCY JUDGES

by

Malia Reddick

Director, IAALS *Quality Judges Initiative*

&

Natalie Knowlton

Manager, IAALS *Quality Judges Initiative*

April 2013

For reprint permission please contact IAALS.

Copyright © 2013 IAALS, the Institute for the
Advancement of the American Legal System.

All rights reserved.

The authors thank several people whose assistance and expertise was invaluable during this project, including Russell Wheeler of the Brookings Institution, Governance Institute, and the IAALS Board of Advisors, Denise Neary of the Federal Judicial Center, Judge Elizabeth Stong of the U.S. Bankruptcy Court for the Eastern District of New York, and Steve Ehrlich of IAALS. We also thank the circuit executives who responded to our questionnaire, answered follow-up questions, recommended potential interviewees, and provided feedback on the report. Finally, we thank the bankruptcy judges and merit selection panel members who contributed their time and experiences to this project.



INSTITUTE *for the* ADVANCEMENT
of the AMERICAN LEGAL SYSTEM



IAALS—Institute for the Advancement of the American Legal System

John Moye Hall, 2060 South Gaylord Way, Denver, CO 80208

Phone: 303-871-6600

<http://iaals.du.edu>

IAALS, the Institute for the Advancement of the American Legal System, is a national independent research center at the University of Denver dedicated to continuous improvement of the process and culture of the civil justice system. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable civil justice system.

Rebecca Love Kourlis Executive Director



The *Quality Judges Initiative* serves to advance empirically informed models for choosing, evaluating and retaining judges that preserve impartiality and accountability in the civil justice system.

TABLE OF CONTENTS

Introduction	1
The Selection Process Over Time	2
The Selection Process in Practice	4
Announcement of the Vacancy.....	5
Application	7
Makeup of the Merit Selection Panel	9
Screening.....	13
Appointment.....	18
Reappointment	18
Areas for Further Investigation	19
APPENDICES	
A. Circuit Executives Questionnaire.....	25
B. Interview Protocol – Bankruptcy Judge	26
C. Interview Protocol – Panel Member.....	28
D. Interview Protocol – Court of Appeals Judge	30

“ ”

THEY GENERALLY
PICK THE BEST
PERSON, AND
IT TRULY IS MERIT
SELECTION. I'M
PROUD OF THE WAY
BANKRUPTCY JUDGES
ARE SELECTED.

TO ME IT IS THE
BEST MERIT
SELECTION PROCESS
WE HAVE.

INTRODUCTION

The 2012 fiscal year saw nearly 1.3 million personal and corporate bankruptcy filings. This represented a 14 percent drop from the previous year and the lowest total since 2008, but it still constituted a substantial workload.¹ The U.S. bankruptcy courts have 351 authorized bankruptcy judgeships, along with an additional 37 retired-recalled bankruptcy judges.² Despite the number of cases processed in these high-volume courts and their significance in the financial lives of individuals and businesses alike, very little is known about how the judges who preside over these courts come to be on the bench.

We undertook this project to address this deficiency—to shed light on the process for selecting bankruptcy judges. In fact, bankruptcy judges are chosen through processes that resemble those used to select some state court judges. A “merit selection panel” composed of judges, practitioners, and/or academics screens applicants, interviews potential candidates, and recommends the best qualified to the circuit’s judicial council. With or without its own screening process (depending on the circuit), the council forwards recommendations that include panel nominees to the circuit judges, who make the appointment.

Our research for this project included interviews with merit selection panel members, court of appeals judges, and bankruptcy judges,³ and these individuals were unanimous in praising the products of the selection process. According to a chief district court judge who has chaired several merit selection panels, “It’s worked really well. When you look at the new judges we have, they are a stellar group.” A circuit court judge who often chairs screening panels also offered her endorsement of the selection process: “The system we’ve used over the last twenty years has gotten some really good judges.” A now-chief bankruptcy judge who has been on the bench for more than two decades summed it up: “They generally pick the best person, and it truly is merit selection. I’m proud of the way bankruptcy judges are selected. To me it is the best merit selection process we have.”

What is the basis for these rave reviews? With this report, we explore in depth the bankruptcy judge selection process and the variations in that process across the circuits. In particular, we highlight aspects that—at least in the view of participants—seem to be working well. We also identify areas where further study may be warranted, in order to ensure the ongoing efficacy of the process.

1 THOMAS F. HOGAN, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATE COURTS: 2012 ANNUAL REPORT OF THE DIRECTOR (2013).

2 *Id.*

3 The interviews were conducted from September 2012 through January 2013. Unless otherwise noted, quoted material originates from the interview transcripts, which are confidential and on file with the authors.

THE SELECTION PROCESS OVER TIME

Today's bankruptcy judges are officers of the U.S. district courts. Prior to 1978, judicial officers who were known variously over time as commissioners, registers, and referees heard bankruptcy matters. Judges of the federal district court in whose jurisdiction they served appointed these officers.⁴

Short-lived provisions of the Bankruptcy Reform Act of 1978 formally established the position of bankruptcy judge, provided for the appointment of such judges by the President with Senate confirmation for a term of fourteen years, and authorized the respective circuit judicial councils to remove them for cause. The act expanded bankruptcy judges' subject-matter jurisdiction, authorized them to conduct jury trials, and subjected their decisions to court of appeals review. This structure was challenged in, and ultimately invalidated by, the U.S. Supreme Court in 1982 in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* The Court ruled that Congress had granted Article III powers to non-Article III "adjunct" courts and thus had "impermissibly removed most, if not all, of the essential attributes of the judicial power" from the U.S. district courts with respect to bankruptcy cases.⁵

Congress eventually rectified this situation with the Bankruptcy Amendments and Federal Judgeship Act (BAFJA) of 1984, which reserved jurisdiction over some bankruptcy proceedings for the U.S. district courts. It provided that

bankruptcy judges would serve fourteen-year terms and be removable only for cause, but the court of appeals judges in each circuit would appoint them, rather than the President with Senate confirmation. BAFJA further stipulated that the judicial council in each circuit would assist the court of appeals in this process by evaluating potential nominees and recommending qualified persons. (The judicial council in each circuit is chaired by the chief judge of the circuit and consists of an equal number of court of appeals and district court judges. The judicial council oversees a wide range of administrative aspects of the circuit's work.)

BAFJA also prescribes minimum qualifications for bankruptcy judges, requiring that they 1) be members of the bar in good standing; 2) possess, and have a reputation for, integrity and good character; 3) be of sound physical and mental health; 4) possess and have demonstrated a commitment to equal justice under the law; 5) possess and have demonstrated outstanding legal ability and competence; and 6) have demeanor, character, and personality that indicate they would "exhibit judicial temperament if appointed."⁶

As directed by BAFJA, the U.S. Judicial Conference adopted regulations for the "selection, appointment, and reappointment" of bankruptcy judges.⁷ According to these regulations, the judicial council in each circuit may appoint a merit selection panel to review applications for bankruptcy judge

⁴ See generally Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L.J. 233, 241 (2008).

⁵ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982).

⁶ Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, sec. 120(c)(2) – (7), 98 Stat. 333, 345 (1984).

⁷ U.S. JUDICIAL CONFERENCE, REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES FOR THE SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES BANKRUPTCY JUDGES (1984) [hereinafter U.S. JUDICIAL CONFERENCE REGULATIONS].



THE STATUTE
AND REGULATIONS
LEAVE MANY ASPECTS
OF THE PROCESS
TO THE DISCRETION
OF THE JUDICIAL
COUNCIL IN THE
CIRCUIT IN WHICH
THE BANKRUPTCY
JUDGE WILL SERVE—
INCLUDING WHETHER
TO USE A MERIT
SELECTION PANEL.

vacancies and make recommendations regarding potential nominees to the council. As part of its screening process, the panel may conduct personal interviews of the applicants. The Conference regulations call for the merit selection panel to make decisions by majority vote of all panel members, and further direct the panel to keep the identities of applicants and potential nominees strictly confidential.

