COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Scott S. Harris
Clerk, Supreme Court of the United States

FROM: Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure

DATE: October 17, 2024

RE: Summary of Proposed New and Amended Federal Rules of Procedure

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This memorandum summarizes proposed amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure. All of the proposed amendments and one new rule have been approved by the relevant advisory committees, the Judicial Conference Committee on Rules of Practice and Procedure, and the Judicial Conference of the United States at its September session. If adopted by the Court and transmitted to Congress by May 1, 2025, absent congressional action, the amended rules and new rule will take effect on December 1, 2025.

I. Federal Rules of Appellate Procedure 6 and 39

Rule 6 (Appeal in a Bankruptcy Case)

The proposed amendment to Rule 6 clarifies the time limits in Rule 6(a) for post-judgment motions in bankruptcy cases and the procedures in Rule 6(c) for direct appeals from bankruptcy court. The amendment also includes stylistic changes throughout the rule. The proposed amendment to Rule 6(a) clarifies the time for filing certain motions that reset the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case. The proposed amendment to Rule 6(c) clarifies the procedure for handling direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2), providing more detail about how parties should handle initial procedural steps in the court of appeals once authorization for a direct appeal is granted.

Rule 39 (Costs on Appeal)

The proposed amendment is in response to the Court's holding in *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021). The amendment clarifies the distinction between (1) the court of appeals deciding which parties must bear costs and, if appropriate, in what percentages and (2) the court of appeals, the district court, or the clerk of either court calculating and taxing the dollar amount of costs upon the proper party or parties. In addition, the proposed amendment codifies the holding in *Hotels.com*, providing that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court; it also establishes a clearer procedure that a party should follow to ask the court of appeals to reconsider the allocation of costs. Finally, the proposed amendment clarifies and improves Rule 39's parallel structure.

II. Federal Rules of Bankruptcy Procedure 3002.1 and 8006

Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case)

The proposed amendment to Rule 3002.1 would encourage compliance with its provisions by adding an optional motion process the debtor or case trustee can initiate to determine a mortgage claim's status while a chapter 13 case is pending and to give the debtor an opportunity to cure any postpetition defaults that may have occurred. The changes also add more detailed provisions about notice of payment changes for home-equity lines of credit.

Rule 8006 (Certifying a Direct Appeal to a Court of Appeals)

Rule 8006 addresses the process for requesting that an appeal go directly from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). The proposed amendment to Rule 8006(g) clarifies that any party to the appeal may file a request that a court of appeals authorize a direct appeal. The amendment dovetails with the proposed amendment to Appellate Rule 6.

III. Federal Rules of Civil Procedure 16, 26, and new Rule 16.1

Rule 16 (Pretrial Conferences; Scheduling; Management) and Rule 26 (Duty to Disclose; General Provisions Governing Discovery)

The proposed amendments would call for early identification of a method to comply with Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials (attorney work-product). Specifically, the proposed amendment to Rule 26(f)(3)(D) would require the parties to address in their discovery plan the timing and method for complying with Rule 26(b)(5)(A). The proposed amendment to Rule 16(b) would provide that the court may address the timing and method of such compliance in its scheduling order.

New Rule 16.1 (Multidistrict Litigation)

Proposed Rule 16.1 is designed to provide a framework for the initial management of multidistrict litigation (MDL) proceedings. Rule 16.1(a) encourages the transferee court to schedule an initial MDL management conference soon after transfer, recognizing that this is currently regular practice among transferee judges. Rule 16.1(b) encourages the court to order the parties to submit a report prior to the initial management conference, and it identifies matters that, unless the court orders otherwise, the parties must address in the report, including the appointment of leadership counsel. Because court action on some matters may be premature before leadership counsel is appointed, the rule distinguishes between matters on which the parties must offer their views and those on which they must offer only initial views. Rule 16.1(c) prompts courts to enter an initial MDL management order after the initial MDL management conference. The order should address the matters listed in Rule 16.1(b) and may address other matters in the court's discretion.

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Thank you for considering these proposed changes. Please let me know if any additional information would assist the Court's review.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE ROBERT J. CONRAD, JR.
Secretary

October 17, 2024

MEMORANDUM

To: Chief Justice of the United States
Associate Justices of the Supreme Court

From: Judge Robert J. Conrad, Jr.
Secretary

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit for the Court's consideration proposed amendments to Rules 6 and 39 of the Federal Rules of Appellate Procedure, which have been approved by the Judicial Conference. The Judicial Conference recommends that the amendments be adopted by the Court and transmitted to Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting (i) clean and blackline copies of the amended rules along with committee notes; (ii) an excerpt from the September 2024 report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) an excerpt from the May 2024 report of the Advisory Committee on Appellate Rules.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 6. Appeal in a Bankruptcy Case or Proceeding

(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case or Proceeding. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising original jurisdiction in a bankruptcy case or proceeding under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules. But the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal Rules of Bankruptcy Procedure, which may be shorter than the time allowed under the Civil Rules.

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case or Proceeding.

(1) **Applicability of Other Rules.** These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case or proceeding under 28 U.S.C. § 158(a) or (b), but with these qualifications:

* * * * *

(C) when the appeal is from a bankruptcy appellate panel, ‘‘district court,’’ as used in any applicable rule, means ‘‘bankruptcy appellate panel’’; and

* * * * *

(2) **Additional Rules.** In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) **Motion for Rehearing.**

* * * * *

(ii) If a party intends to challenge the order disposing of the motion—or the alteration or amendment of a judgment, order, or decree upon the motion—then the party, in accordance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4—excluding

Rules 4(a)(4) and 4(b)—measured from the entry of the order disposing of the motion.

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(C) **Making the Record Available.**

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(ii) All parties must do whatever else is necessary to enable the clerk to assemble the record and make it available. When the record is made available in paper form, the court of appeals may provide by rule or order that a certified copy of the docket entries be made available in place of the redesignated record. But at

any time during the appeal's pendency, any party may request that the redesignated record be made available.

(D) **Filing the Record.** When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date as noted serves as the filing date of the record. The circuit clerk must immediately notify all parties of that date.

(c) Direct Appeal from a Judgment, Order, or Decree of a Bankruptcy Court by Authorization Under 28 U.S.C. § 158(d)(2).

(1) **Applicability of Other Rules.** These rules apply to a direct appeal from a judgment, order, or decree of a bankruptcy court by

authorization under 28 U.S.C. § 158(d)(2), but with these qualifications:

(A) Rules 3–4, 5 (except as provided in this Rule 6(c)), 6(a), 6(b), 8(a), 8(c), 9–12, 13–20, 22–23, and 24(b) do not apply; and

(B) as used in any applicable rule, ''district court'' or ''district clerk'' includes—to the extent appropriate—a bankruptcy court or bankruptcy appellate panel or its clerk.

(2) **Additional Rules.** In addition to the rules made applicable by Rule 6(c)(1), the following rules apply:

(A) **Petition to Authorize a Direct Appeal.** Within 30 days after a certification of a bankruptcy court's order for direct appeal to the court of

appeals under 28 U.S.C. § 158(d)(2) becomes effective under Bankruptcy Rule 8006(a), any party to the appeal may ask the court of appeals to authorize a direct appeal by filing a petition with the circuit clerk under Bankruptcy Rule 8006(g).

(B) **Contents of the Petition.** The petition must include the material required by Rule 5(b)(1) and an attached copy of:

(i) the certification; and

(ii) the notice of appeal of the bankruptcy court's judgment, order, or decree filed under Bankruptcy Rule 8003 or 8004.

(C) **Answer or Cross-Petition; Oral Argument.** Rule 5(b)(2) governs an answer or cross-petition. Rule 5(b)(3) governs oral argument.

(D) **Form of Papers; Number of Copies; Length Limits.** Rule 5(c) governs the required form, number of copies to be filed, and length limits applicable to the petition and any answer or cross-petition.

(E) **Notice of Appeal; Calculating Time.** A notice of appeal to the court of appeals need not be filed. The date when the order authorizing the direct appeal is entered serves as the date of the notice of appeal for calculating time under these rules.

(F) **Notification of the Order Authorizing Direct Appeal; Fees; Docketing the Appeal.**

(i) When the court of appeals enters the order authorizing the direct appeal, the circuit clerk must notify the bankruptcy clerk and the district court clerk or bankruptcy-appellate-panel clerk of the entry.

(ii) Within 14 days after the order authorizing the direct appeal is entered, the appellant must pay the bankruptcy clerk any unpaid required fee, including:

- the fee required for the appeal to the district court or bankruptcy appellate panel; and
- the difference between the fee for an appeal to the district court or bankruptcy appellate panel and the fee required for an appeal to the court of appeals.

(iii) The bankruptcy clerk must notify the circuit clerk once the appellant has paid all required fees. Upon receiving the notice, the circuit clerk must enter the direct appeal on the docket.

(G) **Stay Pending Appeal.** Bankruptcy Rule 8007 governs any stay pending appeal.

(H) **The Record on Appeal.** Bankruptcy Rule 8009 governs the record on appeal. If a party has already filed a document or completed a step required to assemble the record for the appeal to the district court or bankruptcy appellate panel, the party need not repeat that filing or step.

(I) **Making the Record Available.** Bankruptcy Rule 8010 governs completing the record and making it available. When the court of appeals enters the order authorizing the direct appeal, the bankruptcy clerk must

make the record available to the circuit clerk.

(J) **Duties of the Circuit Clerk.** When the bankruptcy clerk has made the record available, the circuit clerk must note that fact on the docket. The date as noted serves as the filing date of the record. The circuit clerk must immediately notify all parties of that date.

(K) **Filing a Representation Statement.** Unless the court of appeals designates another time, within 14 days after the order authorizing the direct appeal is entered, the attorney for each party to the appeal must file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

Committee Note

Subdivision (a). Minor stylistic and clarifying changes are made to subdivision (a). In addition, subdivision (a) is amended to clarify that, when a district court is exercising original jurisdiction in a bankruptcy case or proceeding under 28 U.S.C. § 1334, the time in which to file post-judgment motions that can reset the time to appeal under Rule 4(a)(4)(A) is controlled by the Federal Rules of Bankruptcy Procedure, rather than the Federal Rules of Civil Procedure.

The Bankruptcy Rules partially incorporate the relevant Civil Rules but in some instances shorten the deadlines for motions set out in the Civil Rules. *See* Fed. R. Bankr. P. 9015(c) (any renewed motion for judgment under Civil Rule 50(b) must be filed within 14 days of entry of judgment); Fed. R. Bankr. P. 7052 (any motion to amend or make additional findings under Civil Rule 52(b) must be filed within 14 days of entry of judgment); Fed. R. Bankr. P. 9023 (any motion to alter or amend the judgment or for a new trial under Civil Rule 59 must be filed within 14 days of entry of judgment).

Motions for attorney's fees in bankruptcy cases or proceedings are governed by Bankruptcy Rule 7054(b)(2)(A), which incorporates without change the 14-day deadline set in Civil Rule 54(d)(2)(B). Under Appellate Rule 4(a)(4)(A)(iii), such a motion resets the time to appeal only if the district court so orders pursuant to Civil Rule 58(e), which is made applicable to bankruptcy cases and proceedings by Bankruptcy Rule 7058.

Motions for relief under Civil Rule 60 in bankruptcy cases or proceedings are governed by Bankruptcy

Rule 9024. Appellate Rule 4(a)(4)(A)(vi) provides that a motion for relief under Civil Rule 60 resets the time to appeal only if the motion is made within the time allowed for filing a motion under Civil Rule 59. In a bankruptcy case or proceeding, motions under Civil Rule 59 are governed by Bankruptcy Rule 9023, which, as noted above, requires such motions to be filed within 14 days of entry of judgment.

Civil Rule	**Bankruptcy Rule**	**Time Under Bankruptcy Rule**
50(b)	9015(c)	14 days
52(b)	7052	14 days
59	9023	14 days
54(d)(2)(B)	7054(b)(2)(A)	14 days
60	9024	14 days

Of course, the Bankruptcy Rules may be amended in the future. If that happens, the time allowed for the equivalent motions under the applicable Bankruptcy Rule may change.

Subdivision (b). Minor stylistic and clarifying changes are made to the header of subdivision (b) and to subdivision (b)(1). Subdivision (b)(1)(C) is amended to correct the omission of the word "bankruptcy" from the phrase "bankruptcy appellate panel." Stylistic changes are made to subdivision (b)(2).

Subdivision (c). Subdivision (c) was added to Rule 6 in 2014 to set out procedures governing discretionary direct appeals from orders, judgments, or decrees of the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2).

Typically, an appeal from an order, judgment, or decree of a bankruptcy court may be taken either to the district court for the relevant district or, in circuits that have

established bankruptcy appellate panels, to the bankruptcy appellate panel for that circuit. 28 U.S.C. § 158(a). Final orders of the district court or bankruptcy appellate panel resolving appeals under § 158(a) are then appealable as of right to the court of appeals under § 158(d)(1).

That two-step appeals process can be redundant and time-consuming and could in some circumstances potentially jeopardize the value of a bankruptcy estate by impeding quick resolution of disputes over disposition of estate assets. In the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Congress enacted 28 U.S.C. § 158(d)(2) to provide that, in certain circumstances, appeals may be taken directly from orders of the bankruptcy court to the courts of appeals, bypassing the intervening appeal to the district court or bankruptcy appellate panel.

Specifically, § 158(d)(2) grants the court of appeals jurisdiction of appeals from any order, judgment, or decree of the bankruptcy court if (a) the bankruptcy court, the district court, the bankruptcy appellate panel, or all parties to the appeal certify that (1) "the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance"; (2) "the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions"; or (3) "an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken" *and* (b) "the court of appeals authorizes the direct appeal of the judgment, order, or decree." 28 U.S.C. § 158(d)(2).

Bankruptcy Rule 8006 governs the procedures for certification of a bankruptcy court order for direct appeal to the court of appeals. Among other things, Rule 8006

provides that, to become effective, the certification must be filed in the appropriate court, the appellant must file a notice of appeal of the bankruptcy court order to the district court or bankruptcy appellate panel, and the notice of appeal must become effective. Fed. R. Bankr. P. 8006(a). Once the certification becomes effective under Rule 8006(a), a petition seeking authorization of the direct appeal must be filed with the court of appeals within 30 days. *Id.* 8006(g).

Rule 6(c) governs the procedures applicable to a petition for authorization of a direct appeal and, if the court of appeals grants the petition, the initial procedural steps required to prosecute the direct appeal in the court of appeals.

As promulgated in 2014, Rule 6(c) incorporated by reference most of Rule 5, which governs petitions for permission to appeal to the court of appeals from otherwise non-appealable district court orders. It has become evident over time, however, that Rule 5 is not a perfect fit for direct appeals of bankruptcy court orders to the courts of appeals. The primary difference is that Rule 5 governs discretionary appeals from district court orders that are otherwise non-appealable, and an order granting a petition for permission to appeal under Rule 5 thus initiates an appeal that otherwise would not occur. By contrast, an order granting a petition to authorize a direct appeal under Rule 6(c) means that an appeal that has already been filed and is pending in the district court or bankruptcy appellate panel will instead be heard in the court of appeals. As a result, it is not always clear precisely how to apply the provisions of Rule 5 to a Rule 6(c) direct appeal.