The regulations require the panel, within 90 days of its creation, to submit a report to the judicial council that identifies five to ten “best qualified” applicants and includes all written information regarding the recommended nominees. Fewer names may be submitted for good cause as described in the report. The regulations require the judicial council then to submit a list of at least three nominees to the court of appeals, which makes the appointment by majority vote. The nominees must come from the list provided by the merit selection panel, but the judicial council may by majority vote reject the first list and request a second list. If the council opts not to create a merit selection panel, the judicial council or a council subcommittee may perform the duties of such a panel.

The 1984 BAFJA provided that judges who sought reappointment at the end of their fourteen-year term and met the statutory qualifications would be included among the nominees that the judicial council recommended to the court of appeals for possible appointment. Congress amended this provision in 1996 to incorporate a presumption of reappointment, under which the court of appeals considers whether to reappoint an incumbent judge seeking reappointment before considering other possible candidates. According to Conference regulations, the circuit executive issues a public notice that the judge is seeking reappointment and invites comments from the bar and the public. The judge may be reappointed by a majority vote of active circuit judges. If the judge is not reappointed, the selection and appointment process begins anew.

These are the selection, appointment, and reappointment steps and options laid out by statute and Judicial Conference regulations. But the statute and regulations leave many aspects of the process to the discretion of the judicial council in the circuit in which the bankruptcy judge will serve—including whether to use a merit selection panel. In the following section, we examine the stages of the process for choosing bankruptcy judges, with a particular focus on the commonalities and differences across the various circuits.

THE SELECTION PROCESS IN PRACTICE

To learn more about how bankruptcy judges are chosen, and, in particular, where and how merit selection panels are used, we sent a short questionnaire to the circuit executive in each of the eleven regional circuits and the District of Columbia Circuit. (Congress has authorized each judicial council to appoint a circuit executive to carry out whatever duties the council assigns. See Appendix A for a copy of the questionnaire.) We received responses from all twelve circuit executives and provide here an overview of the responses from all executives except the District of Columbia's circuit executive, where the circuit's only bankruptcy judge was appointed in 1988.⁸ We also interviewed a range of participants in the process, including bankruptcy judges, members of merit selection panels, and circuit judges. (See Appendices B, C, and D for our interview protocols.)

We identified our interviewees through four primary means. First, staff of the Federal Judicial Center shared information about our project and our request for interviewees on an online forum for bankruptcy judges. Second, some circuit executives identified bankruptcy judges and past members of merit selection panels who might be willing to share their experiences. Third, we conducted internet searches for individuals who had served on merit selection panels. And fourth, IAALS contacts within the federal judiciary connected us with bankruptcy judges, panelists, and circuit judges. Because of the way in which we identified our interviewees, we cannot—and do not—offer their views regarding the bankruptcy judge selection process as being representative of all bankruptcy judges, circuit judges, or merit selection panel members. Rather, their responses provide an introduction to the process and highlight aspects where additional exploration may be enlightening.

⁸ According to the circuit executive for the D.C. Circuit, “no one in my office was here in 1988 and the files offer minimal information. We will follow U.S. Judicial Conference guidelines in 2016.” Email from Elizabeth Paret, Circuit Executive, to Malia Reddick, Director, IAALS *Quality Judges Initiative* (Apr. 26, 2011, 12:12 MDT) (on file with authors).

We interviewed a total of twenty-five sitting bankruptcy judges, including at least one judge from each of the eleven regional circuits.⁹ We did not interview the sole bankruptcy judge in the D.C. Circuit, who was selected in 1988 and reappointed in 2002. These twenty-five judges included fourteen women and eleven men, with one Hispanic judge, one African-American judge, and one Asian-American judge.¹⁰ Women were represented at a higher rate among our interviewees (56.0%) than they are in the population of bankruptcy judges (26.9%).¹¹ There was also greater racial and ethnic diversity among our interviewees (12.0%) than in the population of bankruptcy judges (5.1%).¹² Twenty-one of the twenty-five interviewed judges were selected in 2003 or later.

We also interviewed eleven individuals who have participated in the selection process in some way, including two court of appeals judges, one chief district court judge who has chaired several merit selection panels, a former bankruptcy judge who is now a chief district court judge, four bankruptcy practitioners (one of whom is a former bankruptcy judge) who have participated on multiple selection panels, two law professors who have served as panelists, and one circuit executive. These participants were from the Third, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits.

We asked our interviewees about their experiences with and perceptions of each stage of the selection, appointment, and reappointment process for bankruptcy judges as well as their overall impressions of its strengths and weaknesses. To preserve the anonymity of our interviewees, we use feminine pronouns throughout this report.

ANNOUNCEMENT OF THE VACANCY

BAFJA calls for public notice of bankruptcy judge vacancies and an effort “to identify qualified candidates, without regard to race, color, sex, religion or national origin”; similarly, Judicial Conference regulations require public notice of bankruptcy judge vacancies in “sources that will reach a wide audience of qualified applicants” (even though, as explained below, word-of-mouth within

⁹ The distribution of interviewed bankruptcy judges was as follows: First Circuit: 1 judge; Second Circuit: 2 judges; Third Circuit: 2 judges; Fourth Circuit: 2 judges; Fifth Circuit: 3 judges; Sixth Circuit: 2 judges; Seventh Circuit: 2 judges; Eighth Circuit: 1 judge; Ninth Circuit: 6 judges; Tenth Circuit: 1 judge; Eleventh Circuit: 3 judges.

¹⁰ The authors compiled information on the ethnicity of interviewed judges from data collected by Just the Beginning Foundation. JUST THE BEGINNING FOUNDATION, <http://www.jtbf.org> (last visited Feb. 19, 2013).

¹¹ See ADMIN. OFFICE OF THE U.S. COURTS, THE JUDICIARY FAIR EMPLOYMENT PRACTICES ANNUAL REPORT 3-4 (2011).

¹² See *id.* at 4-5.

a district's bankruptcy bar may be the most common source of vacancy information).¹³ Among the regulations' suggested sources are "a general local newspaper or similar publication; a bar journal, newsletter, or local legal periodical; bar association websites; government websites; and other resources relied upon by legal professionals."¹⁴ The circuit executives cover these bases and more in spreading the word about bankruptcy court openings. While the Judicial Conference regulations emphasize circulation to local publications and websites, some circuit executives also post national notices about vacancies. The Third Circuit council, for example, often buys ads in *The National Law Journal* and/or publications of the National Bar Association and the Hispanic Bar Association. Others utilize online resources such as JNet, USCourts.gov, and the website of the National Conference of Bankruptcy Judges. Vacancy announcements are also posted on bankruptcy, district, and circuit court websites, sometimes even for out-of-circuit positions.

Advertising vacancies beyond the district/state/circuit in which the judge will serve reflects some councils' willingness to nominate and some courts' willingness to appoint out-of-district candidates. As a court of appeals judge told us, it is "uncommon but not unheard of" for out-of-circuit applicants to be selected. In fact, some of the bankruptcy judges whom we interviewed had applied for vacancies in more than one circuit. A few interviewees who had served on merit selection panels expressed concern about what they perceived to be a preference for applicants from the state or district where the vacancy exists. As a court of appeals judge who has chaired several panels put it:

There is a tendency for lawyers and selection committees to be somewhat territorial. I've noticed that when we get applications from outside of [the state], with certain members of the different panels, they say 'I don't know why we need to go outside.' But the court of appeals is looking for the best bankruptcy judge we can find. It's important that the vacancy announcement on these judgeships gets national exposure because they are very, very important.

“ ”

A FEW INTERVIEWEES WHO HAD SERVED ON MERIT SELECTION PANELS EXPRESSED CONCERN ABOUT WHAT THEY PERCEIVED TO BE A PREFERENCE FOR APPLICANTS FROM THE STATE OR DISTRICT WHERE THE VACANCY EXISTS.

13 Bankruptcy Amendments and Federal Judgeship Act of 1984, *supra* note 6, at sec. 120(c)(2) – (7); U.S. JUDICIAL CONFERENCE REGULATIONS, *supra* note 7, §2.01.

14 U.S. JUDICIAL CONFERENCE REGULATIONS, *supra* note 7, §2.01.

“ ”

WHILE THE COUNCILS GO TO GREAT LENGTHS TO CIRCULATE VACANCY ANNOUNCEMENTS FOR BANKRUPTCY JUDGESHIPS, MANY APPLICANTS LEARN OF THESE OPPORTUNITIES THROUGH MORE INFORMAL CHANNELS.

A law professor who has participated on several panels echoed this sentiment:

One thing that comes up every single time, at least for [our district], is that there are feelings expressed by judges and the practitioners on the merit selection panel that we don't want to select judges from outside the district. We brought in [an out-of-state applicant] and feared the bankruptcy bar would be upset with us. Our view was that we consider the person who is home-grown, but if the very best is not home-grown, then we go with the best candidate.

A circuit executive summarized her council's view thusly: "We tend to look more closely at applicants that come from the state, but we don't rule out national applicants."

While the councils go to great lengths to circulate vacancy announcements for bankruptcy judgeships, many applicants learn of these opportunities through more informal channels. Twenty-three of the twenty-five judges whom we interviewed learned of the vacancy for which they were selected by word-of-mouth or through personal relationships within the bankruptcy community. One bankruptcy judge told us: "As soon as [a retiring judge] announced his retirement, everyone in the bankruptcy community knew about it." A judge in another circuit said, "I knew the judge was retiring because I clerked for him, and it was well-known in the practice area."

APPLICATION

The vacancy announcement typically directs interested applicants to the court of appeals' website where they may download the application. In terms of eligibility to apply, Judicial Conference regulations reiterate the minimum qualifications prescribed by statute and discussed above, including integrity and good character, commitment to equal justice under the law, outstanding legal ability and competence, judicial temperament, and sound physical and mental health. In addition to being members of the bar in good standing, the regulations also stipulate that candidates have actively practiced law for at least five years, unless the circuit's judicial council determines that other types of legal experience may be substituted.

Although the minimum qualifications for bankruptcy judges apply in all circuits, there is no standard application in use; rather, each judicial council develops its own application. While there are some areas of overlap from circuit to circuit, there is fairly extensive variation as well. Perhaps the greatest variation is found in the length of the application form, ranging from 7 pages in the Fourth Circuit to 36 pages in the Ninth Circuit. The subjects covered in the application are

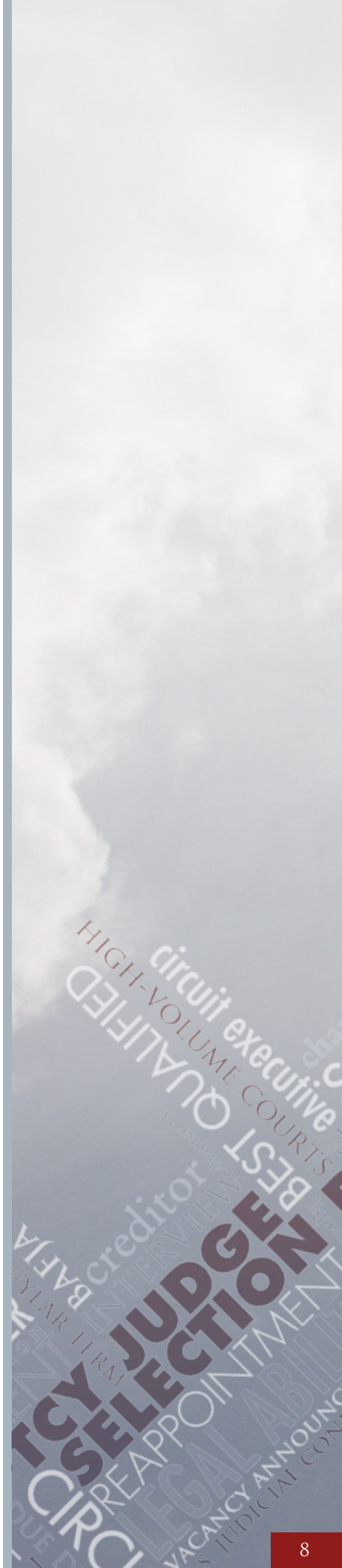
fairly standard across circuits, with questions regarding the applicant's education, law practice, prior judicial experience, business involvement, taxes, disciplinary history, professional affiliations and honors, and personal health; however, the number and nature of the questions in each of these areas varies.

With respect to the submission of materials in addition to the application, some councils invite applicants to provide evidence of their legal scholarship. In the Second and Third Circuits, the application typically calls for one writing sample; Fifth Circuit applicants may submit three examples of legal writing; the Seventh Circuit's council accepts five samples of written work; and the Ninth Circuit asks applicants to submit up to ten pages of one or two representative selections of writing on legal matters. Others simply request citations to publications.

In terms of references, several councils require names and contact information for individuals familiar with the applicant's personal character and abilities, persons who have observed the applicant's professional and general conduct and ability, individuals who have worked for and with the applicant in subordinate positions, and judges who have observed the applicant's professional conduct and ability. Some also ask for names and contact information for attorneys who have represented adverse positions in matters the applicant has handled. In contrast, for applicants in the Fifth Circuit providing the names of three persons "familiar with the applicant's legal ability" is optional. Instructions for Ninth Circuit applicants indicate that reference checks will not be limited to the contacts identified by the applicant.

Without exception, the bankruptcy judges whom we interviewed spoke favorably of the application in terms of gathering information relevant to their potential qualifications as a bankruptcy judge. As one judge put it, "Thorough" is an understatement." A judge in another circuit agreed, saying that "it was burdensome, but I thought the questions were reasonable in terms of what they were looking for." One of the bankruptcy judges we interviewed suggested that the application had a winnowing effect: "The application is hard enough to complete that it forces you to really do self-selection as you're completing it. You have to want the position and be able to say why you want it." Another judge believed the application had a larger significance: "I think the application is thought-provoking and helps you think about what qualities and experience you might bring to the bench and what would make you become a good judge."

There is some variation in the average number of applicants per vacancy. Of those circuits for which this information was provided, the Third Circuit council reported the highest average number of applicants with 55. The Eighth and Ninth Circuits had the lowest number of applicants on average, with 15 to 20 and 16





THE APPLICANTS
LEARN FROM THE
EXPERIENCE AND
COME BACK. IT'S NOT
SO OFF-PUTTING
THAT IT DETERS
GOOD APPLICANTS.

applicants, respectively. In other circuits, the average number of applicants is 20 to 25 in the First Circuit, 20 in the Second Circuit, 25 in the Fourth Circuit, 30 in the Seventh Circuit, 27 in the Tenth Circuit, and 30 to 40 in the Eleventh Circuit.

Of the twenty-five bankruptcy judges whom we interviewed, twenty-one had applied for at least one previous vacancy. Five had applied at least four times, with one applying at least eight times. A bankruptcy judge who had applied five times before being selected attributed this to a perceived norm in her circuit that she termed “queuing”:

I did not have interviews the other times I applied, which, as I understand the process now, likely had to do with the queuing that they use. It's an informal thing. I believe there is a desire to see repeated applications in part to show that the applicant is truly interested in the position. That may not be the sole reason they do this, but typically people don't get a position on their first try. In [this district], people apply eight, nine, eleven times before they get the job.

A federal district judge who has chaired several merit selection panels viewed the prevalence of “repeat” applicants as evidence of the quality of the process: “The applicants learn from the experience and come back. It's not so off-putting that it deters good applicants.”

A panelist in another circuit raised a potential concern with respect to repeat applicants. In her view, the prevalence of repeat applicants makes it particularly important to have turnover in the members of the merit selection panel. As she put it, “It is not necessarily fair to have a practitioner who always seems to be on the panel because a repeat panelist may bring prejudices to the process. If you applied multiple times in the same district and were on her bad side, you could just be dead in the water.”