The new amendments to Rule 6(c) are intended to address that problem by making Rule 6(c) self-contained. Thus, Rule 6(c)(1) is amended to provide that Rule 5 is not

applicable to Rule 6(c) direct appeals except as specified in Rule 6(c) itself. Rule 6(c)(2) is also amended to include the substance of applicable provisions of Rule 5, modified to apply more clearly to Rule 6(c) direct appeals. In addition, stylistic and clarifying amendments are made to conform to other provisions of the Appellate Rules and Bankruptcy Rules and to ensure that all the procedures governing direct appeals of bankruptcy court orders are as clear as possible to both courts and practitioners.

Subdivision (c)—Title. The title of subdivision (c) is amended to change "Direct Review" to "Direct Appeal" and "Permission" to "Authorization," to be consistent with the language of 28 U.S.C. § 158(d)(2). In addition, the language "from a Judgment, Order, or Decree of a Bankruptcy Court" is added for clarity and to be consistent with other subdivisions of Rule 6.

Subdivision (c)(1). The language of the first sentence is amended to be consistent with the title of subdivision (c). In addition, the list of rules in subdivision (c)(1)(A) that are inapplicable to direct appeals is modified to include Rule 5, except as provided in subdivision (c) itself. Subdivision (c)(1)(C), which modified certain language in Rule 5 in the context of direct appeals, is therefore deleted. As set out in more detail below, the provisions of Rule 5 that are applicable to direct appeals have been added, with appropriate modifications to take account of the direct appeal context, as new provisions in subdivision (c)(2).

Subdivision (c)(2). The language "to the rules made applicable by (c)(1)" is added to the first sentence for consistency with other subdivisions of Rule 6.

Subdivision (c)(2)(A). Subdivision (c)(2)(A) is a new provision that sets out the basic procedure and timeline for filing a petition to authorize a direct appeal in the court

of appeals. It is intended to be substantively identical to Bankruptcy Rule 8006(g), with minor stylistic changes made in light of the context of the Appellate Rules.

Subdivision (c)(2)(B). Subdivision (c)(2)(B) is a new provision that specifies the contents of a petition to authorize a direct appeal. It provides that, in addition to the material required by Rule 5, the petition must include an attached copy of the certification under § 158(d)(2) and a copy of the notice of appeal to the district court or bankruptcy appellate panel.

Subdivision (c)(2)(C). Subdivision (c)(2)(C) is a new provision. For clarity, it specifies that answers or cross-petitions are governed by Rule 5(b)(2) and oral argument is governed by Rule 5(b)(3).

Subdivision (c)(2)(D). Subdivision (c)(2)(D) is a new provision. For clarity, it specifies that the required form, number of copies to be filed, and length limits applicable to the petition and any answer or cross-petition are governed by Rule 5(c).

Subdivision (c)(2)(E). Subdivision (c)(2)(E) is a new provision that incorporates the substance of Rule 5(d)(2), modified to take into account that the appellant will already have filed a notice of appeal to the district court or bankruptcy appellate panel. It makes clear that a second notice of appeal to the court of appeals need not be filed, and that the date of entry of the order authorizing the direct appeal serves as the date of the notice of appeal for the purpose of calculating time under the Appellate Rules.

Subdivision (c)(2)(F). Subdivision (c)(2)(F) is a new provision. It largely incorporates the substance of Rules 5(d)(1)(A) and 5(d)(3), with some modifications.

Subdivision (c)(2)(F)(i) now requires that when the court of appeals enters an order authorizing a direct appeal, the circuit clerk must notify the bankruptcy clerk and the clerk of the district court or the clerk of the bankruptcy appellate panel of the order.

Subdivision (c)(2)(F)(ii) requires that, within 14 days of entry of the order authorizing the direct appeal, the appellant must pay the bankruptcy clerk any required filing or docketing fees that have not yet been paid. Thus, if the appellant has not yet paid the required fee for the initial appeal to the district court or bankruptcy appellate panel, the appellant must do so. In addition, the appellant must pay the bankruptcy clerk the difference between the fee for the appeal to the district court or bankruptcy appellate panel and the fee for an appeal to the court of appeals, so that the appellant has paid the full fee required for an appeal to the court of appeals.

Subdivision (c)(2)(F)(iii) then requires the bankruptcy clerk to notify the circuit clerk that all fees have been paid, which triggers the circuit clerk's duty to docket the direct appeal.

Subdivision (c)(2)(G). Subdivision (c)(2)(G) was formerly subdivision (c)(2)(C). It is substantively unchanged, continuing to provide that Bankruptcy Rule 8007 governs stays pending appeal, but reflects minor stylistic revisions.

Subdivision (c)(2)(H). Subdivision (c)(2)(H) was formerly subdivision (c)(2)(A). It continues to provide that Bankruptcy Rule 8009 governs the record on appeal, but adds a sentence clarifying that steps taken to assemble the record under Bankruptcy Rule 8009 before the court of appeals authorizes the direct appeal need not be repeated after the direct appeal is authorized.

Subdivision (c)(2)(I). Subdivision (c)(2)(I) was formerly subdivision (c)(2)(B). It continues to provide that Bankruptcy Rule 8010 governs provision of the record to the court of appeals. It adds a sentence clarifying that when the court of appeals authorizes the direct appeal, the bankruptcy clerk must make the record available to the court of appeals.

Subdivision (c)(2)(J). Subdivision (c)(2)(J) was formerly subdivision (c)(2)(D). It is unchanged other than a stylistic change and being renumbered.

Subdivision (c)(2)(K). Subdivision (c)(2)(K) was formerly subdivision (c)(2)(E). Because any party may file a petition to authorize a direct appeal, it is modified to provide that the attorney for each party—rather than only the attorney for the party filing the petition—must file a representation statement. In addition, the phrase "granting permission to appeal" is changed to "authorizing the direct appeal" to conform to the language used throughout the rest of subdivision (c), and a stylistic change is made.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 39. Costs

(a) Allocating Costs Among the Parties. The following rules apply to allocating taxable costs among the parties unless the law provides, the parties agree, or the court orders otherwise:

(1) if an appeal is dismissed, costs are allocated against the appellant;

(2) if a judgment is affirmed, costs are allocated against the appellant;

(3) if a judgment is reversed, costs are allocated against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, each party bears its own costs.

(b) Reconsideration. Once the allocation of costs is established by the entry of judgment, a party may

seek reconsideration of that allocation by filing a motion in the court of appeals within 14 days after the entry of judgment. But issuance of the mandate under Rule 41 must not be delayed awaiting a determination of the motion. The court of appeals retains jurisdiction to decide the motion after the mandate issues.

(c) Costs Governed by Allocation Determination. The allocation of costs applies both to costs taxable in the court of appeals under Rule 39(e) and to costs taxable in district court under Rule 39(f).

(d) Costs For and Against the United States. Costs for or against the United States, its agency, or officer will be allocated under Rule 39(a) only if authorized by law.

(e) Costs on Appeal Taxable in the Court of Appeals.

(1) **Costs Taxable.** The following costs on appeal are taxable in the court of appeals for the benefit of the party entitled to costs:

(A) the production of necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f);

(B) the docketing fee; and

(C) a filing fee paid in the court of appeals.

(2) **Costs of Copies.** Each court of appeals must, by local rule, set the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(3) **Bill of Costs: Objections; Insertion in Mandate.**

(A) A party who wants costs taxed in the court of appeals must—within 14 days after judgment is entered—file with the circuit clerk and serve an itemized and verified bill of those costs.

(B) Objections must be filed within 14 days after the bill of costs is served, unless the court extends the time.

(C) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must—upon the

circuit clerk's request—add the statement of costs, or any amendment of it, to the mandate.

(f) Costs on Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs:

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Committee Note

In *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021), the Supreme Court held that Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs listed in subdivision (e) of that Rule. The Court also observed that "the current Rules and the relevant statutes could specify more clearly the procedure that such a party should follow to bring their arguments to the court of appeals…." *Id*. at 1638. The amendment does so. Stylistic changes are also made.

Subdivision (a). Both the heading and the body of the Rule are amended to clarify that allocation of the costs among the parties is done by the court of appeals. The court may allow the default rules specified in subdivision (a) to operate based on the judgment, or it may allocate them differently based on the equities of the situation. Subdivision (a) is not concerned with calculating the amounts owed; it is concerned with who bears those costs, and in what

proportion. The amendment also specifies a default for mixed judgments: each party bears its own costs.

Subdivision (b). The amendment specifies a procedure for a party to ask the court of appeals to reconsider the allocation of costs established pursuant to subdivision (a). A party may do so by motion in the court of appeals within 14 days after the entry of judgment. The mandate is not stayed pending resolution of this motion, but the court of appeals retains jurisdiction to decide the motion after the mandate issues.

Subdivision (c). Codifying the decision in *Hotels.com*, the amendment also makes clear that the allocation of costs by the court of appeals governs the taxation of costs both in the court of appeals and in the district court.

Subdivision (d). The amendment uses the word "allocated" to match subdivision (a).

Subdivision (e). The amendment specifies which costs are taxable in the court of appeals and clarifies that the procedure in that subdivision governs the taxation of costs taxable in the court of appeals. The docketing fee, currently $500, is established by the Judicial Conference of the United States pursuant to 28 U.S.C. § 1913. The reference to filing fees paid in the court of appeals is not a reference to the $5 fee paid to the district court required by 28 U.S.C. § 1917 for filing a notice of appeal from the district court to the court of appeals. Instead, the reference is to filing fees paid in the court of appeals, such as the fee to file a notice of appeal from a bankruptcy appellate panel.

Subdivision (f). The provisions governing costs taxable in the district court are lettered (f) rather than (e).

The filing fee referred to in this subdivision is the $5 fee required by 28 U.S.C. § 1917 for filing a notice of appeal from the district court to the court of appeals.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 6. Appeal in a Bankruptcy Case or Proceeding

(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case or Proceeding. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising original jurisdiction in a bankruptcy case or proceeding under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules. But the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal

[1] New material is underlined; matter to be omitted is lined through.

Rules of Bankruptcy Procedure, which may be shorter than the time allowed under the Civil Rules.

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case or Proceeding.

(1) **Applicability of Other Rules.** These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case or proceeding under 28 U.S.C. § 158(a) or (b), but with these qualifications:

* * * * *

(C) when the appeal is from a bankruptcy appellate panel, ‘‘district court,’’ as

used in any applicable rule, means ''bankruptcy appellate panel''; and

* * * * *

(2) **Additional Rules.** In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) **Motion for Rehearing.**

* * * * *

(ii) If a party intends to challenge the order disposing of the motion—or the alteration or amendment of a judgment, order, or decree upon the motion—then the party, in ~~compliance~~ accordance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal.

The notice or amended notice must be filed within the time prescribed by Rule 4—excluding Rules 4(a)(4) and 4(b)—measured from the entry of the order disposing of the motion.

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(C) **Making the Record Available.**

* * * * *

(ii) All parties must do whatever else is necessary to enable the clerk to assemble the record and make it available. When the record is made available in paper form, the court of appeals may provide by rule or order that a certified copy

of the docket entries be made available in place of the redesignated record. But at any time during the appeal's pendency, any party may request ~~at any time during the pendency of the appeal~~ that the redesignated record be made available.

(D) **Filing the Record.** When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date as noted ~~on the docket~~ serves as the filing date of the record. The circuit clerk must immediately notify all parties of that ~~the filing~~ date.

(c) Direct Appeal ~~Review~~ from a Judgment, Order, or Decree of a Bankruptcy Court by ~~Permission~~ Authorization Under 28 U.S.C. § 158(d)(2).

(1) **Applicability of Other Rules.** These rules apply to a direct appeal from a judgment, order, or decree of a bankruptcy court by ~~permission~~ authorization under 28 U.S.C. § 158(d)(2), but with these qualifications:

(A) Rules 3–4, 5~~(a)(3)~~ (except as provided in this Rule 6(c)), 6(a), 6(b), 8(a), 8(c), 9–12, 13–20, 22–23, and 24(b) do not apply; and

(B) as used in any applicable rule, ''district court'' or ''district clerk'' includes—to the extent appropriate—a bankruptcy court or bankruptcy appellate panel or its clerk~~; and~~

~~(C) the reference to ''Rules 11 and 12(c)'' in Rule 5(d)(3) must be read as a reference to Rules 6(c)(2)(B) and (C).~~

(2) **Additional Rules.** In addition to the rules made applicable by Rule 6(c)(1), the following rules apply:

(A) **Petition to Authorize a Direct Appeal.** Within 30 days after a certification of a bankruptcy court's order for direct appeal to the court of appeals under 28 U.S.C. § 158(d)(2) becomes effective under Bankruptcy Rule 8006(a), any party to the appeal may ask the court of appeals to authorize a direct appeal by filing a petition with the circuit clerk under Bankruptcy Rule 8006(g).

(B) **Contents of the Petition.** The petition must include the material required by Rule 5(b)(1) and an attached copy of:

(i) the certification; and

(ii) the notice of appeal of the bankruptcy court's judgment, order, or decree filed under Bankruptcy Rule 8003 or 8004.

(C) **Answer or Cross-Petition; Oral Argument.** Rule 5(b)(2) governs an answer or cross-petition. Rule 5(b)(3) governs oral argument.

(D) **Form of Papers; Number of Copies; Length Limits.** Rule 5(c) governs the required form, number of copies to be filed, and length limits

applicable to the petition and any answer or cross-petition.

(E) **Notice of Appeal; Calculating Time.** A notice of appeal to the court of appeals need not be filed. The date when the order authorizing the direct appeal is entered serves as the date of the notice of appeal for calculating time under these rules.

(F) **Notification of the Order Authorizing Direct Appeal; Fees; Docketing the Appeal.**

(i) When the court of appeals enters the order authorizing the direct appeal, the circuit clerk must notify the bankruptcy clerk and the district court clerk or

bankruptcy-appellate-panel clerk of the entry.

(ii) Within 14 days after the order authorizing the direct appeal is entered, the appellant must pay the bankruptcy clerk any unpaid required fee, including:

- the fee required for the appeal to the district court or bankruptcy appellate panel; and
- the difference between the fee for an appeal to the district court or bankruptcy appellate panel and the fee required

for an appeal to the court of appeals.

(iii) The bankruptcy clerk must notify the circuit clerk once the appellant has paid all required fees. Upon receiving the notice, the circuit clerk must enter the direct appeal on the docket.

(G) **Stay Pending Appeal.** Bankruptcy Rule 8007 governs any stay pending appeal.

~~(A)~~(H) **The Record on Appeal.** Bankruptcy Rule 8009 governs the record on appeal. If a party has already filed a document or completed a step required to assemble the record for the appeal to the district court or

bankruptcy appellate panel, the party need not repeat that filing or step.

~~(B)~~(I) **Making the Record Available.** Bankruptcy Rule 8010 governs completing the record and making it available. When the court of appeals enters the order authorizing the direct appeal, the bankruptcy clerk must make the record available to the circuit clerk.

~~(C)~~ ~~**Stays Pending Appeal.** Bankruptcy Rule 8007 applies to stays pending appeal.~~

~~(D)~~(J) **Duties of the Circuit Clerk.** When the bankruptcy clerk has made the record available, the circuit clerk must note that fact on the docket. The date as noted ~~on the docket~~ serves as

the filing date of the record. The circuit clerk must immediately notify all parties of that ~~the filing~~ date.