MAKEUP OF THE MERIT SELECTION PANEL

According to Judicial Conference regulations, the judicial council in each circuit may appoint a merit selection panel to make recommendations to the council regarding potential nominees. In response to our questionnaire, each circuit executive indicated that a merit selection panel is used to choose bankruptcy judges in her circuit.

Conference regulations provide few specifics as to the composition of the merit selection panel, stipulating only that each panel consist of a chair and at least two other members who are appointed by majority vote of the judicial council

and who are residents of the circuit in which the vacancy exists. In some circuits, the circuit executive also serves on the panel. The makeup of the merit selection panel is the aspect of the selection process for which we found the greatest variation across the circuits. This variation is readily apparent in Table 1.

TABLE 1: COMPOSITION OF MERIT SELECTION PANEL

CIRCUIT	AD HOC OR PERMANENT	PRESCRIBED COMPOSITION?	SIZE OF PANEL	CIRCUIT EXECUTIVE	CIRCUIT JUDGES	DISTRICT JUDGES	BANKRUPTCY JUDGES	PRACTITIONERS	ACADEMICS
First	Ad hoc	No	8	Yes	1	--	--	5 (all bankruptcy)	1
Second	Ad hoc	Yes	4	Yes	1 (<i>chair</i>)	2	--	--	--
Third	Ad hoc	No	7-9	--	--	--	--	Yes	Sometimes
Fourth	Ad hoc	Yes	7	Yes	--	1 (chief)	1 (chief)	3 (2 bankruptcy; state bar president)	1 (law school dean— <i>chair</i>)
Fifth	Ad hoc	Yes	3	--	1 (<i>chair</i>)	1	--	1	--
Sixth	Permanent	No	3-7	--	--	--	--	Yes	Sometimes
Seventh	Ad hoc	No	5	Yes	1 (<i>chair</i>)	1 (former)		--	1
						1	--		
Eighth	Ad hoc	Yes	8-11	Yes	3+	3	1	--	--
Ninth	Ad hoc	No	6*	--	1	1 (chief)	1 (chief)	2 (state bar president; local bar president)	1 (law school dean)
Tenth	Ad hoc	Yes	5-6	--	Sometimes (<i>chair</i> ?)	1-2 (<i>chair</i>)	--	3-4 (all bankruptcy)	--
Eleventh	Ad hoc	Yes	Varies	--	Yes (from that state)	Yes (chiefs in that state)	--	--	--

Note: For those circuits in which the composition of the merit selection panel is not prescribed, the composition reflects that of the most recently used panel.

**Others may be invited to participate with the approval of the chief circuit and district judges, including the clerk of the bankruptcy court as an ex officio member and/or other local bar association presidents.*

With one exception, the circuits reported that their merit selection panels are ad hoc—i.e., a new panel is created each time a vacancy arises, although a new panel might include members of previous panels. Only the Sixth Circuit executive described his circuit’s panels as “permanent,” with panelists serving for a term of one year and being eligible for reappointment. That said, all but one of the panel members with whom we spoke had served on multiple panels and/or served on a panel that screened applicants for more than one vacancy.

In some circuits—the Second, Fourth, Fifth, Tenth, and Eleventh—the makeup of the panel in terms of the number and types of panelists is fixed, while in the remaining circuits the number and types of panelists may change from vacancy to vacancy. Panels ranged in size from three members in the Second and Fifth Circuits to as many as nine members in the Third Circuit. One of the Third Circuit bankruptcy judges whom we interviewed reported that as many as twelve to fifteen people were on the panel that recommended her appointment.

A bankruptcy practitioner who has served on Fifth Circuit panels said that the small size of the panel (three members)

was one of the strengths of the process: “If the committee is too big, you don’t get things done efficiently.” Panelists in circuits with larger merit selection panels believed the larger size allows for broader diversity in backgrounds and perspectives among the members. The Third Circuit executive described the makeup of that circuit’s panels:

The council seeks bankruptcy practitioners whose practice areas encompass all aspects of bankruptcy work, including debtor and creditor representation. In addition, the Court seeks people from both solo practices and large firms. We work diligently to have gender and racial diversity in addition to practice diversity.

Similarly, a Sixth Circuit bankruptcy judge described “a good mix of debtor and creditor, and consumer and business people” among the lawyers who served on the panel that recommended her. A bankruptcy practitioner who has served on Third Circuit panels found particular value in the perspective of bankruptcy practitioners as panel members: “We are a relatively small bar, and usually many of the committee members know each of the candidates. So they have some real information about how this person acts and what their temperament and personality is.”

As in the Third Circuit, there were no judges on a Sixth Circuit panel used to fill a 2011 vacancy. In contrast, panels in the Second, Eighth, and Eleventh Circuits consist only of judges. A bankruptcy judge in the Second Circuit described the makeup of the panel in her circuit—a circuit judge and two district judges—as a particular strength of that circuit’s process, while a Sixth Circuit panelist viewed the approach in her circuit as the right one: “I think putting judges on the committee gives them too much power. Some of them have very strong opinions about who they want to be a judge. I think that needs to be tempered by having practitioners evaluate it.”

Panels in the Fourth, Eighth, and Ninth Circuits include bankruptcy judges. The bankruptcy judges whom we interviewed had differing opinions on whether they should be represented on merit selection panels. One judge found it “odd” that sitting bankruptcy judges are not involved in the process in her circuit, and

a bankruptcy judge in another circuit concurred: “Bankruptcy judges tend to come from a pool of bankruptcy lawyers in the region, and who knows them better than the bankruptcy judges before whom they appear.” Another judge disagreed: “It seemed odd at first, but it’s good we don’t choose our colleagues. They are better chosen by people not sitting down the hall from us.”

Although most states with a commission-based appointment process for choosing state judges include non-attorneys on the commission, none of the circuit executives reported the inclusion of non-attorneys on bankruptcy judge selection panels. We asked our interviewees whether it might be valuable to have a non-attorney’s perspective on these panels. Most indicated that it would have little value given the specialized nature of bankruptcy law and practice. One bankruptcy judge was adamant: “No value whatsoever. Ninety percent of lawyers don’t understand bankruptcy. A layperson, with all due respect, has no idea what goes on in bankruptcy court.” A bankruptcy judge in another circuit said it would “degrade” the selection process. A federal district court judge who has chaired several panels elaborated on this concern:

Bankruptcy law is so specialized that the interview becomes a more detailed discussion of law than interviews I’ve been involved with for other types of legal positions. Frankly, when we had hypotheticals, I was usually lost. I could judge whether the individual seemed to know what they were talking about, but I didn’t know the law.

A few interviewees thought the inclusion of a non-attorney on merit selection panels was worthy of further consideration. One bankruptcy judge suggested that it could lend transparency to the process. A bankruptcy practitioner who has served on several panels said a non-attorney “could keep the process honest, asking questions that might be obvious to the bankruptcy people but are worth discussing.” Another bankruptcy judge thought a non-attorney might provide a counterpoint to the judges on the panel, as “someone who feels more comfortable to argue against them when it’s appropriate, someone who never has to appear before that judge.”

“

BANKRUPTCY LAW

IS SO SPECIALIZED

THAT THE INTERVIEW

BECOMES A

MORE DETAILED

DISCUSSION OF LAW

THAN INTERVIEWS

I’VE BEEN INVOLVED

WITH FOR OTHER

TYPES OF LEGAL

POSITIONS.

SCREENING

Under Judicial Conference regulations, the role of the merit selection panel is to identify and recommend to the judicial council the five to ten “best qualified” applicants. Each judicial council is authorized to establish additional qualifications to those prescribed by statute and Judicial Conference regulations. Though none of the circuit executives reported their council’s having done so, the Fourth Circuit council provides merit selection panel members with an evaluation form for each interviewee that also includes such criteria as knowledge of and experience with bankruptcy law, reputation among members of the bar, and administrative ability. Table 2 provides information about screening practices in each circuit.