~~(E)~~(K) **Filing a Representation Statement.** Unless the court of appeals designates another time, within 14 days after ~~entry of~~ the order ~~granting permission to appeal~~ authorizing the direct appeal is entered, the attorney for each party to the appeal ~~the attorney who sought permission~~ must file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

Committee Note

Subdivision (a). Minor stylistic and clarifying changes are made to subdivision (a). In addition, subdivision (a) is amended to clarify that, when a district court is exercising original jurisdiction in a bankruptcy case or proceeding under 28 U.S.C. § 1334, the time in which to file post-judgment motions that can reset the time to appeal under Rule 4(a)(4)(A) is controlled by the Federal Rules of

Bankruptcy Procedure, rather than the Federal Rules of Civil Procedure.

The Bankruptcy Rules partially incorporate the relevant Civil Rules but in some instances shorten the deadlines for motions set out in the Civil Rules. *See* Fed. R. Bankr. P. 9015(c) (any renewed motion for judgment under Civil Rule 50(b) must be filed within 14 days of entry of judgment); Fed. R. Bankr. P. 7052 (any motion to amend or make additional findings under Civil Rule 52(b) must be filed within 14 days of entry of judgment); Fed. R. Bankr. P. 9023 (any motion to alter or amend the judgment or for a new trial under Civil Rule 59 must be filed within 14 days of entry of judgment).

Motions for attorney's fees in bankruptcy cases or proceedings are governed by Bankruptcy Rule 7054(b)(2)(A), which incorporates without change the 14-day deadline set in Civil Rule 54(d)(2)(B). Under Appellate Rule 4(a)(4)(A)(iii), such a motion resets the time to appeal only if the district court so orders pursuant to Civil Rule 58(e), which is made applicable to bankruptcy cases and proceedings by Bankruptcy Rule 7058.

Motions for relief under Civil Rule 60 in bankruptcy cases or proceedings are governed by Bankruptcy Rule 9024. Appellate Rule 4(a)(4)(A)(vi) provides that a motion for relief under Civil Rule 60 resets the time to appeal only if the motion is made within the time allowed for filing a motion under Civil Rule 59. In a bankruptcy case or proceeding, motions under Civil Rule 59 are governed by Bankruptcy Rule 9023, which, as noted above, requires such motions to be filed within 14 days of entry of judgment.

Civil Rule	Bankruptcy Rule	Time Under Bankruptcy Rule
50(b)	9015(c)	14 days
52(b)	7052	14 days
59	9023	14 days
54(d)(2)(B)	7054(b)(2)(A)	14 days
60	9024	14 days

Of course, the Bankruptcy Rules may be amended in the future. If that happens, the time allowed for the equivalent motions under the applicable Bankruptcy Rule may change.

Subdivision (b). Minor stylistic and clarifying changes are made to the header of subdivision (b) and to subdivision (b)(1). Subdivision (b)(1)(C) is amended to correct the omission of the word "bankruptcy" from the phrase "bankruptcy appellate panel." Stylistic changes are made to subdivision (b)(2).

Subdivision (c). Subdivision (c) was added to Rule 6 in 2014 to set out procedures governing discretionary direct appeals from orders, judgments, or decrees of the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2).

Typically, an appeal from an order, judgment, or decree of a bankruptcy court may be taken either to the district court for the relevant district or, in circuits that have established bankruptcy appellate panels, to the bankruptcy appellate panel for that circuit. 28 U.S.C. § 158(a). Final orders of the district court or bankruptcy appellate panel resolving appeals under § 158(a) are then appealable as of right to the court of appeals under § 158(d)(1).

That two-step appeals process can be redundant and time-consuming and could in some circumstances

potentially jeopardize the value of a bankruptcy estate by impeding quick resolution of disputes over disposition of estate assets. In the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Congress enacted 28 U.S.C. § 158(d)(2) to provide that, in certain circumstances, appeals may be taken directly from orders of the bankruptcy court to the courts of appeals, bypassing the intervening appeal to the district court or bankruptcy appellate panel.

Specifically, § 158(d)(2) grants the court of appeals jurisdiction of appeals from any order, judgment, or decree of the bankruptcy court if (a) the bankruptcy court, the district court, the bankruptcy appellate panel, or all parties to the appeal certify that (1) "the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance"; (2) "the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions"; or (3) "an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken" *and* (b) "the court of appeals authorizes the direct appeal of the judgment, order, or decree." 28 U.S.C. § 158(d)(2).

Bankruptcy Rule 8006 governs the procedures for certification of a bankruptcy court order for direct appeal to the court of appeals. Among other things, Rule 8006 provides that, to become effective, the certification must be filed in the appropriate court, the appellant must file a notice of appeal of the bankruptcy court order to the district court or bankruptcy appellate panel, and the notice of appeal must become effective. Fed. R. Bankr. P. 8006(a). Once the certification becomes effective under Rule 8006(a), a petition seeking authorization of the direct appeal must be filed with the court of appeals within 30 days. *Id.* 8006(g).

Rule 6(c) governs the procedures applicable to a petition for authorization of a direct appeal and, if the court of appeals grants the petition, the initial procedural steps required to prosecute the direct appeal in the court of appeals.

As promulgated in 2014, Rule 6(c) incorporated by reference most of Rule 5, which governs petitions for permission to appeal to the court of appeals from otherwise non-appealable district court orders. It has become evident over time, however, that Rule 5 is not a perfect fit for direct appeals of bankruptcy court orders to the courts of appeals. The primary difference is that Rule 5 governs discretionary appeals from district court orders that are otherwise non-appealable, and an order granting a petition for permission to appeal under Rule 5 thus initiates an appeal that otherwise would not occur. By contrast, an order granting a petition to authorize a direct appeal under Rule 6(c) means that an appeal that has already been filed and is pending in the district court or bankruptcy appellate panel will instead be heard in the court of appeals. As a result, it is not always clear precisely how to apply the provisions of Rule 5 to a Rule 6(c) direct appeal.

The new amendments to Rule 6(c) are intended to address that problem by making Rule 6(c) self-contained. Thus, Rule 6(c)(1) is amended to provide that Rule 5 is not applicable to Rule 6(c) direct appeals except as specified in Rule 6(c) itself. Rule 6(c)(2) is also amended to include the substance of applicable provisions of Rule 5, modified to apply more clearly to Rule 6(c) direct appeals. In addition, stylistic and clarifying amendments are made to conform to other provisions of the Appellate Rules and Bankruptcy Rules and to ensure that all the procedures governing direct appeals of bankruptcy court orders are as clear as possible to both courts and practitioners.

Subdivision (c)—Title. The title of subdivision (c) is amended to change "Direct Review" to "Direct Appeal" and "Permission" to "Authorization," to be consistent with the language of 28 U.S.C. § 158(d)(2). In addition, the language "from a Judgment, Order, or Decree of a Bankruptcy Court" is added for clarity and to be consistent with other subdivisions of Rule 6.

Subdivision (c)(1). The language of the first sentence is amended to be consistent with the title of subdivision (c). In addition, the list of rules in subdivision (c)(1)(A) that are inapplicable to direct appeals is modified to include Rule 5, except as provided in subdivision (c) itself. Subdivision (c)(1)(C), which modified certain language in Rule 5 in the context of direct appeals, is therefore deleted. As set out in more detail below, the provisions of Rule 5 that are applicable to direct appeals have been added, with appropriate modifications to take account of the direct appeal context, as new provisions in subdivision (c)(2).

Subdivision (c)(2). The language "to the rules made applicable by (c)(1)" is added to the first sentence for consistency with other subdivisions of Rule 6.

Subdivision (c)(2)(A). Subdivision (c)(2)(A) is a new provision that sets out the basic procedure and timeline for filing a petition to authorize a direct appeal in the court of appeals. It is intended to be substantively identical to Bankruptcy Rule 8006(g), with minor stylistic changes made in light of the context of the Appellate Rules.

Subdivision (c)(2)(B). Subdivision (c)(2)(B) is a new provision that specifies the contents of a petition to authorize a direct appeal. It provides that, in addition to the material required by Rule 5, the petition must include an attached copy of the certification under § 158(d)(2) and a

copy of the notice of appeal to the district court or bankruptcy appellate panel.

Subdivision (c)(2)(C). Subdivision (c)(2)(C) is a new provision. For clarity, it specifies that answers or cross-petitions are governed by Rule 5(b)(2) and oral argument is governed by Rule 5(b)(3).

Subdivision (c)(2)(D). Subdivision (c)(2)(D) is a new provision. For clarity, it specifies that the required form, number of copies to be filed, and length limits applicable to the petition and any answer or cross-petition are governed by Rule 5(c).

Subdivision (c)(2)(E). Subdivision (c)(2)(E) is a new provision that incorporates the substance of Rule 5(d)(2), modified to take into account that the appellant will already have filed a notice of appeal to the district court or bankruptcy appellate panel. It makes clear that a second notice of appeal to the court of appeals need not be filed, and that the date of entry of the order authorizing the direct appeal serves as the date of the notice of appeal for the purpose of calculating time under the Appellate Rules.

Subdivision (c)(2)(F). Subdivision (c)(2)(F) is a new provision. It largely incorporates the substance of Rules 5(d)(1)(A) and 5(d)(3), with some modifications.

Subdivision (c)(2)(F)(i) now requires that when the court of appeals enters an order authorizing a direct appeal, the circuit clerk must notify the bankruptcy clerk and the clerk of the district court or the clerk of the bankruptcy appellate panel of the order.

Subdivision (c)(2)(F)(ii) requires that, within 14 days of entry of the order authorizing the direct appeal, the appellant must pay the bankruptcy clerk any required filing

or docketing fees that have not yet been paid. Thus, if the appellant has not yet paid the required fee for the initial appeal to the district court or bankruptcy appellate panel, the appellant must do so. In addition, the appellant must pay the bankruptcy clerk the difference between the fee for the appeal to the district court or bankruptcy appellate panel and the fee for an appeal to the court of appeals, so that the appellant has paid the full fee required for an appeal to the court of appeals.

Subdivision (c)(2)(F)(iii) then requires the bankruptcy clerk to notify the circuit clerk that all fees have been paid, which triggers the circuit clerk's duty to docket the direct appeal.

Subdivision (c)(2)(G). Subdivision (c)(2)(G) was formerly subdivision (c)(2)(C). It is substantively unchanged, continuing to provide that Bankruptcy Rule 8007 governs stays pending appeal, but reflects minor stylistic revisions.

Subdivision (c)(2)(H). Subdivision (c)(2)(H) was formerly subdivision (c)(2)(A). It continues to provide that Bankruptcy Rule 8009 governs the record on appeal, but adds a sentence clarifying that steps taken to assemble the record under Bankruptcy Rule 8009 before the court of appeals authorizes the direct appeal need not be repeated after the direct appeal is authorized.

Subdivision (c)(2)(I). Subdivision (c)(2)(I) was formerly subdivision (c)(2)(B). It continues to provide that Bankruptcy Rule 8010 governs provision of the record to the court of appeals. It adds a sentence clarifying that when the court of appeals authorizes the direct appeal, the bankruptcy clerk must make the record available to the court of appeals.

Subdivision (c)(2)(J). Subdivision (c)(2)(J) was formerly subdivision (c)(2)(D). It is unchanged other than a stylistic change and being renumbered.

Subdivision (c)(2)(K). Subdivision (c)(2)(K) was formerly subdivision (c)(2)(E). Because any party may file a petition to authorize a direct appeal, it is modified to provide that the attorney for each party—rather than only the attorney for the party filing the petition—must file a representation statement. In addition, the phrase "granting permission to appeal" is changed to "authorizing the direct appeal" to conform to the language used throughout the rest of subdivision (c), and a stylistic change is made.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 39. Costs

(a) ~~Against Whom Assessed~~ Allocating Costs Among the Parties. The following rules apply to allocating taxable costs among the parties unless the law provides, the parties agree, or the court orders otherwise:

(1) if an appeal is dismissed, costs are ~~taxed~~ allocated against the appellant~~, unless the parties agree otherwise~~;

(2) if a judgment is affirmed, costs are ~~taxed~~ allocated against the appellant;

(3) if a judgment is reversed, costs are ~~taxed~~ allocated against the appellee;

[1] New material is underlined; matter to be omitted is lined through.

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, each party bears its own costs ~~costs are taxed only as the court orders~~.

(b) Reconsideration. Once the allocation of costs is established by the entry of judgment, a party may seek reconsideration of that allocation by filing a motion in the court of appeals within 14 days after the entry of judgment. But issuance of the mandate under Rule 41 must not be delayed awaiting a determination of the motion. The court of appeals retains jurisdiction to decide the motion after the mandate issues.

(c) Costs Governed by Allocation Determination. The allocation of costs applies both to costs taxable in the court of appeals under Rule 39(e) and to costs taxable in district court under Rule 39(f).

~~(b)~~**(d) Costs For and Against the United States.** Costs for or against the United States, its agency, or officer will be ~~assessed~~ allocated under Rule 39(a) only if authorized by law.

(e) Costs on Appeal Taxable in the Court of Appeals.

(1) **Costs Taxable.** The following costs on appeal are taxable in the court of appeals for the benefit of the party entitled to costs:

(A) the production of necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f);

(B) the docketing fee; and

(C) a filing fee paid in the court of appeals.

~~(c)~~ (2) **Costs of Copies.** Each court of appeals must, by local rule, set ~~fix~~ the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records

authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

~~(d)~~ (3) **Bill of Costs: Objections; Insertion in Mandate.**

~~(1)~~ (A) A party who wants costs taxed in the court of appeals must—within 14 days after ~~entry of~~ judgment is entered—file with the circuit clerk and serve an itemized and verified bill of those costs.

~~(2)~~ (B) Objections must be filed within 14 days after ~~service of~~ the bill of costs is served, unless the court extends the time.

~~(3)~~ (C) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must—upon the circuit clerk's request—add the statement of costs, or any amendment of it, to the mandate.

~~(e)~~**(f) Costs on Appeal Taxable in the District Court.** The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs ~~under this rule~~:

* * * * *

Committee Note

In *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021), the Supreme Court held that Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs listed in subdivision (e) of that Rule. The Court also

observed that "the current Rules and the relevant statutes could specify more clearly the procedure that such a party should follow to bring their arguments to the court of appeals…." *Id*. at 1638. The amendment does so. Stylistic changes are also made.

Subdivision (a). Both the heading and the body of the Rule are amended to clarify that allocation of the costs among the parties is done by the court of appeals. The court may allow the default rules specified in subdivision (a) to operate based on the judgment, or it may allocate them differently based on the equities of the situation. Subdivision (a) is not concerned with calculating the amounts owed; it is concerned with who bears those costs, and in what proportion. The amendment also specifies a default for mixed judgments: each party bears its own costs.

Subdivision (b). The amendment specifies a procedure for a party to ask the court of appeals to reconsider the allocation of costs established pursuant to subdivision (a). A party may do so by motion in the court of appeals within 14 days after the entry of judgment. The mandate is not stayed pending resolution of this motion, but the court of appeals retains jurisdiction to decide the motion after the mandate issues.

Subdivision (c). Codifying the decision in *Hotels.com*, the amendment also makes clear that the allocation of costs by the court of appeals governs the taxation of costs both in the court of appeals and in the district court.

Subdivision (d). The amendment uses the word "allocated" to match subdivision (a).