TABLE 2: SCREENING PROCEDURES

CIRCUIT	INTERVIEWED BY PANEL?	NUMBER INTERVIEWED	STANDARD QUESTIONS?	NUMBER FORWARDED TO JUDICIAL COUNCIL	NOMINEES RANKED?	ADDITIONAL INTERVIEWS
First	Yes	n/i	No	n/i	n/i	Court of appeals
Second	Yes	n/i	Determined by panel in advance	n/i	n/i	--
Third	Yes	7-9	Yes	3-5	Yes	Judicial council & court of appeals
Fourth	Yes	n/i	Yes	4-5	Yes	--
Fifth	Yes	5-10	No	3-5	Yes	--
Sixth	Yes	5-10	n/i	5	Yes	Judicial council committee
Seventh	Yes	5-7	No	All qualified candidates	Top candidate identified	--
Eighth	Yes	Up to 8	No	3-4	n/i	Court of appeals
Ninth	Yes	5-9*	Guidelines for questions	3-5*	Yes	Court-Council Committee on Bankruptcy Appointments
Tenth	Yes	10-15	No	3-5	Yes	--
Eleventh	Yes	n/i	No	3	n/i	Court of appeals

Note: n/i = no information

*Depending on number of openings.

We asked our interviewees—both bankruptcy judges and participants in the selection process—to name the three most important qualities for a bankruptcy judge to possess. There was a remarkable degree of consensus among them. By far the most frequently cited quality was judicial temperament, though some interviewees defined it differently. One bankruptcy judge described judicial temperament as a “willingness to be impartial and fair, and to let everyone express their views in the process.” A bankruptcy judge in another circuit couched the concept in the negative:

“A lack of judicial temperament means wanting to engage lawyers, and pre-judging matters, and not having that really important quality of listening.” For several interviewees, good judicial temperament was particularly essential because of the wide range of types of litigants with whom bankruptcy judges interact. Another bankruptcy judge told us:

On a weekly basis, I can have the entire range, from people who have limited English or education and are losing their house to very sophisticated business enterprises trying to restructure or sell. You have to have the demeanor to be happy working with both and to communicate what you’re trying to say to both.

A court of appeals judge concurred:

You need someone who has empathy and has a good judicial temperament because an awful lot of that work is pro se. I cannot personally imagine coming into work and having fifty pro se people sitting in the waiting room, none of whom know what they are up against or what they have to do to sort through all of their problems and get to the heart of whatever it is they are involved in.

Some bankruptcy judges tied the importance of judicial temperament to litigants’ trust and confidence in the judicial process. One judge stressed the need for patience and courtesy in this context: “Ninety-plus percent of citizens’ exposure to federal court is bankruptcy court, and I view as one of my job responsibilities leaving people with a favorable impression—that whatever they participated in, they were heard.”

Many interviewees also stressed the importance of a strong background in bankruptcy law and a broad range of litigation experience. A court of appeals judge told us that she prioritized “knowledge of the law and a wide and varied background representing creditors and debtors in big and little cases” in selecting among applicants. One bankruptcy judge said having a bankruptcy background would make the job easier: “I think it would be hard to do the job without having a pretty broad knowledge of the bankruptcy area. Otherwise you’d spend several years learning.” A judge in another circuit was succinct: “Knowing bankruptcy law is huge.” In terms of the professional backgrounds of the twenty-five

“ ”

NINETY-PLUS
PERCENT OF
CITIZENS’ EXPOSURE
TO FEDERAL COURT
IS BANKRUPTCY
COURT, AND I VIEW
AS ONE OF MY JOB
RESPONSIBILITIES
LEAVING PEOPLE
WITH A FAVORABLE
IMPRESSION—THAT
WHATEVER THEY
PARTICIPATED IN,
THEY WERE HEARD.



THE RIGHT
JUDICIAL
TEMPERAMENT
AND WILLINGNESS
TO WORK HARD—YOU
CAN FIND THOSE
QUALITIES AMONG
NON-BANKRUPTCY
PRACTITIONERS.”

bankruptcy judges whom we interviewed—with the caveat that they are not necessarily representative of the larger population—twenty-three had been bankruptcy practitioners, with an average of 19 years of experience among them.

Some participants in the selection process expressed an alternative view. One bankruptcy judge spoke favorably of what she perceived as another circuit’s openness to applicants with no bankruptcy experience: “The Seventh Circuit has a rich tradition of picking lawyers who are not bankruptcy lawyers to come on to the bench. The right judicial temperament and willingness to work hard—you can find those qualities among non-bankruptcy practitioners.” The circuit executive for the Seventh Circuit told us, “Bankruptcy experience is a plus, but lack of it is not a negative.”

Other often-cited essential qualities for bankruptcy judges included organizational and time-management skills, diligence, and decisiveness. As a group, these qualities hint at two aspects of a bankruptcy judge’s work. The first is that bankruptcy judges carry heavy caseloads. One interviewee put the workload demands on bankruptcy judges into context: “In [my state], we have two active circuit judges, six active district judges, eleven magistrate judges, and two bankruptcy judges. So those bankruptcy judges really carry a huge load.”

Second, qualities such as administrative ability and decisiveness also suggest that prior judicial experience may be an asset for potential bankruptcy judges. Interestingly, while many of the bankruptcy judges we interviewed had experience in mediation and arbitration, only two had prior judicial experience—both as local pro-tem judges. Though our interviewees are not necessarily representative of the population of bankruptcy judges, this is consistent with information that the Administrative Office of the U.S. Courts provided for a 2005 law review article. According to this data, only “a handful” of bankruptcy judges had been state court or magistrate judges in their prior careers.¹⁵

A final quality that several interviewees mentioned is a commitment to the work. One bankruptcy judge put it thusly: “I think it’s important to have a willingness to be a bankruptcy judge because it’s an area you believe in and believe you can contribute to.”

INITIAL SCREENING

The purpose of the initial screening process is to help the panel determine which applicants it will interview. Panels in various circuits differ in terms of how this is handled, but ultimately the members of the panel agree on whom to interview. Judicial councils do not specify the number of applicants to be interviewed, though Table 2 shows the typical number of interviewees for some circuits.

15 Ralph R. Mabey, *The Evolving Bankruptcy Bench: How Are the ‘Units’ Faring?*, 47 B.C. L. REV. 105, 107 (2005).

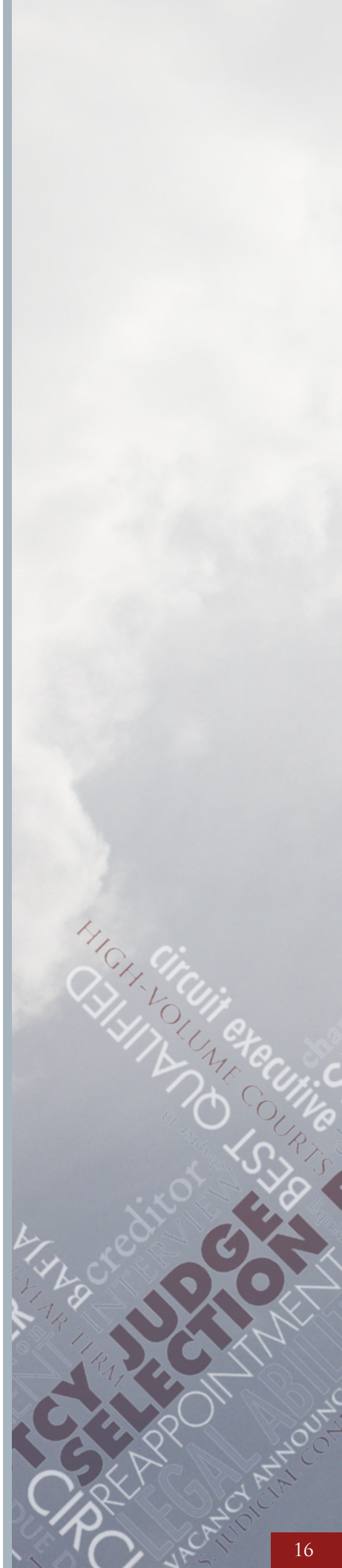
In some circuits, the panelists conduct an initial review of the applications and rate or rank the applicants. In one state in the Tenth Circuit, panel members review the applications and rank the top 10-15 to interview. Panels in at least one district in the Ninth Circuit take a different tack: “We circulate the applications to the panel and put them in three categories: those we think ought to be interviewed, those that shouldn’t, and those we have more questions about.” A panelist in the Third Circuit told us that her panel decided whom to interview “by reviewing the application and taking a vote of the committee as to whether or not this person would even possibly get our vote. So, if it was someone who clearly wouldn’t make the cut, we didn’t want to waste our time or theirs on the interview.”