Subdivision (e). The amendment specifies which costs are taxable in the court of appeals and clarifies that the procedure in that subdivision governs the taxation of costs taxable in the court of appeals. The docketing fee, currently $500, is established by the Judicial Conference of the United States pursuant to 28 U.S.C. § 1913. The reference to filing fees paid in the court of appeals is not a reference to the $5 fee paid to the district court required by 28 U.S.C. § 1917 for filing a notice of appeal from the district court to the court of appeals. Instead, the reference is to filing fees paid in the court of appeals, such as the fee to file a notice of appeal from a bankruptcy appellate panel.

Subdivision (f). The provisions governing costs taxable in the district court are lettered (f) rather than (e). The filing fee referred to in this subdivision is the $5 fee required by 28 U.S.C. § 1917 for filing a notice of appeal from the district court to the court of appeals.

Agenda E-19
Rules
September 2024

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 4, 2024. All members participated.

* * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Appellate Rules 6 and 39. The Standing Committee unanimously approved the Advisory Committee's recommendations, with minor stylistic changes to each rule.

Rule 6 (Appeal in a Bankruptcy Case)

The proposed amendments to Rule 6 make changes to Rule 6(a) (dealing with appeals from judgments of a district court exercising original jurisdiction in a bankruptcy case) to clarify the time limits for post-judgment motions in bankruptcy cases and Rule 6(c) (dealing with direct appeals from bankruptcy court to the court of appeals) to clarify the procedures for direct appeals. The amendments also make stylistic changes to those provisions and to Rule 6(b) (dealing with appeals from a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case). The proposed amendments to Rule 6(a) clarify the time for filing certain motions that reset the time to appeal in cases where a district court is exercising

original jurisdiction in a bankruptcy case. The proposed amendments provide that the reference in Appellate Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read in such cases as a reference to the time allowed for the equivalent motions under the applicable Federal Rules of Bankruptcy Procedure. The proposed amendments to Rule 6(c) clarify the procedure for handling direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2), providing more detail about how parties should handle initial procedural steps in the court of appeals once authorization for a direct appeal is granted. The Rule 6(c) amendments dovetail with the proposed amendment to Bankruptcy Rule 8006(g) described later in this report.

Rule 39 (Costs on Appeal)

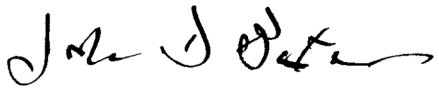
The proposed amendments are in response to the Supreme Court's holding in *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021). In that case, the Court held that Rule 39, which governs costs on appeal, does not permit a district court to alter a court of appeals' allocation of costs, even those costs that are taxed by the district court.

The proposed amendments clarify the distinction between (1) the court of appeals deciding which parties must bear the costs and, if appropriate, in what percentages and (2) the court of appeals, the district court, or the clerk of either court calculating and taxing the dollar amount of costs upon the proper party or parties. In addition, the proposed amendments codify the holding in *Hotels.com*, providing that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court, and establish a clearer procedure that a party should follow if it wants to ask the court of appeals to reconsider the allocation of costs. Finally, the proposed amendments clarify and improve Rule 39's parallel structure.

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 6 and 39, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,



John D. Bates, Chair

Paul Barbadoro	Lisa O. Monaco
Elizabeth J. Cabraser	Andrew J. Pincus
Louis A. Chaiten	D. Brooks Smith
William J. Kayatta, Jr.	Kosta Stojilkovic
Edward M. Mansfield	Jennifer G. Zipps
Troy A. McKenzie	
Patricia Ann Millett	

* * * * *

Excerpt from the May 13, 2024 Report of the Advisory Committee on Appellate Rules

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Jay Bybee, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules*

DATE: May 13, 2024

I. Introduction

The Advisory Committee on the Appellate Rules met on Wednesday, April 10, 2024, in Denver, Colorado. * * *

The Advisory Committee seeks final approval of amendments to Rule 39, dealing with costs, and Rule 6, dealing with appeals in bankruptcy cases. These

* A copy of the full committee report can be found in the June 2024 Standing Committee agenda book publicly available on www.uscourts.gov.

amendments were published for public comment in August of 2023, and the Advisory Committee recommends final approval as published. (Part II of this report.)

* * * * *

II. Action Items for Final Approval

A. Costs on Appeal (21-AP-D)

In the spring of 2021, the Supreme Court held that Rule 39, which governs costs on appeal, does not permit a district court to alter a court of appeals' allocation of costs, even those costs that are taxed by the district court. *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628 (2021). The Court also observed that "the current Rules and the relevant statutes could specify more clearly the procedure that such a party should follow to bring their arguments to the court of appeals." *Id*. at 1638.

That fall, the Advisory Committee appointed a subcommittee to examine the issue, and, in June of 2023, the Standing Committee approved publication of proposed amendments to Rule 39. The proposed amended rule is included with this report in Attachment A. The Advisory Committee seeks final approval as published.

The amended Rule is designed to accomplish several things:

First, it clarifies the distinction between (1) the court of appeals deciding which parties must bear the costs and, if appropriate, in what percentages and (2) the court of appeals, the district court (or the clerk of either) calculating and taxing the dollar amount of costs upon the proper party or parties. It uses the term "allocated" for the former and the term "taxed" for the latter. Rule 39(a) establishes default rules for the allocation of costs; these default rules can be displaced by party agreement or court order.

Second, it codifies the holding in *Hotels.com*, providing that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court.

Third, it responds to the need identified in *Hotels.com* for a clearer procedure that a party should follow if it wants to ask the court of appeals to reconsider the allocation of costs. It does this by providing for a motion for reconsideration of the allocation. To prevent delay, it provides that the mandate must not be delayed while awaiting determination of such a motion for reconsideration while making clear that the court of appeals retains jurisdiction to decide the motion.

Fourth, it makes Rule 39's structure more parallel. The current Rule lists the costs taxable in the district court but not the costs taxable in the court of appeals. The proposed amendment lists the costs taxable in the court of appeals.

The proposal does not, however, have a mechanism for making the judgment winner in the district court aware of the magnitude of the costs it might face under Rule 39 (or even the obligation to pay such costs) early enough to ask the court of appeals to reallocate the costs. While most costs on appeal are so modest that this is not a serious concern, one such cost—the premium paid for a supersedeas bond—can run into the millions of dollars. In our report requesting publication, the Appellate Rules Committee noted that it believed that the easiest time for disclosure is when the bond is before the district court for approval and had requested the Advisory Committee on Civil Rules to consider amending Civil Rule 62 to require that disclosure.

The Advisory Committee received three comments. Two of them are positive; one is negative.

The Minnesota State Bar Association's Assembly, its policy-making body, voted to support the proposed rule. The Committee on Appellate Courts of the California Lawyers Association's Litigation Section "believes that the proposal provides clarity to courts and practitioners regarding the respective authority of circuit courts and district courts to allocate and tax costs," and "cogently addresses the issues regarding FRAP 39 raised" by the Supreme Court in *Hotels.com*. And it "agrees that the Rules Committee should explore an amendment to Federal Rules of Civil Procedure 62."

Andrew Straw suggested that no costs should be allocated against a party who was allowed to proceed in forma pauperis. However, the IFP statute provides, "Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings," 28 U.S.C. § 1915(f)(1).

The Advisory Committee does not believe that these public comments warrant any changes to the proposed amendments. Instead, it unanimously recommends final approval of the proposed amendments as published.[1]

In addition, it notes that, to the extent there are reasons not to amend Civil Rule 62(b) to require disclosure of the premium paid for a supersedeas bond, perhaps the Advisory Committee on Civil Rules might consider adding a cross-reference to Appellate Rule 39 in Civil Rule 62(b) so that litigants seeking district court approval of a supersedeas bond are alerted to this possibility.

[1] After the meeting of the Advisory Committee, an additional comment was submitted and docketed as a new suggestion. This comment was circulated to the members of the Advisory Committee with a question whether any member wanted to reopen the matter. None did.

B. Appeals in Bankruptcy Cases (no number assigned)

These proposed amendments to Rule 6, dealing with appeals in bankruptcy cases, arose from requests by the Advisory Committee on Bankruptcy Rules. In June of 2023, the Standing Committee approved publication of proposed amendments to Rule 6. * * * The Advisory Committee seeks final approval as published.

The proposed amendments address two different concerns.

Resetting Time to Appeal

The first concern involves resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case. Federal Rule of Appellate Procedure 4(a)(4)(A) resets the time to appeal if various post-judgment motions are timely made in the district court. To be timely in an ordinary civil case, the motion must be made within 28 days of the judgment. Fed. R. Civ. P. 50(b), 52(b), 59. But in a bankruptcy case, the equivalent motions must be made within 14 days of the judgment. Fed. R. Bankr. P. 7052, 9015(c), 9023.

So what happens if a district court itself—rather than a bankruptcy court—decides a bankruptcy proceeding in the first instance and a post-judgment motion is made on the 20th day after judgment? Does the motion have resetting effect or not?

The proposed amendment to Appellate Rule 6(a)—the rule that deals with bankruptcy appeals where the district court exercised original jurisdiction—makes clear that it does not. It provides that the reference in Appellate Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read in such cases as a reference to the time allowed for the equivalent motions under the applicable Federal Rule of Bankruptcy Procedure. And it warns that this time may be shorter than the time allowed under the Civil Rules. The Committee Note provides a table of the equivalent motions and the time allowed under the current version of the applicable Bankruptcy Rules.

Direct Appeals

The second concern involves direct appeals in bankruptcy cases. Appeals in bankruptcy are governed by 28 U.S.C. § 158. The default rule for appeals from an order of the bankruptcy court is that such appeals go either to the district court for the district where the bankruptcy court is located or (in the circuits that have established a bankruptcy appellate panel (BAP)) to the BAP for that circuit. Under § 158, the losing party then has a further appeal as of right to the court of appeals from a final judgment of the district court or BAP.

In some circumstances, however, a direct appeal to the court of appeals can be authorized under § 158(d)(2). The requirements are similar to, but looser than, the

standards for certification under 28 U.S.C. § 1292(b), which permits courts of appeals to hear appeals of interlocutory orders of the district courts in certain circumstances. Moreover, the certification can be made by the bankruptcy court, district court, BAP, or the parties. Under the Bankruptcy Rules, even if a bankruptcy court order has been certified for direct appeal to the court of appeals, the appellant must still file a notice of appeal to the district court or BAP in order to render the certification effective. As with § 1292(b), the court of appeals must also authorize the direct appeal.

Under this structure, a court of appeals' decision to authorize a direct appeal does not determine whether an appeal will go forward, but instead in what court the appeal will be heard. The party asking that the appeal from the bankruptcy court be heard directly in the court of appeals might be an appellee rather than an appellant. Accordingly, the Advisory Committee on Bankruptcy Rules is seeking final approval of a clarifying amendment to Bankruptcy Rule 8006(g) providing that any party to the appeal may file a request that the court of appeals authorize a direct appeal.

Current Appellate Rule 6(c), which governs direct appeals, largely relies on a cross-reference to Rule 5, which governs appeals by permission. But the proposed amendment to the Bankruptcy Rules revealed that Appellate Rule 5 is not a good fit for direct appeals in bankruptcy cases. That's because Rule 5 was designed for the situation in which the court of appeals is deciding whether to allow an appeal at all. But in the direct appeal context, that's not the question. Instead, in the direct appeal context, there is an appeal; the question is which court is going to hear that appeal.

More generally, experience with direct appeals shows considerable confusion in applying the Appellate Rules. This is primarily due to the manner in which Rule 6(c) cross-references Rule 5 and to its failure to take into account that an appeal of the bankruptcy court order in question is already proceeding in the district court or BAP, which results in uncertainty about precisely what steps are necessary to perfect an appeal after the court of appeals authorizes a direct appeal.

For these reasons, the proposed amendments overhaul Rule 6(c) and make it largely self-contained. Parties will not need to refer to Rule 5 unless Rule 6(c) expressly refers to a specific provision of Rule 5. Rule 6(c) makes Rule 5 inapplicable except to the extent provided for in other parts of Rule 6(c).

The proposed amendments also spell out in more detail how parties should handle initial procedural steps in the court of appeals once authorization for a direct appeal is granted, taking into account that an appeal from the same order will already be pending in the district court or BAP. The proposed Rule 6(c)(2) permits any party to the appeal to ask the court of appeals to authorize a direct appeal. It also adds provisions governing contents of the petition, answer or cross-petition, oral argument, form of papers, number of copies, and length limits and provides for calculating time, notification of the order authorizing a direct appeal, and payment of fees. It adds a provision governing stays pending appeal, makes clear that steps already taken in

pursuing the appeal need not be repeated, and provides for making the record available to the circuit clerk. It requires all parties, not just the appellant or applicant for direct appeal, to file a representation statement. Additional changes in language are made to better match the relevant statutes.

None of these are intended to make major changes to existing procedures but to clarify those procedures.

We received only one public comment. The Minnesota State Bar Association's Assembly, its policy-making body, voted to support the proposed rule. It stated that the proposed changes "will foster transparency and possibly efficiency between parties and the court." The Advisory Committee on Bankruptcy Rules has not received any comments objecting to the amendments either.

The Advisory Committee unanimously recommends final approval of the proposed amendments as published.

* * * * *

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE ROBERT J. CONRAD, JR.
Secretary

October 17, 2024

MEMORANDUM

To: Chief Justice of the United States
Associate Justices of the Supreme Court

From: Judge Robert J. Conrad, Jr.
Secretary

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit for the Court's consideration proposed amendments to Rules 3002.1 and 8006 of the Federal Rules of Bankruptcy Procedure, which have been approved by the Judicial Conference. The Judicial Conference recommends that the amended rules be adopted by the Court and transmitted to Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting (i) clean and blackline copies of the amended rules along with committee notes; (ii) an excerpt from the September 2024 report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) an excerpt from the May 2024 report of the Advisory Committee on Bankruptcy Rules.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 3002.1. Chapter 13—Claim Secured by a Security Interest in the Debtor's Principal Residence[1]

(a) In General. This rule applies in a Chapter 13 case to a claim that is secured by a security interest in the debtor's principal residence and for which the plan provides for the trustee or debtor to make payments on the debt. Unless the court orders otherwise, the requirements of this rule cease when an order terminating or annulling the automatic stay related to that residence becomes effective.

(b) Notice of a Payment Change; Home-Equity Line of Credit; Effect of an Untimely Notice; Objection.

[1] The changes indicated are to the restyled version of Rule 3002.1, not yet in effect.

(1) ***Notice by the Claim Holder—In General.*** The claim holder must file a notice of any change in the payment amount, including one resulting from an interest-rate or escrow-account adjustment. The notice must be served on:

- the debtor;
- the debtor's attorney; and
- the trustee.

Except as provided in (b)(2), it must be filed and served at least 21 days before the new payment is due.

(2) ***Notice of a Change in a Home-Equity Line of Credit.***

(A) *Deadline for the Initial Filing; Later Annual Filing.* If the claim arises from a home-equity line of credit, the notice of a payment change must be

filed and served either as provided in (b)(1) or within one year after the bankruptcy-petition filing, and then at least annually.

(B) *Content of the Annual Notice.* The annual notice must:

(i) state the payment amount due for the month when the notice is filed; and

(ii) include a reconciliation amount to account for any overpayment or underpayment during the prior year.

(C) *Amount of the Next Payment.* The first payment due at least 21 days after the annual notice is filed and served must

be increased or decreased by the reconciliation amount.

(D) *Effective Date.* The new payment amount stated in the annual notice (disregarding the reconciliation amount) is effective on the first payment due date after the payment under (C) has been made and remains effective until a new notice becomes effective.

(E) *Payment Changes Greater Than $10.* If the claim holder chooses to give annual notices under (b)(2) and the monthly payment increases or decreases by more than $10 in any month, the holder must file and serve (in addition to the annual notice) a notice under (b)(1) for that month.

(3) ***Effect of an Untimely Notice.*** If the claim holder does not timely file and serve the notice required by (b)(1) or (b)(2), the effective date of the new payment amount is as follows:

(A) when the notice concerns a payment increase, on the first payment due date that is at least 21 days after the untimely notice was filed and served; or

(B) when the notice concerns a payment decrease, on the actual payment due date, even if it is prior to the notice.

(4) ***Party in Interest's Objection.*** A party in interest who objects to a payment change noticed under (b)(1) or (b)(2) may file and serve a motion to determine the change's validity. Unless the court orders otherwise,

if no motion is filed before the day the new payment is due, the change goes into effect on that date.

(c) Fees, Expenses, and Charges Incurred After the Case Was Filed; Notice by the Claim Holder. The claim holder must file a notice itemizing all fees, expenses, and charges incurred after the case was filed that the holder asserts are recoverable against the debtor or the debtor's principal residence. Within 180 days after the fees, expenses, or charges are incurred, the notice must be filed and served on the individuals listed in (b)(1).

(d) Filing Notice as a Supplement to a Proof of Claim. A notice under (b) or (c) must be filed as a supplement to a proof of claim using Form 410S-1 or 410S-2, respectively. The notice is not subject to Rule 3001(f).

(e) Determining Fees, Expenses, or Charges. On a party in interest's motion, the court must, after notice and a hearing, determine whether paying any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law. The motion must be filed within one year after the notice under (c) was served, unless a party in interest requests and the court orders a shorter period.

(f) Motion to Determine Status; Response; Court Determination.

(1) ***Timing; Content and Service.*** At any time after the date of the order for relief under Chapter 13 and until the trustee files the notice under (g)(1), the trustee or debtor may file a motion to determine the status of any claim described in (a). The motion must be prepared using Form 410C13-M1 and be served on:

- the debtor and the debtor's attorney, if the trustee is the movant;
- the trustee, if the debtor is the movant; and
- the claim holder.

(2) ***Response; Content and Service.*** If the claim holder disagrees with facts set forth in the motion, it must file a response within 28 days after the motion is served. The response must be prepared using Form 410C13-M1R and be served on the individuals listed in (b)(1).

(3) ***Court Determination.*** If the claim holder's response asserts a disagreement with facts set forth in the motion, the court must, after notice and a hearing, determine the status of the claim and enter an appropriate order. If the claim holder does not respond to the

motion or files a response agreeing with the facts set forth in it, the court may grant the motion based on those facts and enter an appropriate order.

(g) Trustee's End-of-Case Notice of Disbursements Made; Response; Court Determination.

(1) ***Timing and Content.*** Within 45 days after the debtor completes all payments due to the trustee under a Chapter 13 plan, the trustee must file a notice:

(A) stating what amount the trustee disbursed to the claim holder to cure any default and whether it has been cured;

(B) stating what amount the trustee disbursed to the claim holder for payments that came due during the pendency of the case and whether

such payments are current as of the date of the notice; and

(C) informing the claim holder of its obligation to respond under (g)(3).

(2) ***Service.*** The notice must be prepared using Form 410C13-N and be served on:

- the claim holder;
- the debtor; and
- the debtor's attorney.

(3) ***Response.*** The claim holder must file a response to the notice within 28 days after its service. The response, which is not subject to Rule 3001(f), must be filed as a supplement to the claim holder's proof of claim. The response must be prepared using Form 410C13-NR and be served on the individuals listed in (b)(1).

(4) ***Court Determination of a Final Cure and***

Payment.

(A) *Motion*. Within 45 days after service of the response under (g)(3) or after service of the trustee's notice under (g)(1) if no response is filed by the claim holder, the debtor or trustee may file a motion to determine whether the debtor has cured all defaults and paid all required postpetition amounts on a claim described in (a). The motion must be prepared using Form 410C13-M2 and be served on the entities listed in (f)(1).

(B) *Response.* If the claim holder disagrees with the facts set forth in the motion, it must file a response within 28 days after the motion is served.

The response must be prepared using Form 410C13-M2R and be served on the individuals listed in (b)(1).

(C) *Court Determination.* After notice and a hearing, the court must determine whether the debtor has cured all defaults and paid all required postpetition amounts. If the claim holder does not respond to the motion or files a response agreeing with the facts set forth in it, the court may enter an appropriate order based on those facts.

(h) Claim Holder's Failure to Give Notice or Respond. If the claim holder fails to provide any information as required by this rule, the court may, after notice and a hearing, do one or more of the following:

(1) preclude the holder from presenting the omitted information in any form as evidence in a contested matter or adversary proceeding in the case—unless the court determines that the failure was substantially justified or is harmless;

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure; and

(3) take any other action authorized by this rule.

Committee Note

The rule is amended to encourage a greater degree of compliance with its provisions and to allow assessments of a mortgage claim's status while a chapter 13 case is pending in order to give the debtor an opportunity to cure any postpetition defaults that may have occurred. Stylistic changes are made throughout the rule, and its title and subdivision headings have been changed to reflect the amended content.

Subdivision (a), which describes the rule's applicability, is amended to delete the words "contractual" and "installment" in the phrase "contractual installment payments" in order to clarify and broaden the rule's applicability. The deletion of "contractual" is intended to

make the rule applicable to home mortgages that may be modified and are being paid according to the terms of the plan rather than strictly according to the contract, including mortgages being paid in full during the term of the plan. The word "installment" is deleted to clarify the rule's applicability to reverse mortgages. They are not paid in installments, but a debtor may be curing a default on a reverse mortgage under the plan. If so, the rule applies.

In addition to stylistic changes, subdivision (b) is amended to provide more detailed provisions about notice of payment changes for home-equity lines of credit ("HELOCs") and to add provisions about the effective date of late payment change notices. The treatment of HELOCs presents a special issue under this rule because the amount owed changes frequently, often in small amounts. Requiring a notice for each change can be overly burdensome. Under new subdivision (b)(2), a HELOC claimant may choose to file only annual payment change notices—including a reconciliation figure (net overpayment or underpayment for the past year)—unless the payment change in a single month is for more than $10. This provision also ensures at least 21 days' notice before a payment increase takes effect.

As a sanction for noncompliance, subdivision (b)(3) now provides that late notices of a payment increase do not go into effect until the first payment due date after the required notice period (at least 21 days) expires. The claim holder will not be permitted to collect the increase for the interim period. There is no delay, however, in the effective date of an untimely notice of a payment decrease. It may even take effect retroactively, if the actual due date of the decreased payment occurred before the claim holder gave notice of the change.

The changes made to subdivisions (c) and (d) are largely stylistic. Stylistic changes are also made to subdivision (e). In addition, the court is given authority, upon motion of a party in interest, to shorten the time for seeking a determination of the fees, expenses, or charges owed. Such a shortening, for example, might be appropriate in the later stages of a chapter 13 case.

Subdivision (f) is new. It provides a procedure for assessing the status of the mortgage at any point before the trustee files the notice under (g)(1). This optional procedure, which should be used only when necessary and appropriate for carrying out the plan, allows the debtor and the trustee to be informed of any deficiencies in payment and to reconcile records with the claim holder in time to become current before the case is closed. The procedure is initiated by motion of the trustee or debtor. An Official Form has been adopted for this purpose. The claim holder then must respond if it disagrees with facts stated in the motion, again using an Official Form to provide the required information. If the claim holder's response asserts such a disagreement, the court, after notice and a hearing, will determine the status of the mortgage claim. If the claim holder fails to respond or does not dispute the facts set forth in the motion, the court may enter an order favorable to the moving party based on those facts.

Under subdivision (g), within 45 days after the last plan payment is made to the trustee, the trustee must file an End-of-Case Notice of Disbursements Made. An Official Form has been adopted for this purpose. The notice will state the amount that the trustee has paid to cure any default on the claim and whether the default has been cured. It will also state the amount that the trustee has disbursed on obligations that came due during the case and whether those payments are current as of the date of the notice. If the trustee has

disbursed no amounts to the claim holder under either or both categories, the notice should be filed stating $0 for the amount disbursed. The claim holder then must respond within 28 days after service of the notice, again using an Official Form to provide the required information.

Either the trustee or the debtor may file a motion for a determination of final cure and payment. The motion, using the appropriate Official Form, may be filed within 45 days after the claim holder responds to the trustee's notice under (g)(1), or, if the claim holder fails to respond to the notice, within 45 days after the notice was served. If the claim holder disagrees with any facts in the motion, it must respond within 28 days after the motion is served, using the appropriate Official Form. The court will then determine the status of the mortgage. A Director's Form provides guidance on the type of information that should be included in the order.

Subdivision (h) was previously subdivision (i). It has been amended to clarify that the listed sanctions are authorized in addition to any other actions that the rule authorizes the court to take if the claim holder fails to provide notice or respond as required by the rule. Stylistic changes have also been made to the subdivision.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 8006. Certifying a Direct Appeal to the Court of Appeals[1]

* * * * *

(g) Request After Certification for a Court of Appeals to Authorize a Direct Appeal. Within 30 days after the certification has become effective under (a), any party to the appeal may ask the court of appeals to authorize a direct appeal by filing a petition with the circuit clerk in accordance with Fed. R. App. P. 6(c).

Committee Note

Rule 8006(g) is revised to clarify that any party to the appeal may file a request that a court of appeals authorize a direct appeal. There is no obligation to do so if no party wishes the court of appeals to authorize a direct appeal.

[1] The changes indicated are to the restyled version of Rule 8006, not yet in effect.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE[1]

Rule 3002.1. ~~Notice Relating to~~ Chapter 13 ~~Claims~~ Claim Secured by a Security Interest in the Debtor's Principal Residence ~~in a Chapter 13 Case~~[2]

(a) In General. This rule applies in a Chapter 13 case to a claim that is secured by a security interest in the debtor's principal residence and for which the plan provides for the trustee or debtor to make ~~contractual installment~~ payments on the debt. Unless the court orders otherwise, the ~~notice~~ requirements of this rule cease when an order terminating or annulling the automatic stay related to that residence becomes effective.

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[1] New material is underlined; matter to be omitted is lined through.

[2] The changes indicated are to the restyled version of Rule 3002.1, not yet in effect.

(b) Notice of a Payment Change; Home-Equity Line of Credit; Effect of an Untimely Notice; Objection.

(1) ***Notice by the Claim Holder—In General.*** The claim holder must file a notice of any change in the payment amount, ~~of an installment payment~~ including ~~any change~~ one resulting from an interest-rate or escrow-account adjustment. ~~At least 21 days before the new payment is due, the~~ The notice must be ~~filed and~~ served on:

- the debtor;
- the debtor's attorney; and
- the trustee.

Except as provided in (b)(2), it must be filed and served at least 21 days before the new payment is due. ~~If the claim arises from a home-equityline of credit, the court may~~

~~modify this requirement.~~

(2) ***Notice of a Change in a Home-Equity Line of Credit.***

(A) *Deadline for the Initial Filing; Later Annual Filing.* If the claim arises from a home-equity line of credit, the notice of a payment change must be filed and served either as provided in (b)(1) or within one year after the bankruptcy-petition filing, and then at least annually.

(B) *Content of the Annual Notice.* The annual notice must:

(i) state the payment amount due for the month when the notice is filed; and

(ii) include a reconciliation amount to account for any

overpayment or underpayment during the prior year.

(C) *Amount of the Next Payment.* The first payment due at least 21 days after the annual notice is filed and served must be increased or decreased by the reconciliation amount.

(D) *Effective Date.* The new payment amount stated in the annual notice (disregarding the reconciliation amount) is effective on the first payment due date after the payment under (C) has been made and remains effective until a new notice becomes effective.

(E) *Payment Changes Greater Than $10.* If the claim holder chooses to give

annual notices under (b)(2) and the monthly payment increases or decreases by more than $10 in any month, the holder must file and serve (in addition to the annual notice) a notice under (b)(1) for that month.

(3) ***Effect of an Untimely Notice.*** If the claim holder does not timely file and serve the notice required by (b)(1) or (b)(2), the effective date of the new payment amount is as follows:

(A) when the notice concerns a payment increase, on the first payment due date that is at least 21 days after the untimely notice was filed and served; or

(B) when the notice concerns a payment decrease, on the actual payment due date, even if it is prior to the notice.

(~~2~~4) ***Party in Interest's Objection.*** A party in interest who objects to ~~the~~ a payment change noticed under (b)(1) or (b)(2) may file and serve a motion to determine ~~whether the change is required to maintain payments under § 1322(b)(5)~~the change's validity. Unless the court orders otherwise, if no motion is filed ~~by~~ before the day ~~before~~ the new payment is due, the change goes into effect on that date.

(c) Fees, Expenses, and Charges Incurred After the Case Was Filed; Notice by the Claim Holder. The claim holder must file a notice itemizing all fees, expenses, and charges incurred after the case was filed that the holder asserts are recoverable

against the debtor or the debtor's principal residence. Within 180 days after the fees, expenses, or charges ~~were~~ are incurred, the notice must be filed and served on the individuals listed in (b)(1).~~:~~

~~• the debtor;~~

~~• the debtor's attorney; and~~

~~• the trustee.~~

(d) Filing Notice as a Supplement to a Proof of Claim. A notice under (b) or (c) must be filed as a supplement to ~~the~~ a proof of claim using Form 410S-1 or 410S-2, respectively. The notice is not subject to Rule 3001(f).

(e) Determining Fees, Expenses, or Charges. On a party in interest's motion ~~filed within one year after the notice in (c) was served~~, the court must, after notice and a hearing, determine whether paying any claimed fee, expense, or charge is required by the

underlying agreement and applicable nonbankruptcy law. ~~to cure a default or maintain payments under § 1322(b)(5).~~The motion must be filed within one year after the notice under (c) was served, unless a party in interest requests and the court orders a shorter period.

(f) Motion to Determine Status; Response; Court Determination.

(1) ***Timing; Content and Service.*** At any time after the date of the order for relief under Chapter 13 and until the trustee files the notice under (g)(1), the trustee or debtor may file a motion to determine the status of any claim described in (a). The motion must be prepared using Form 410C13-M1 and be served on:

- the debtor and the debtor's attorney, if the trustee is the movant;
- the trustee, if the debtor is the movant; and
- the claim holder.

(2) ***Response; Content and Service.*** If the claim holder disagrees with facts set forth in the motion, it must file a response within 28 days after the motion is served. The response must be prepared using Form 410C13-M1R and be served on the individuals listed in (b)(1).

(3) ***Court Determination.*** If the claim holder's response asserts a disagreement with facts set forth in the motion, the court must, after notice and a hearing, determine the status of the claim and enter an appropriate order. If the claim holder does not respond to the

motion or files a response agreeing with the facts set forth in it, the court may grant the motion based on those facts and enter an appropriate order.

(~~f~~g) ~~Notice of the Final Cure Payment.~~ Trustee's End-of-Case Notice of Disbursements Made; Response; Court Determination.