Panels across the circuits also vary in terms of who performs “due diligence” on the applicants and at what point in time. Panelists in the Third, Sixth, and Ninth Circuits reported dividing up the applicants among panel members and contacting references prior to the interviews, while in the Second, Fifth, and Tenth Circuits, panel members called references after the interviews were completed. In the Seventh Circuit, the circuit executive takes on much of the responsibility for due diligence, reaching out to potential sources both before and after the interviews: “The further you are in the application process, the more people we call. For finalists, we probably talk to forty or fifty persons as references.”

In some circuits, these reference checks extend beyond individuals who were identified in the application. On one Fifth Circuit panel, the circuit judge was assigned to call bankruptcy judges in the district, the district judge contacted other district judges, and the practitioner called other bankruptcy attorneys. Similarly, a Sixth Circuit panelist said her panel spoke by conference call with each of the federal district judges in the district where the vacancy existed. They also contacted other bankruptcy judges. A Third Circuit panelist also reported interviewing sitting bankruptcy judges about their view of the candidates.

The merit selection panel members whom we interviewed stressed the importance of this due diligence. One panelist described it as one of the primary strengths of the process:

It’s amazing to me how things seem to bubble up. For example, on the temperament question, in the midst of checking references, temperament comments are made about lawyers. It’s easy to see when someone has a bit of an issue. On the question of basic competence with regard to the subject matter and intellect, a lot of times judges are able to say ‘he didn’t represent his client well because he didn’t know the law.’ Those issues do seem to show up.



A bankruptcy judge in another circuit described an instance in which due diligence was not performed, and the panel made recommendations to the judicial council based solely on the applications and interviews. “This can lead to disaster,” she told us.

INTERVIEWS

Although Judicial Conference regulations do not require that applicants be interviewed, merit selection panels in each circuit interview a subset of applicants. Among the judges with whom we spoke, the interviews ranged in length from 15 to 20 minutes in the Eleventh Circuit to 45 to 60 minutes in the First Circuit.

As shown in Table 2, circuit executives in the Third and Fourth Circuits told us that panels use standard interview questions, while in the Ninth Circuit, the circuit executive simply provides guidelines for questions. Even in circuits without standard questions, however, most of the bankruptcy judges involved in this project perceived that there were similar questions asked of all interviewees with follow-up questions as appropriate, and the panelists with whom we spoke confirmed this. In terms of the level of engagement of panelists in the interviews, we learned that all panel members tended to be active in asking questions of the applicants, though some were more active than others.

Once the interviews are complete, the merit selection panel meets to determine which applicants to recommend to the judicial council and, at least in some circuits, to rank those applicants. While the Judicial Conference regulations call for the panel to recommend five to ten “best qualified” persons, in practice most panels submit three to five names. One exception is the Seventh Circuit, where the panel reports on all of the candidates who were interviewed but identifies the top candidate, reasoning that “no one is better prepared to make the recommendation than the panel.”

ADDITIONAL SCREENING

In some circuits, there is an additional stage of screening—i.e., another round of interviews—for the recommended applicants. In the First, Third, Eighth, and Eleventh Circuits, these interviews are conducted by all of the active circuit judges, and in the Third Circuit, members of the judicial council also participate. In the Sixth and Ninth Circuits, a judicial council committee conducts these interviews. According to the Sixth Circuit’s rules of procedure, this committee consists of three circuit judges, the chief district judge in the district with the vacancy, and the bankruptcy judge representative to the judicial council. The committee recommends three ranked applicants to the court of appeals. The Ninth Circuit’s Court-Council Committee on Bankruptcy Judge Appointments

is composed of three circuit judges, along with a chief bankruptcy judge and a Ninth Circuit judge who serves on the Judicial Conference's Committee on the Administration of the Bankruptcy System. The latter two members serve *ex officio* and do not vote on the committee's recommendation of one candidate per vacancy to the full circuit. In the remaining circuits, there is no additional round of interviews; rather, the court of appeals makes the appointment based on recommendations from the judicial council.

APPOINTMENT

With a report and recommendations from the merit selection panel, and perhaps supplemented by a judicial council committee report or their own interviews, the active circuit judges appoint a bankruptcy judge by majority vote. As with other federal judicial appointees, this individual must undergo an FBI background check before taking the bench.

The participants in the selection process whom we interviewed reported that the court of appeals judges "usually" go along with the judicial council's (and by extension, in most instances, the merit selection panel's) recommendations, with a few exceptions. A bankruptcy practitioner who has served on three panels told us that in two of the three processes in which she participated, the circuit went with the top-ranked candidate, though for a third process, the judges selected from further down the list. Similarly, a longtime court of appeals judge in another circuit said that, while the court of appeals usually adopts the panel's/council's recommendations, there have been a few vacancies where her circuit went with the number two rather than the number one candidate. Another court of appeals judge described an instance in which the circuit judges exercised their prerogative to reject the names the circuit council/merit selection panel recommended. The chief judge then "designated one or two circuit judges, plus one or two from the area where the vacancy occurred, to go back and redo the interviews," and this group then submitted a new report.

REAPPOINTMENT

As they near the completion of their fourteen-year terms, bankruptcy judges may notify the chief judge of their circuit of their desire to be considered for reappointment. The reappointment process is non-competitive, with the circuit executive seeking comments about the incumbent judge from members of the bar and the public. In some circuits, the circuit executive also solicits input from district and other bankruptcy judges. Committees in the Second, Fifth, Eighth, Ninth, and Eleventh Circuits review this input and submit a report with a recommendation to the court of appeals. In the Fifth Circuit, this committee consists of two circuit judges; in the Eighth Circuit, the judicial council's bankruptcy committee performs this role; in the Ninth Circuit, the responsibility falls to the

Court-Council Committee on Bankruptcy Judge Appointments; and in the Eleventh Circuit, the relevant committee consists of judicial council members from the state where the incumbent judge serves.

In the Third and Seventh Circuits, a more comprehensive process is used to solicit feedback from attorneys who have experience with the judge, and it resembles the judicial performance evaluation programs used for state judges in many states.¹⁶ The circuit executives send questionnaires to attorneys who have practiced before the judge. In the Seventh Circuit, these are detailed surveys of attorneys “who have had multiple adversary experiences before the judge” and for which there is better than a 50 percent response rate.

Judges may be reappointed by a majority vote of active circuit judges. If they are not reappointed, the selection process starts over with the announcement of a vacancy.

AREAS FOR FURTHER INVESTIGATION

Throughout this report, we have noted aspects of the selection process that our interviewees believed were particularly well-suited to selecting highly qualified judges, such as the content of the application, the particular size and composition of the merit selection panel, and the nature of the due diligence performed for applicants. While illuminating, the circuit executives’ responses to our questionnaire and our interviews with twenty-five bankruptcy judges and eleven selection-process participants are not adequate bases for identifying “best practices” or offering recommendations for changes in the process. However, the data we gathered does suggest areas that might benefit from further exploration, which might then provide a more solid foundation for possible recommendations.