(1) ~~*Contents of a Notice*~~ ***Timing and Content***. Within ~~30~~ 45 days after the debtor completes all payments due to the trustee under a Chapter 13 plan, the trustee must file a notice:

(A) stating ~~that the debtor has paid in full the~~ what amount ~~required~~ the trustee disbursed to the claim holder to cure any default ~~on the claim~~and whether it has been cured; ~~and~~

(B) stating what amount the trustee disbursed to the claim holder for

payments that came due during the pendency of the case and whether such payments are current as of the date of the notice; and

(C) informing the claim holder of its obligation to ~~file and serve a response~~ respond under (g)(3).

(2) ***~~Serving the Notice~~ Service.*** The notice must be prepared using Form 410C13-N and be served on:

- the claim holder;
- the debtor; and
- the debtor's attorney.

(3) ***Response.*** The claim holder must file a response to the notice within 28 days after its service. The response, which is not subject to Rule 3001(f), must be filed as a supplement to the claim holder's proof of claim. The

response must be prepared using Form 410C13-NR and be served on the individuals listed in (b)(1).

~~(3) ***The Debtor's Right to File.*** The debtor may file and serve the notice if:~~

~~(A) the trustee fails to do so;~~

~~(B) and the debtor contends that the final cure payment has been made and all plan payments have been completed.~~

(4) ***Court Determination of a Final Cure and Payment.***

(A) *Motion*. Within 45 days after service of the response under (g)(3) or after service of the trustee's notice under (g)(1) if no response is filed by the claim holder, the debtor or trustee may file a motion to determine whether the debtor has cured all

defaults and paid all required postpetition amounts on a claim described in (a). The motion must be prepared using Form 410C13-M2 and be served on the entities listed in (f)(1).

(B) *Response.* If the claim holder disagrees with the facts set forth in the motion, it must file a response within 28 days after the motion is served. The response must be prepared using Form 410C13-M2R and be served on the individuals listed in (b)(1).

(C) *Court Determination.* After notice and a hearing, the court must determine whether the debtor has cured all defaults and paid all required postpetition amounts. If the

claim holder does not respond to the motion or files a response agreeing with the facts set forth in it, the court may enter an appropriate order based on those facts.

~~**(g) Response to a Notice of the Final Cure Payment.**~~

~~**(1)** ***Required Statement.*** Within 21 days after the notice under (f) is served, the claim holder must file and serve a statement that:~~

~~(A) indicates whether:~~

~~(i) the claim holder agrees that the debtor has paid in full the amount required to cure any default on the claim; and~~

~~(ii) the debtor is otherwise current on all payments under § 1322(b)(5); and~~

~~(B) itemizes the required cure or~~

~~postpetition amounts, if any, that the claim holder contends remain unpaid as of the statement's date.~~

~~(2) ***Persons to be Served.*** The holder must serve the statement on:~~

- ~~the debtor;~~
- ~~the debtor's attorney; and~~
- ~~the trustee.~~

~~(3) ***Statement to be a Supplement.*** The statement must be filed as a supplement to the proof of claim and is not subject to Rule 3001(f).~~

~~**(h) Determining the Final Cure Payment.** On the debtor's or trustee's motion filed within 21 days after the statement under (g)is served, the court must, after notice and a hearing, determine whether the debtor has cured the default and made all required postpetition payments.~~

(~~i~~h) Claim Holder's Failure to Give Notice or

Respond. If the claim holder fails to provide any information as required by ~~(b), (c), or (g)~~this rule, the court may, after notice and a hearing, ~~take one or both of these actions~~do one or more of the following:

(1) preclude the holder from presenting the omitted information in any form as evidence in a contested matter or adversary proceeding in the case—unless the court determines that the failure was substantially justified or is harmless; ~~and~~

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure; and

(3) take any other action authorized by this rule.

Committee Note

The rule is amended to encourage a greater degree of compliance with its provisions and to allow assessments of a mortgage claim's status while a chapter 13 case is pending in order to give the debtor an opportunity to cure any postpetition defaults that may have occurred. Stylistic changes are made throughout the rule, and its title and

subdivision headings have been changed to reflect the amended content.

Subdivision (a), which describes the rule's applicability, is amended to delete the words "contractual" and "installment" in the phrase "contractual installment payments" in order to clarify and broaden the rule's applicability. The deletion of "contractual" is intended to make the rule applicable to home mortgages that may be modified and are being paid according to the terms of the plan rather than strictly according to the contract, including mortgages being paid in full during the term of the plan. The word "installment" is deleted to clarify the rule's applicability to reverse mortgages. They are not paid in installments, but a debtor may be curing a default on a reverse mortgage under the plan. If so, the rule applies.

In addition to stylistic changes, subdivision (b) is amended to provide more detailed provisions about notice of payment changes for home-equity lines of credit ("HELOCs") and to add provisions about the effective date of late payment change notices. The treatment of HELOCs presents a special issue under this rule because the amount owed changes frequently, often in small amounts. Requiring a notice for each change can be overly burdensome. Under new subdivision (b)(2), a HELOC claimant may choose to file only annual payment change notices—including a reconciliation figure (net overpayment or underpayment for the past year)—unless the payment change in a single month is for more than $10. This provision also ensures at least 21 days' notice before a payment increase takes effect.

As a sanction for noncompliance, subdivision (b)(3) now provides that late notices of a payment increase do not go into effect until the first payment due date after the required notice period (at least 21 days) expires. The claim

holder will not be permitted to collect the increase for the interim period. There is no delay, however, in the effective date of an untimely notice of a payment decrease. It may even take effect retroactively, if the actual due date of the decreased payment occurred before the claim holder gave notice of the change.

The changes made to subdivisions (c) and (d) are largely stylistic. Stylistic changes are also made to subdivision (e). In addition, the court is given authority, upon motion of a party in interest, to shorten the time for seeking a determination of the fees, expenses, or charges owed. Such a shortening, for example, might be appropriate in the later stages of a chapter 13 case.

Subdivision (f) is new. It provides a procedure for assessing the status of the mortgage at any point before the trustee files the notice under (g)(1). This optional procedure, which should be used only when necessary and appropriate for carrying out the plan, allows the debtor and the trustee to be informed of any deficiencies in payment and to reconcile records with the claim holder in time to become current before the case is closed. The procedure is initiated by motion of the trustee or debtor. An Official Form has been adopted for this purpose. The claim holder then must respond if it disagrees with facts stated in the motion, again using an Official Form to provide the required information. If the claim holder's response asserts such a disagreement, the court, after notice and a hearing, will determine the status of the mortgage claim. If the claim holder fails to respond or does not dispute the facts set forth in the motion, the court may enter an order favorable to the moving party based on those facts.

Under subdivision (g), within 45 days after the last plan payment is made to the trustee, the trustee must file an

End-of-Case Notice of Disbursements Made. An Official Form has been adopted for this purpose. The notice will state the amount that the trustee has paid to cure any default on the claim and whether the default has been cured. It will also state the amount that the trustee has disbursed on obligations that came due during the case and whether those payments are current as of the date of the notice. If the trustee has disbursed no amounts to the claim holder under either or both categories, the notice should be filed stating $0 for the amount disbursed. The claim holder then must respond within 28 days after service of the notice, again using an Official Form to provide the required information.

Either the trustee or the debtor may file a motion for a determination of final cure and payment. The motion, using the appropriate Official Form, may be filed within 45 days after the claim holder responds to the trustee's notice under (g)(1), or, if the claim holder fails to respond to the notice, within 45 days after the notice was served. If the claim holder disagrees with any facts in the motion, it must respond within 28 days after the motion is served, using the appropriate Official Form. The court will then determine the status of the mortgage. A Director's Form provides guidance on the type of information that should be included in the order.

Subdivision (h) was previously subdivision (i). It has been amended to clarify that the listed sanctions are authorized in addition to any other actions that the rule authorizes the court to take if the claim holder fails to provide notice or respond as required by the rule. Stylistic changes have also been made to the subdivision.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE[1]

Rule 8006. Certifying a Direct Appeal to the Court of Appeals[2]

* * * * *

(g) Request <u>After Certification</u> for ~~Leave to Take a Direct Appeal to~~ a Court of Appeals ~~After Certification~~ <u>to Authorize a Direct Appeal</u>. Within 30 days after the certification has become effective under (a), ~~a request for leave to take a direct appeal to a court of appeals must be filed~~ <u>any party to the appeal may ask the court of appeals to authorize a direct appeal by filing a petition</u> with the circuit clerk in accordance with Fed. R. App. P. 6(c).

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[1] New material is underlined; matter to be omitted is lined through.

[2] The changes indicated are to the restyled version of Rule 8006, not yet in effect.

Committee Note

Rule 8006(g) is revised to clarify that any party to the appeal may file a request that a court of appeals authorize a direct appeal. There is no obligation to do so if no party wishes the court of appeals to authorize a direct appeal.

Agenda E-19
Rules
September 2024

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 4, 2024. All members participated.

* * * * *

FEDERAL RULES OF BANKRUPTCY PROCEDURE

*Rules * * * Recommended for Approval and Transmission*

The Advisory Committee on Bankruptcy Rules recommended for final approval: (1) amendments to Bankruptcy Rule 3002.1 * * *; (2) amendments to Rule 8006; * * *. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case) and Related Official Forms

Rule 3002.1 is amended to encourage a greater degree of compliance with its provisions by adding an optional motion process the debtor or case trustee can initiate to determine a mortgage claim's status while a chapter 13 case is pending to give the debtor an opportunity to cure any postpetition defaults that may have occurred. The changes also add more detailed provisions about notice of payment changes for home-equity lines of credit.

* * * * *

Stylistic changes are made throughout the rule, and its title and subdivision headings have been changed to reflect the amended content.

Rule 8006 (Certifying a Direct Appeal to a Court of Appeals)

Rule 8006 addresses the process for requesting that an appeal go directly from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). The proposed amendment to Rule 8006(g) clarifies that any party to the appeal may file a request that a court of appeals authorize a direct appeal. There is no obligation to do so if no party wishes the court of appeals to authorize a direct appeal. This amendment dovetails with the proposed amendments to Appellate Rule 6 discussed earlier in this report.

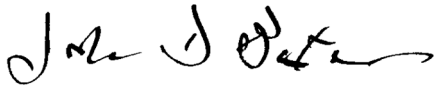
* * * * *

Recommendation: That the Judicial Conference approve the following:

a. Proposed amendments to Bankruptcy Rules 3002.1 and 8006, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; * * *

* * * * *

Respectfully submitted,



John D. Bates, Chair

Paul Barbadoro
Elizabeth J. Cabraser
Louis A. Chaiten
William J. Kayatta, Jr.
Edward M. Mansfield
Troy A. McKenzie
Patricia Ann Millett
Lisa O. Monaco
Andrew J. Pincus
D. Brooks Smith
Kosta Stojilkovic
Jennifer G. Zipps

* * * * *

Excerpt from the May 10, 2024 Report of the Advisory Committee on Bankruptcy Rules

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Rebecca B. Connelly, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules*

DATE: May 10, 2024

I. Introduction

The Advisory Committee on Bankruptcy Rules met in Denver on April 11, 2024. Two Committee members attended remotely; the rest of the Committee met in person. * * *

At the meeting, the Advisory Committee voted to give final approval to amendments to Bankruptcy Rules 3002.1 (Notice Relating to Claims Secured by a Security Interest in the

* A copy of the full committee report can be found in the June 2024 Standing Committee agenda book publicly available on www.uscourts.gov.

Debtor's Principal Residence in a Chapter 13 Case) and Bankruptcy Rule 8006 (Certifying a Direct Appeal to a Court of Appeals), as well as * * *.

* * * * *

Part II of this report presents those action items. They are organized as follows:

A. Items for Final Approval

Rules and Forms published for comment in August 2023:

- Rule 3002.1;
- Rule 8006;
- * * *; and
- * * *.

* * * * *

II. Action Items

A. Items for Final Approval

The Advisory Committee recommends that the following rule and form amendments and new Official Forms that were published for public comment in 2023 and are discussed below be given final approval. Bankruptcy Appendix A includes the rules and forms that are in this group, along with summaries of the comments that were submitted.

Action Item 1. Rule 3002.1 (Notice Relating to Claims Secured by a Security Interest in the Debtor's Principal Residence in a Chapter 13 Case). After proposed amendments to Rule 3002.1 were published in 2021, the Advisory Committee made significant revisions in response to the comments that were received. The rule with revised amendments was republished in 2023. Ten sets of comments concerning the rule were submitted. They ranged from addressing specific wording issues and proposed deadlines to raising some broader issues, such as the scope of the rule and whether limitations should be placed on the authority to file a motion to determine the status of a mortgage.

The Advisory Committee considered these comments during its spring meeting, along with the Consumer Subcommittee's recommendations. It now recommends that the revised rule be given final approval, with the changes to the published version of the rule discussed below.

Subdivision (a) – In General. The Advisory Committee voted to delete the word "contractual" in the first sentence of subdivision (a) so that the end of the sentence now reads, "for which the plan provides for the trustee or debtor to make payments on the debt." Several comments were submitted suggesting this deletion. They explained that sometimes home mortgages may be modified in chapter 13—such as those paid in full or short-term mortgages—

and they are paid according to the terms of the plan, rather than strictly according to the terms of the contract. The Advisory Committee thought that the rule should apply in these situations and that making this change would not require republication. The Advisory Committee also approved a change to the Committee Note's discussion of subdivision (a) that clarifies that the amended rule applies to reverse mortgages.

Comments suggested other expansions of the rule's applicability that the Advisory Committee decided against. These included making the rule applicable to mortgages on property other than the debtor's principal residence and to liens not created by agreement, such as statutory liens. These suggestions may have merit, as they would assist debtors in emerging from chapter 13 with mortgages and other types of real-property liens current or paid in full. However, because proposed amendments to the rule have now been published twice, the Advisory Committee did not want to propose any changes to subdivision (a) that would require yet another publication. Members thought that expanding the rule beyond the debtor's principal residence or making it applicable to statutory liens runs that risk. Otherwise, new types of creditors could be affected who were not given notice that the rule would apply to them.

Subdivision (b) – Notice of a Payment Change; Home-Equity Line of Credit; Effect of an Untimely Notice; Objection. In response to several of the mortgage organizations' comments, the Advisory Committee voted to state in subdivision (b)(3)(B) that a payment decrease is effective on the actual payment due date, even if that date is in the past. There are instances where a payment decrease is retroactively applied, and the debtor should get the benefit of that decrease. As revised, (b)(3)(B) would state that the effective date of the new payment amount is, "when the notice concerns a payment decrease, on the actual payment due date, even if prior to the notice."

Subdivision (f) – Motion to Determine Status; Response; Court Determination. The Advisory Committee voted to make two changes to this subdivision. First, in (f)(2) it changed the deadline for responding to a trustee's or debtor's motion from 21 to 28 days. Mortgage organizations commented that they need that amount of time to respond properly, and it is the amount of time that subdivision (g)(3) provides for responding to the trustee's end-of-case notice.

Second, the Advisory Committee agreed with the National Bankruptcy Conference's comment that the phrase "and enter an appropriate order" should be added at the end of subdivision (f)(3) to be consistent with other provisions in the rule about the court's determination.