1. How much time does the selection process take, and is a lengthy process a disincentive to apply?

The bankruptcy judges whom we interviewed reported considerable variation in the time consumed by the selection process—from 2 months to 12-13 months, with an average time of approximately 6 months, plus the time required for the FBI background check. One judge believed the length of the process could deter some qualified candidates from applying:

¹⁶ Quality Judges Initiative, *Implementation*, IAALS, <http://iaals.du.edu/initiatives/quality-judges-initiative/implementation/judicial-performance-evaluation> (last visited Feb. 19, 2013).

I don't know whether it did, but it should have caused some people not to even apply if they understood what a pain it is. Anyone with any sense would probably throw up their hands and not waste an entire year of their life being in limbo.

A bankruptcy judge who had applied in more than one circuit offered a comparative perspective: "I liked [this circuit's] process because it was very prompt. They worked through it very quickly, and there weren't the delays I experienced in [another circuit]. That was tougher."

The Judicial Conference might benefit from more systematic, comprehensive information about the amount of time the selection process takes in the various circuits, any apparent relationship between elapsed time and the number of applicants, and whether, in light of that information, its regulations should be amended to speed up the process.

2. Is there adequate communication with applicants throughout the selection process?

A judge who objected to the amount of time the selection process took also told us that "[d]uring that period, the biggest complaint was there was no communication from the circuit." In fact, the most prevalent concern raised by the bankruptcy judges we interviewed was a need for more, and more timely, communication with applicants throughout the selection process. One judge described her experience:

It was frustrating, from the standpoint of an applicant, in that you work on the application for a long time and then you don't hear for a few months. Then you find out you have been selected for an interview, then the interview, then another few months before you hear anything. Everyone on that committee is very busy, and maybe it's the way it goes. But it seems like a lot of hurry up and wait.

A judge in another circuit expressed similar frustrations:

The process here is very shrouded in secrecy. You don't know what's going on from the point in time you turn in the application, and you hear nothing. Then you get a letter that you have an interview, then it's dead quiet again, then a letter/phone call setting up a time for an interview, then quiet, then find out you got it.

“

IT WAS
FRUSTRATING, FROM
THE STANDPOINT
OF AN APPLICANT,
IN THAT YOU WORK
ON THE APPLICATION
FOR A LONG TIME
AND THEN YOU
DON'T HEAR FOR
A FEW MONTHS.

”

A practitioner who has served on several panels and been an applicant herself agreed: “Even early on when it is decided an applicant won’t be interviewed, I don’t know if there is notice to the applicant, other than hearing on the street that interviews have been scheduled and conducted.” One judge was blunt about her circuit’s lack of communication with applicants at both the screening stage and the circuit stage: “When we talk about dignity in the court system, and how we want everyone to have a positive experience, why wouldn’t you give the courtesy of a rejection letter to those who have spent their time to get the job?”

This seems to be a source of frustration for applicants that can be easily addressed. The judicial council in each circuit may wish to revisit its procedures for keeping applicants informed of the status of their applications and make adjustments as appropriate.

3. Is the dissemination of vacancy announcements sufficiently broad?

Several aspects of the selection process as experienced by our interviewees raise concerns about openness. A first-time panelist was particularly concerned about “the breadth of opportunities and how open people feel the process is,” particularly in light of the prevalence of repeat applicants. A panel member in another circuit concurred: “I would want to make sure the word gets out there . . . that people who ought to consider it would have been likely to hear about it and would have enough time to respond.” A bankruptcy judge couched her concern that vacancies be widely publicized in the need for diversity: “It is an important quality, having people on the court who have different experiences with life issues that may be raised.” Also recall the tendency for our interviewed bankruptcy judges to have learned about vacancies via word-of-mouth.

Judicial Conference regulations emphasize the importance of “reach[ing] a wide audience of qualified applicants,” and circuit executives seem to be very thorough in publicizing vacancies, even making them available to a national audience. But given the great variety of approaches taken across the circuits, some further assessment of the actual reach of dissemination may be in order.

4. Does the process give appropriate consideration to demographic characteristics?

Diversity on the bench, broadly defined, may be particularly important for bankruptcy judges in light of the frequency with which pro se litigants appear before them. At the same time, Judicial Conference regulations call

for merit selection panels to “give due consideration to all qualified candidates, without regard to race, color, age (over 40), gender, religion, national origin, or disability.”

Several participants said that an interest in diversity was sometimes discussed in conjunction with applicants’ qualifications and experience. Lack of diversity seems to be a valid concern among bankruptcy judges, with lower rates of women and minority judges on the bankruptcy bench than among Article III and magistrate judges. Thirty percent of Article III judges and magistrate judges are women, while 27 percent of bankruptcy judges are women.¹⁷ Seventy-two percent of Article III judges and 81 percent of magistrate judges are Caucasian, while nearly 89 percent of bankruptcy judges are Caucasian.¹⁸

One panelist acknowledged that her panel noted racial and gender diversity among applicants but said she “didn’t think it was determinative or limiting.” In another circuit, a participant reported an instance in which the circuit judges were told, “If you want to reach further into the candidate pool, here is where there is some diversity you might want to consider.” A bankruptcy judge in one circuit saw diversity as a more decisive factor: “The circuit wants to reflect diversity, but sometimes that takes precedence over picking the person who probably is the best candidate. I don’t agree with that.”

One option for increasing demographic diversity among bankruptcy judge applicants, nominees, and appointees—without explicitly making diversity a factor in the selection decision—may be to ensure demographic diversity among the members of the merit selection panel. Research on diversity among members of the nominating commissions who assist in appointing state court judges suggests that there is a link between the diversity of the commission’s membership and the diversity of applicants, nominees, and appointees.¹⁹

The Judicial Conference might examine more closely the extent of diversity on the merit selection panels in use across the circuits and explore options for enhancing gender, racial/ethnic, geographic, and professional diversity.

“ ”

ONE OPTION
FOR INCREASING
DEMOGRAPHIC
DIVERSITY AMONG
BANKRUPTCY
JUDGE APPLICANTS,
NOMINEES, AND
APPOINTEES—
WITHOUT EXPLICITLY
MAKING DIVERSITY
A FACTOR IN
THE SELECTION
DECISION—MAY
BE TO ENSURE
DEMOGRAPHIC
DIVERSITY AMONG
THE MEMBERS OF
THE MERIT
SELECTION PANEL.

17 ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 11, at 3.

18 *Id.* at 5.

19 See KEVIN M. ESTERLING & SETH S. ANDERSEN, AM. JUDICATURE SOC’Y, DIVERSITY AND THE JUDICIAL MERIT SELECTION PROCESS: A STATISTICAL REPORT 24-29 (1999) (examining data from nominating commission membership, applicant pools, and nominating lists from Alabama, New Mexico, Maryland, Indiana, and Florida).

“ ”

IT'S NONPOLITICAL
WHEN THEY PICK
A BANKRUPTCY
JUDGE. THAT
IS UNUSUAL IN THIS
DAY AND TIME.

This is undoubtedly more of a challenge in those circuits where panels consist of the minimum three members and/or where panel members serve ex officio.

5. Does the process minimize the influence of extraneous considerations in selecting judges?

One of the strengths of the selection process that our interviewees consistently mentioned was the absence of considerations not relevant to applicants' qualifications and experience, such as political party affiliation, ideology, and personal connections. One bankruptcy judge summed it up: "The strength of the bankruptcy appointment system lies in the fact that it is apolitical, and the decision is made by persons who would know whether one would be good or bad at the job." Another bankruptcy judge concurred: "They really were seeking to choose the best candidate, not being swayed by connections."

In touting the fact that the selection process focuses on qualifications and experience, several participants compared it favorably to other judicial selection processes. As one bankruptcy judge told us:

Circuit and district judges are generally picked because they are in the same political party as the president, and they know or are known by the senator or chair of the party in the state in which they live. It helps to be the former college roommate of the senator in your state to get a district or circuit appointment. It's nonpolitical when they pick a bankruptcy judge. That is unusual in this day and time.

At the same time, two interviewees suggested that extraneous considerations may come into play after the merit selection panel completes its work. One panelist expressed the view that "politics come in at the judge level," and another cited an instance in which "political muscle" may have led the court of appeals to select an applicant who was further down on the panel's list.

Some interviewees also raised concerns about the openness and inclusiveness of the process, discussed above with respect to the dissemination of the vacancy announcement. In addition to a prevalence of repeat applicants, there may also be a prevalence of repeat merit selection panel members, as well as a tendency for applicants to be well-known to members of the panel.

In the interest of preserving this well-respected process, it may be worthwhile to seek a more comprehensive assessment of the extent to which factors not related to potential as a bankruptcy judge figure into the selection process with respect to decisions by the merit selection panel, the judicial council and/or council committee, and the court of appeals.


92	88	543	412	123
1448	2003	2003	2003	2003
9322	933	988	188	188
831	24	233	1338	1338
3131	313	2011	168	168
21	351	3134	356	356
7	899	978	457	326
6	457	9689	346	678
39	2678	789	234	978
	5692	852	2596	215
	489	926	678	373
	15	115	1155	155
	899	978	457	326
	2678	789	234	978
	655	688	188	622
	189	926	678	37378
	4	233	1558	4568
	1	3134	356	509
	97	852	2596	215
	2	5692	852	215

APPENDIX A: CIRCUIT EXECUTIVES QUESTIONNAIRE

1. How are judicial vacancies in your circuit publicized?
2. Is a standard application used? (If so, would you be willing to provide us with a copy of it?)
3. On average, how many applicants are there for each vacancy in your circuit?
4. Does your court always/sometimes/never use a “merit selection panel” in appointing bankruptcy judges? If a selection panel is used...
 - a. Is the panel permanent or ad hoc?
 - b. Does the panel follow written rules of procedure? (If so, would you be willing to provide us with a copy of them?) If not, what if any guidelines are provided to panel members?
 - c. How are the members of the panel appointed?
 - d. Are there established requirements for who serves on the panel—e.g., circuit judges, other bankruptcy judges, lawyers, non-lawyers?
 - i. If there are no set requirements, what were the backgrounds of the members who served on the most recently used selection panel?
5. Are applicants/potential nominees always/sometimes/never interviewed? If applicants are interviewed...
 - a. By whom are they interviewed?
 - b. Are there standard interview questions that are asked?
6. What information does the court/selection panel consider in addition to the application (and, if conducted, interview)—e.g., reference checks, interviews with opposing counsel in recent cases, public comment?
7. Does the court establish qualifications in addition to the minimum qualifications set by the U.S. Judicial Conference?
8. How, if at all, does the process differ when the court is considering a reappointment as opposed to an initial appointment?
9. Describe the participation of the circuit judges in the process of selecting bankruptcy judges (e.g., serving on the selection panel, recommending panelists, interviewing applicants, etc.).
10. As the circuit executive, how active are you in the selection process?

APPENDIX B: INTERVIEW PROTOCOL – BANKRUPTCY JUDGE

1. In what year were you selected?
2. Had you applied for a previous vacancy before the one for which you were selected?
3. How did you learn of the vacancy to which you were selected?
4. How long did the selection process take, from the time you applied to the time you learned you had been selected?
5. What position did you hold at the time you were selected?
6. How many years of legal experience did you have at the time you were selected?
 - a. Did you have experience as a bankruptcy law practitioner? If so, how much?
 - b. Did you have previous judicial experience? If so, how much?
7. How many other applicants were there for the vacancy for which you were selected (if you know)?
8. What materials, if any, were you asked to submit in addition to an application?
9. In terms of the written application, did you find it well-focused? Or did you feel it asked for information that was not relevant to your potential qualifications as a bankruptcy judge?
10. Were you interviewed by the merit selection panel? [If applied more than once: Were you interviewed each time you applied?]
 - a. Approximately how long did the interview last?
 - b. To your knowledge, were there standard interview questions asked of all applicants?
 - c. Were all members of the panel active participants in the interview?
11. Were you interviewed during any other stage of the selection process—e.g., by the judicial council?
12. At any stage of the process, did you have one-on-one interviews or were all of the interviews group interviews?

- 
13. What was the makeup of the merit selection panel for the vacancy for which you were selected (if you recall)—e.g., circuit judges, district judges, bankruptcy judges, practitioners, academics, non-attorneys?
 - a. [If no non-attorneys on the panel: Do you think the panel would have benefitted from the perspective of a non-attorney?]
 14. What was the size of the merit selection panel?
 15. What are the three most important qualities of a bankruptcy judge?
 16. Is the selection process in your circuit well designed to identify whether applicants either possess these qualities or can quickly develop them once on the bench? Why or why not?
 17. In your view, did considerations other than qualifications and experience enter into the selection process at any point?
 18. What did you view as the strengths of the selection process used in your circuit?
 19. Were there any weaknesses in the selection process used in your circuit?
 20. What recommendations would you make, if any, for improving the process for selecting bankruptcy judges in your circuit?
 21. Do you have any additional comments?
 22. Are you comfortable with having your circuit and/or your name identified as having been interviewed for the project?
 23. May we follow up with you if we have any questions going forward?

APPENDIX C: INTERVIEW PROTOCOL – PANEL MEMBER

1. On how many merit selection panels have you served?
2. What was the makeup of the most recent merit selection panel on which you served—e.g., circuit judges, district judges, bankruptcy judges, practitioners, academics, non-attorneys? [Confirm size of panel.]
3. For non-judge panel members: What is your role on the panel—practitioner, lawyer, academic, etc.?
4. Are there any other types of panelists whose perspectives you think might have enhanced the process?
 - a. [If no non-attorneys on the panel: Do you think the panel would have benefitted from the perspective of a non-attorney?]
5. Does the merit selection panel interview all applicants? If not, how does it determine whom to interview?
6. What is the role of the panelists in screening applicants, or how was “due diligence” done for applicants?
7. Approximately how long did the interviews last?
8. Do the panelists ask standard interview questions of all applicants, or were the questions tailored to the applicants?
9. Does the merit selection panel discuss in advance what qualities of potential bankruptcy judges are most important?
10. What are the three most important qualities you look for in bankruptcy judge applicants?
11. Is the selection process in your circuit well designed to identify whether applicants either possess these qualities or can quickly develop them once on the bench? Why or why not?
12. In your view, do considerations other than qualifications and experience enter into the selection process at any point?
13. What do you view as the strengths of the selection process used in your circuit?

14. Are there any weaknesses in the selection process used in your circuit, or any recommendations you would make for improving the process for selecting bankruptcy judges in your circuit?
15. Do you have any additional comments?
16. Are you comfortable with being identified as a merit selection panel member from your circuit?
17. May we follow up with you if we have any questions going forward?

APPENDIX D: INTERVIEW PROTOCOL – COURT OF APPEALS JUDGE

1. How does the process for selecting bankruptcy judges work in your circuit?
2. What are the three most important qualities you look for in bankruptcy judge applicants?
3. In your view, is the selection process in your circuit well designed to identify whether applicants either possess these qualities or can quickly develop them once on the bench? Why or why not?
4. In your view, do considerations other than qualifications and experience enter into the selection process at any point?
5. What do you view as the strengths of the selection process used in your circuit?
6. Are there any weaknesses in the selection process used in your circuit, or any recommendations you would make for improving the process for selecting bankruptcy judges in your circuit?
7. Do you have any additional comments?
8. Are you comfortable with being identified as a circuit court judge from your circuit?
9. May we follow up with you if we have any questions going forward?



INSTITUTE *for the* ADVANCEMENT
of the AMERICAN LEGAL SYSTEM



UNIVERSITY *of*
DENVER

Institute for the Advancement of the American Legal System

University of Denver

John Moyer Hall, 2060 South Gaylord Way

Denver, CO 80208

Phone: 303.871.6600 <http://iaals.du.edu>