Mortgage organizations suggested a number of limitations that they thought should be added to prevent the abusive use of this subdivision. Those restrictions included limiting the time period during which a motion to determine the status of a mortgage could be filed or limiting the number of times it could be filed, specifying potential remedies for the mortgage claimant if the provision is misused, providing that a pro se debtor must provide an attestation as to the facts set forth in the motion, and providing that it is a ground for setting aside an adverse order if the movant failed to name and serve the correct mortgage claimant/servicer. The Advisory Committee made no changes in response to these comments. If a debtor, debtor's attorney, or trustee files a motion under this provision, Rule 9011 applies and could result in sanctions if the court determines that the motion was filed "for any improper purpose" or that the

factual allegations lack evidentiary support. Furthermore, relief would be available outside of this rule if an adverse order is entered against a party that was not served.

Subdivision (g) – Trustee's End-of-Case Notice of Payments Made; Response; Court Determination. The Advisory Committee voted to change the words "payments" and "paid" in the title and in subdivision (g)(1) to "disbursements" and "disbursed." That terminology better describes the role of chapter 13 trustees. The Advisory Committee also deleted two uses of "contractual" in (g)(1)(B) to be consistent with the recommended change to subdivision (a).

In subdivision (g)(1)(A), the Advisory Committee deleted "if any" after "what amount" in order to avoid suggesting that a trustee who makes no disbursements to the mortgage claim holder does not need to file an end-of-case notice. It also added to the Committee Note the statement that "If the trustee has disbursed no amounts to the claim holder under either or both categories, the notice should be filed stating $0 for the amount disbursed."

Several comments noted that in subdivision (g)(4)(A), no deadline was stated for filing a motion to determine the status of the mortgage if the claim holder responded to the trustee's notice. It merely said that the motion could be filed "[a]fter service of the response." Agreeing with the comments, the Advisory Committee voted to rewrite the first sentence of subparagraph (A) to make a 45-day deadline applicable to that situation as well as to when the claim holder does not respond to the notice.

In subdivision (g)(4)(B), the Advisor Committee changed the time for the claim holder to respond to the motion from 21 to 28 days, just as in subdivision (f)(2).

Committee Note. In addition to the changes discussed above, the Advisory Committee made conforming changes to the Committee Note.

Action Item 2. Rule 8006(g) (Request After Certification for a Court of Appeals to Authorize a Direct Appeal). Last August the Standing Committee published an amendment to Fed. R. Bankr. P. 8006(g) suggested by Bankruptcy Judge A. Benjamin Goldgar to make explicit what the Advisory Committee believed was the existing meaning of the Rule—that any party to an appeal of a case that has been certified for direct appeal may submit a request to the court of appeals to accept the direct appeal under 28 U.S.C. § 158(d)(2). The form of the amendment was developed in consultation with the Advisory Committee on Appellate Rules, which was concurrently preparing an amendment to Appellate Rule 6(c) (Appeal in a Bankruptcy Case – Direct Review by Permission Under 28 U.S.C. § 158(d)(2)) to make sure the rules worked well together. Both amended rules were published at the same time.

The only comment on the published amendment was a submission from the Minnesota State Bar Association's Assembly supporting it (and the other published proposed amendments to the Bankruptcy Rules, Appellate Rules, and Civil Rules).

The Advisory Committee approved the amendment to Rule 8006(g) as published.

* * * * *

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE ROBERT J. CONRAD, JR.
Secretary

October 17, 2024

MEMORANDUM

To: Chief Justice of the United States
Associate Justices of the Supreme Court

From: Judge Robert J. Conrad, Jr.
Secretary

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit for the Court's consideration proposed amendments to Rules 16 and 26 of the Federal Rules of Civil Procedure and new Rule 16.1, which have been approved by the Judicial Conference. The Judicial Conference recommends that the amended rules and new rule be adopted by the Court and transmitted to Congress pursuant to law.

For your assistance in considering the proposed amendments and new rule, I am transmitting (i) clean and blackline copies of the rules and new rule along with committee notes; (ii) an excerpt from the September 2024 report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) an excerpt from the May 2024 report of the Advisory Committee on Civil Rules.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling and Management.

* * * * *

(3) ***Contents of the Order.***

* * * * *

(B) *Permitted Contents*.

* * * * *

(iv) include the timing and method for complying with Rule 26(b)(5)(A) and any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after

information is produced, including agreements reached under Federal Rule of Evidence 502;

* * * * *

Committee Note

Rule 16(b) is amended in tandem with an amendment to Rule 26(f)(3)(D). In addition, two words—"and management"—are added to the title of this rule in recognition that it contemplates that the court will in many instances do more than establish a schedule in its Rule 16(b) order; the focus of this amendment is an illustration of such activity.

The amendment to Rule 26(f)(3)(D) directs the parties to discuss and include in their discovery plan a method for complying with the requirements in Rule 26(b)(5)(A). It also directs that the discovery plan address the timing for compliance with this requirement, in order to avoid problems that can arise if issues about compliance emerge only at the end of the discovery period.

Early attention to the particulars on this subject can avoid problems later in the litigation by establishing case-specific procedures up front. It may be desirable for the Rule 16(b) order to provide for "rolling" production that may identify possible disputes about whether certain withheld materials are indeed protected. If the parties are unable to resolve those disputes, it is often desirable to have them resolved at an early stage by the court, in part so that

the parties can apply the court's resolution of the issues in further discovery in the case.

Because the specific method of complying with Rule 26(b)(5)(A) depends greatly on the specifics of a given case there is no overarching standard for all cases. In the first instance, the parties themselves should discuss these specifics during their Rule 26(f) conference; these amendments to Rule 16(b) recognize that the court can provide direction early in the case. Though the court ordinarily will give much weight to the parties' preferences, the court's order prescribing the method for complying with Rule 26(b)(5)(A) does not depend on party agreement. But the parties may report that it is too early to settle on a specific method, and the court should be open to modifying its order should modification be warranted by evolving circumstances in the case.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 16.1. Multidistrict Litigation

(a) Initial Management Conference. After the Judicial Panel on Multidistrict Litigation transfers actions, the transferee court should schedule an initial management conference to develop an initial plan for orderly pretrial activity in the MDL proceedings.

(b) Report for the Conference.

(1) ***Submitting a Report.*** The transferee court should order the parties to meet and to submit a report to the court before the conference.

(2) ***Required Content: the Parties' Views on Leadership Counsel and Other Matters.*** The report must address any matter the court designates—which may include any matter in Rule 16—and, unless the court orders otherwise, the parties' views on:

(A) whether leadership counsel should be appointed and, if so:

(i) the timing of the appointments;

(ii) the structure of leadership counsel;

(iii) the procedure for selecting leadership and whether the appointments should be reviewed periodically;

(iv) their responsibilities and authority in conducting pretrial activities and any role in facilitating resolution of the MDL proceedings;

(v) the proposed methods for regularly communicating with

and reporting to the court and nonleadership counsel;

(vi) any limits on activity by nonleadership counsel; and

(vii) whether and when to establish a means for compensating leadership counsel;

(B) any previously entered scheduling or other orders that should be vacated or modified;

(C) a schedule for additional management conferences with the court;

(D) how to manage the direct filing of new actions in the MDL proceedings; and

(E) whether related actions have been—or are expected to be—filed in other

courts, and whether to adopt methods for coordinating with them.

(3) ***Additional Required Content: the Parties' Initial Views on Various Matters.*** Unless the court orders otherwise, the report also must address the parties' initial views on:

(A) whether consolidated pleadings should be prepared;

(B) how and when the parties will exchange information about the factual bases for their claims and defenses;

(C) discovery, including any difficult issues that may arise;

(D) any likely pretrial motions;

(E) whether the court should consider any measures to facilitate resolving some or all actions before the court;

(F) whether any matters should be referred to a magistrate judge or a master; and

(G) the principal factual and legal issues likely to be presented.

(4) ***Permitted Content.*** The report may include any other matter that the parties wish to bring to the court's attention.

(c) **Initial Management Order.** After the conference, the court should enter an initial management order addressing the matters in Rule 16.1(b) and, in the court's discretion, any other matters. This order controls the course of the proceedings unless the court modifies it.

Committee Note

The Multidistrict Litigation Act, 28 U.S.C. § 1407, was adopted in 1968. It empowers the Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or consolidated pretrial proceedings to promote the just and efficient conduct of such actions. The number of civil actions subject to transfer orders from the Panel has

increased since the statute was enacted but has leveled off in recent years. These actions have accounted for a substantial portion of the federal civil docket. There has been no reference to multidistrict litigation (MDL proceedings) in the Civil Rules. The addition of Rule 16.1 is designed to provide a framework for the initial management of MDL proceedings.

Not all MDL proceedings present the management challenges this rule addresses, and, thus, it is important to maintain flexibility in managing MDL proceedings. Of course, other multiparty litigation that did not result from a Judicial Panel transfer order may present similar management challenges. For example, multiple actions in a single district (sometimes called related cases and assigned by local rule to a single judge) may exhibit characteristics similar to MDL proceedings. In such situations, courts may find it useful to employ procedures similar to those Rule 16.1 identifies in handling those multiparty proceedings. In both MDL proceedings and other multiparty litigation, the Manual for Complex Litigation also may be a source of guidance.

Rule 16.1(a). Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial management conference soon after the Judicial Panel transfer occurs. One purpose of the initial management conference is to begin to develop an initial management plan for the MDL proceedings and, thus, this initial conference may only address some of the matters referenced in Rule 16.1(b)(2)-(3). That initial MDL management conference ordinarily would not be the only management conference held during the MDL proceedings. Although holding an initial management conference in MDL proceedings is not mandatory under Rule 16.1(a), early attention to the matters

identified in Rule 16.1(b)(2)-(3) should be of great value to the transferee judge and the parties.

Rule 16.1(b)(1). The court ordinarily should order the parties to meet to submit a report to the court about the matters designated in Rule 16.1(b)(2)-(3) prior to the initial management conference. This should be a single report, but it may reflect the parties' divergent views on these matters.

Rule 16.1(b)(2). Unless the court orders otherwise, the report must address all of the matters identified in Rule 16.1(b)(2) (as well as all those in 16.1(b)(3)). The court also may direct the parties to address any other matter, whether or not listed in Rule 16.1(b) or in Rule 16. Rules 16.1(b) and 16 provide a series of prompts for the court and do not constitute a mandatory checklist for the transferee judge to follow.

The rule distinguishes between the matters identified in Rule 16.1(b)(2)(B)-(E) and in Rule 16.1(b)(3) because court action on a matter identified in Rule 16.1(b)(3) may be premature before leadership counsel is appointed, if that is to occur. For this reason, 16.1(b)(2) calls for the parties' views on the matters designated in (b)(2) whereas 16.1(b)(3) requires only the parties' initial views on those matters listed in (b)(3).

Rule 16.1(b)(2)(C) directs the parties to suggest a schedule for additional management conferences during which the same or other matters may be addressed, and the Rule 16.1(c) initial management order controls only until it is modified. The goal of the initial management conference is to begin to develop an initial management plan, not necessarily to adopt a final plan for the entirety of the MDL proceeding. Experience has shown, however, that the matters identified in Rule 16.1(b)(2)(B)-(E) and

Rule 16.1(b)(3) are often important to the management of MDL proceedings.

Rule 16.1(b)(2)(A). Appointment of leadership counsel is not universally needed in MDL proceedings, and the timing of appointments may vary. But, to manage the MDL proceedings, the court may decide to appoint leadership counsel and many times this will be one of the early orders the transferee judge enters. Rule 16.1(b)(2)(A) calls attention to several topics the court should consider if appointment of leadership counsel seems warranted.

The first topic is the timing of appointment of leadership. Ordinarily, transferee judges enter orders appointing leadership counsel separately from orders addressing the matters in Rule 16.1(b)(2)(B)-(E) and 16.1(b)(3).

In some MDL proceedings it may be important that leadership counsel be organized into committees with specific duties and responsibilities. Rule 16.1(b)(2)(A)(ii) therefore prompts counsel to provide the court with specific suggestions on the leadership structure that should be employed.

The procedure for selecting leadership counsel is addressed in item (iii). There is no single method that is best for all MDL proceedings. The transferee judge is responsible to ensure that the lawyers appointed to leadership positions are able to do the work and will responsibly and fairly discharge their leadership obligations. In undertaking this process, a transferee judge should consider the benefits of geographical distribution as well as differing experiences, skills, knowledge, and backgrounds. Courts have considered the nature of the actions and parties, the needs of the litigation, and each lawyer's qualifications, expertise, and

access to resources. They have also taken into account how the lawyers will complement one another and work collectively.

MDL proceedings do not have the same commonality requirements as class actions, so substantially different categories of claims or parties may be included in the same MDL proceeding and leadership may be comprised of attorneys who represent parties asserting a range of claims in the MDL proceeding. For example, in some MDL proceedings there may be claims by individuals who suffered injuries and also claims by third-party payors who paid for medical treatment. The court may need to take these differences into account in making leadership appointments.

Courts have selected leadership counsel through combinations of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings.

The rule also calls for advising the court whether appointment to leadership should be reviewed periodically. Transferee courts have found that appointment for a term is useful as a management tool for the court to monitor progress in the MDL proceedings.

Item (iv) recognizes that another important role for leadership counsel in some MDL proceedings is to facilitate resolution of claims. Resolution may be achieved by such means as early exchange of information, expedited discovery, pretrial motions, bellwether trials, and settlement negotiations.

An additional task of leadership counsel is to communicate with the court and with nonleadership counsel as proceedings unfold. Item (v) directs the parties to report

how leadership counsel will communicate with the court and nonleadership counsel. In some instances, the court or leadership counsel have created websites that permit nonleadership counsel to monitor the MDL proceedings, and sometimes online access to court hearings provides a method for monitoring the proceedings.

Another responsibility of leadership counsel is to organize the MDL proceedings in accordance with the court's initial management order under Rule 16.1(c). In some MDL proceedings, there may be tension between the approach that leadership counsel takes in handling pretrial matters and the preferences of individual parties and nonleadership counsel. As item (vi) recognizes, it may be necessary for the court to give priority to leadership counsel's pretrial plans when they conflict with initiatives sought by nonleadership counsel. The court should, however, ensure that nonleadership counsel have suitable opportunities to express their views to the court, and take care not to interfere with the responsibilities nonleadership counsel owe their clients.

Finally, item (vii) addresses whether and when to establish a means to compensate leadership counsel for their added responsibilities. Courts have entered orders pursuant to the common benefit doctrine establishing specific protocols for the management of case staffing, timekeeping, cost reimbursement, and related common benefit issues. But it may be best to defer entering a specific order relating to a common benefit fee and expenses until well into the proceedings, when the court is more familiar with the effects of such an order and the activities of leadership counsel.

If proposed class actions are included within the MDL proceeding, Rule 23(g) applies to appointment of class counsel should the court eventually certify one or more

classes, and the court may also choose to appoint interim class counsel before resolving the certification question. In such MDL proceedings, the court must be alert to the relative responsibilities of leadership counsel under Rule 16.1 and class counsel under Rule 23(g). Rule 16.1 does not displace Rule 23.

Rule 16.1(b)(2)(B)-(E) and (3). Rule 16.1(b)(2) and (3) identify a number of matters that often are important in the management of MDL proceedings. The matters identified in Rule 16.1(b)(2)(B)-(E) frequently call for early action by the court. The matters identified by Rule 16.1(b)(3) are in a separate paragraph of the rule because, in the absence of appointment of leadership counsel should appointment be warranted, the parties may be able to provide only their initial views on these matters at the conference.

Rule 16.1(b)(2)(B). When multiple actions are transferred to a single district pursuant to 28 U.S.C. § 1407, those actions may have reached different procedural stages in the district courts from which they were transferred. In some, Rule 26(f) conferences may have occurred and Rule 16(b) scheduling orders may have been entered. Those scheduling orders are likely to vary. Managing the centralized MDL proceedings in a consistent manner may warrant vacating or modifying scheduling orders or other orders entered in the transferor district courts, as well as any scheduling orders previously entered by the transferee judge.

Rule 16.1(b)(2)(C). The Rule 16.1(a) conference is the initial management conference. Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceeding to effectively manage the litigation and promote clear, orderly,

and open channels of communication between the parties and the court on a regular basis.

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The existence of such actions can have important consequences for the management of the MDL proceeding. For example, the coordination of overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL

transferee judge be aware of whether such actions in other courts have been filed or are anticipated.

Rule 16.1(b)(3). As compared to the matters listed in Rule 16.1(b)(2)(B)-(E), Rule 16.1(b)(3) identifies matters that may be more fully addressed once leadership is appointed, should leadership be recommended, and thus, in their report the parties may only be able to provide their initial views on these matters.

Rule 16.1(b)(3)(A). For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers, in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. The Rules of Civil Procedure, including the pleading rules, continue to apply in all MDL proceedings. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceedings depends on the purpose of the consolidated pleadings in the MDL proceeding. Decisions regarding whether to use master pleadings can have significant implications in MDL proceedings, as the Supreme Court noted in *Gelboim v. Bank of America Corp.*, 574 U.S. 405, 413 n.3 (2015).

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management method for planning and organizing the proceedings. Such methods can be used early on when information is being exchanged between the parties or during the discovery process addressed in Rule 16.1(b)(3)(C).

The level of detail called for by such methods should be carefully considered to meet the purpose to be served and avoid undue burdens. Early exchanges may depend on a number of factors, including the types of cases before the court. And the timing of these exchanges may depend on other factors, such as motions to dismiss or other early matters and their impact on the early exchange of information. Other factors might include whether there are issues that should be addressed early in the proceeding (e.g., jurisdiction, general causation, or preemption) and the number of plaintiffs in the MDL proceeding.

This court-ordered exchange of information may be ordered independently from the discovery rules, which are addressed in Rule 16.1(b)(3)(C). Alternatively, in some cases, transferee judges have ordered that such exchanges of information be made under Rule 33 or 34. Under some circumstances—after taking account of whether the party whose claim or defense is involved has reasonable access to needed information—the court may find it appropriate to employ expedited methods to resolve claims or defenses not supported after the required information exchange.

Rule 16.1(b)(3)(C). A major task for the MDL transferee judge is to supervise discovery in an efficient manner. The principal issues in the MDL proceeding may help guide the discovery plan and avoid inefficiencies and unnecessary duplication.

Rule 16.1(b)(3)(D). Early attention to likely pretrial motions can be important to facilitate progress and efficiently manage the MDL proceedings. The manner and timing in which certain legal and factual issues are to be addressed by the court can be important in determining the most efficient method for discovery.

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Rule 16.1(b)(3)(F). MDL transferee judges may refer matters to a magistrate judge or a master to expedite the pretrial process or to play a part in facilitating communication between the parties, including but not limited to settlement negotiations. It can be valuable for the court to know the parties' positions about the possible appointment of a master before considering whether such an appointment should be made. Rule 53 prescribes procedures for appointment of a master.

Rule 16.1(b)(3)(G). Orderly and efficient pretrial activity in MDL proceedings can be facilitated by early identification of the principal factual and legal issues likely to be presented. Depending on the issues presented, the court may conclude that certain factual issues should be pursued through early discovery, and certain legal issues should be addressed through early motion practice.

Rule 16.1(b)(4). In addition to the matters the court has directed counsel to address, the parties may choose to discuss and report about other matters that they believe the transferee judge should address at the initial management conference.

Rule 16.1(c). Effective and efficient management of MDL proceedings benefits from a comprehensive management order. An initial management order need not address all matters designated under Rule 16.1(b) if the court determines the matters are not significant to the MDL proceeding or would better be addressed in a subsequent order. There is no requirement under Rule 16.1 that the court set specific time limits or other scheduling provisions as in ordinary litigation under Rule 16(b)(3)(A). Because active judicial management of MDL proceedings must be flexible, the court should be open to modifying its initial management order in light of developments in the MDL proceedings. Such modification may be particularly appropriate if leadership counsel is appointed after the initial management conference under Rule 16.1(a).

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(f) Conference of the Parties; Planning for Discovery.

* * * * *

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

* * * * *

(D) any issues about claims of privilege or of protection as trial-preparation materials, including the timing and method for complying with Rule 26(b)(5)(A) and—if the parties agree on a procedure to assert these claims after production—whether to

ask the court to include their agreement in an order under Federal Rule of Evidence 502;

* * * * *

Committee Note

Rule 26(f)(3)(D) is amended to address concerns about application of the requirement in Rule 26(b)(5)(A), which requires that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials in a manner that "will enable other parties to assess the claim." Compliance with Rule 26(b)(5)(A) can involve very large burdens for all parties.

Rule 26(b)(5)(A) was adopted in 1993, and from the outset was intended to recognize the need for flexibility. This amendment directs the parties to address the question of how they will comply with Rule 26(b)(5)(A) in their discovery plan, and report to the court about this topic. A companion amendment to Rule 16(b)(3)(B)(iv) seeks to prompt the court to include provisions about complying with Rule 26(b)(5)(A) in scheduling or case management orders.

This amendment also seeks to provide the parties maximum flexibility in designing an appropriate method for identifying the grounds for withholding materials. Depending on the nature of the litigation, the nature of the materials sought through discovery, and the nature of the privilege or protection involved, what is needed in one case may not be necessary in another. No one-size-fits-all approach would actually be suitable in all cases.

Requiring that discussion of this topic begin at the outset of the litigation and that the court be advised of the parties' plans or disagreements in this regard is a key purpose of this amendment, and should minimize problems later on, particularly if objections to a party's compliance with Rule 26(b)(5)(A) might otherwise emerge only at the end of the discovery period. Production of a privilege log near the close of the discovery period can create serious problems. Often it will be valuable to provide for "rolling" production of materials and an appropriate description of the nature of the withheld material. In that way, areas of potential dispute may be identified and, if the parties cannot resolve them, presented to the court for resolution.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE[1]

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling and Management.

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(3) ***Contents of the Order.***

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(B) *Permitted Contents*.

* * * * *

(iv) include the timing and method for complying with Rule 26(b)(5)(A) and any agreements the parties reach for asserting claims of

[1] New material is underlined; matter to be omitted is lined through.

privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502;

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Committee Note

Rule 16(b) is amended in tandem with an amendment to Rule 26(f)(3)(D). In addition, two words—"and management"—are added to the title of this rule in recognition that it contemplates that the court will in many instances do more than establish a schedule in its Rule 16(b) order; the focus of this amendment is an illustration of such activity.

The amendment to Rule 26(f)(3)(D) directs the parties to discuss and include in their discovery plan a method for complying with the requirements in Rule 26(b)(5)(A). It also directs that the discovery plan address the timing for compliance with this requirement, in order to avoid problems that can arise if issues about compliance emerge only at the end of the discovery period.

Early attention to the particulars on this subject can avoid problems later in the litigation by establishing case-specific procedures up front. It may be desirable for the Rule 16(b) order to provide for "rolling" production that

may identify possible disputes about whether certain withheld materials are indeed protected. If the parties are unable to resolve those disputes, it is often desirable to have them resolved at an early stage by the court, in part so that the parties can apply the court's resolution of the issues in further discovery in the case.

Because the specific method of complying with Rule 26(b)(5)(A) depends greatly on the specifics of a given case there is no overarching standard for all cases. In the first instance, the parties themselves should discuss these specifics during their Rule 26(f) conference; these amendments to Rule 16(b) recognize that the court can provide direction early in the case. Though the court ordinarily will give much weight to the parties' preferences, the court's order prescribing the method for complying with Rule 26(b)(5)(A) does not depend on party agreement. But the parties may report that it is too early to settle on a specific method, and the court should be open to modifying its order should modification be warranted by evolving circumstances in the case.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE[1]

Rule 16.1. Multidistrict Litigation

(a) Initial Management Conference. After the Judicial Panel on Multidistrict Litigation transfers actions, the transferee court should schedule an initial management conference to develop an initial plan for orderly pretrial activity in the MDL proceedings.

(b) Report for the Conference.

(1) ***Submitting a Report.*** The transferee court should order the parties to meet and to submit a report to the court before the conference.

(2) ***Required Content: the Parties' Views on Leadership Counsel and Other Matters.*** The report must address any matter the court designates—which may include any matter in

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Rule 16—and, unless the court orders otherwise, the parties' views on:

(A) whether leadership counsel should be appointed and, if so:

(i) the timing of the appointments;

(ii) the structure of leadership counsel;

(iii) the procedure for selecting leadership and whether the appointments should be reviewed periodically;

(iv) their responsibilities and authority in conducting pretrial activities and any role in facilitating resolution of the MDL proceedings;

(v) the proposed methods for regularly communicating with and reporting to the court and nonleadership counsel;

(vi) any limits on activity by nonleadership counsel; and

(vii) whether and when to establish a means for compensating leadership counsel;

(B) any previously entered scheduling or other orders that should be vacated or modified;

(C) a schedule for additional management conferences with the court;

(D) how to manage the direct filing of new actions in the MDL proceedings; and

(E) whether related actions have been—or are expected to be—filed in other courts, and whether to adopt methods for coordinating with them.

(3) ***Additional Required Content: the Parties' Initial Views on Various Matters.*** Unless the court orders otherwise, the report also must address the parties' initial views on:

(A) whether consolidated pleadings should be prepared;

(B) how and when the parties will exchange information about the factual bases for their claims and defenses;

(C) discovery, including any difficult issues that may arise;

(D) any likely pretrial motions;

(E) whether the court should consider any measures to facilitate resolving some or all actions before the court;

(F) whether any matters should be referred to a magistrate judge or a master; and

(G) the principal factual and legal issues likely to be presented.

(4) ***Permitted Content.*** The report may include any other matter that the parties wish to bring to the court's attention.

(c) Initial Management Order. After the conference, the court should enter an initial management order addressing the matters in Rule 16.1(b) and, in the court's discretion, any other matters. This order controls the course of the proceedings unless the court modifies it.

Committee Note

The Multidistrict Litigation Act, 28 U.S.C. § 1407, was adopted in 1968. It empowers the Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or consolidated pretrial proceedings to promote the just and efficient conduct of such actions. The number of civil actions subject to transfer orders from the Panel has increased since the statute was enacted but has leveled off in recent years. These actions have accounted for a substantial portion of the federal civil docket. There has been no reference to multidistrict litigation (MDL proceedings) in the Civil Rules. The addition of Rule 16.1 is designed to provide a framework for the initial management of MDL proceedings.

Not all MDL proceedings present the management challenges this rule addresses, and, thus, it is important to maintain flexibility in managing MDL proceedings. Of course, other multiparty litigation that did not result from a Judicial Panel transfer order may present similar management challenges. For example, multiple actions in a single district (sometimes called related cases and assigned by local rule to a single judge) may exhibit characteristics similar to MDL proceedings. In such situations, courts may find it useful to employ procedures similar to those Rule 16.1 identifies in handling those multiparty proceedings. In both MDL proceedings and other multiparty litigation, the Manual for Complex Litigation also may be a source of guidance.

Rule 16.1(a). Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial management conference soon after the Judicial Panel transfer occurs. One purpose of the initial management conference is to begin to develop an initial management plan for the MDL

proceedings and, thus, this initial conference may only address some of the matters referenced in Rule 16.1(b)(2)-(3). That initial MDL management conference ordinarily would not be the only management conference held during the MDL proceedings. Although holding an initial management conference in MDL proceedings is not mandatory under Rule 16.1(a), early attention to the matters identified in Rule 16.1(b)(2)-(3) should be of great value to the transferee judge and the parties.

Rule 16.1(b)(1). The court ordinarily should order the parties to meet to submit a report to the court about the matters designated in Rule 16.1(b)(2)-(3) prior to the initial management conference. This should be a single report, but it may reflect the parties' divergent views on these matters.

Rule 16.1(b)(2). Unless the court orders otherwise, the report must address all of the matters identified in Rule 16.1(b)(2) (as well as all those in 16.1(b)(3)). The court also may direct the parties to address any other matter, whether or not listed in Rule 16.1(b) or in Rule 16. Rules 16.1(b) and 16 provide a series of prompts for the court and do not constitute a mandatory checklist for the transferee judge to follow.

The rule distinguishes between the matters identified in Rule 16.1(b)(2)(B)-(E) and in Rule 16.1(b)(3) because court action on a matter identified in Rule 16.1(b)(3) may be premature before leadership counsel is appointed, if that is to occur. For this reason, 16.1(b)(2) calls for the parties' views on the matters designated in (b)(2) whereas 16.1(b)(3) requires only the parties' initial views on those matters listed in (b)(3).

Rule 16.1(b)(2)(C) directs the parties to suggest a schedule for additional management conferences during

which the same or other matters may be addressed, and the Rule 16.1(c) initial management order controls only until it is modified. The goal of the initial management conference is to begin to develop an initial management plan, not necessarily to adopt a final plan for the entirety of the MDL proceeding. Experience has shown, however, that the matters identified in Rule 16.1(b)(2)(B)-(E) and Rule 16.1(b)(3) are often important to the management of MDL proceedings.

Rule 16.1(b)(2)(A). Appointment of leadership counsel is not universally needed in MDL proceedings, and the timing of appointments may vary. But, to manage the MDL proceedings, the court may decide to appoint leadership counsel and many times this will be one of the early orders the transferee judge enters. Rule 16.1(b)(2)(A) calls attention to several topics the court should consider if appointment of leadership counsel seems warranted.

The first topic is the timing of appointment of leadership. Ordinarily, transferee judges enter orders appointing leadership counsel separately from orders addressing the matters in Rule 16.1(b)(2)(B)-(E) and 16.1(b)(3).

In some MDL proceedings it may be important that leadership counsel be organized into committees with specific duties and responsibilities. Rule 16.1(b)(2)(A)(ii) therefore prompts counsel to provide the court with specific suggestions on the leadership structure that should be employed.

The procedure for selecting leadership counsel is addressed in item (iii). There is no single method that is best for all MDL proceedings. The transferee judge is responsible to ensure that the lawyers appointed to leadership positions

are able to do the work and will responsibly and fairly discharge their leadership obligations. In undertaking this process, a transferee judge should consider the benefits of geographical distribution as well as differing experiences, skills, knowledge, and backgrounds. Courts have considered the nature of the actions and parties, the needs of the litigation, and each lawyer's qualifications, expertise, and access to resources. They have also taken into account how the lawyers will complement one another and work collectively.

MDL proceedings do not have the same commonality requirements as class actions, so substantially different categories of claims or parties may be included in the same MDL proceeding and leadership may be comprised of attorneys who represent parties asserting a range of claims in the MDL proceeding. For example, in some MDL proceedings there may be claims by individuals who suffered injuries and also claims by third-party payors who paid for medical treatment. The court may need to take these differences into account in making leadership appointments.

Courts have selected leadership counsel through combinations of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings.

The rule also calls for advising the court whether appointment to leadership should be reviewed periodically. Transferee courts have found that appointment for a term is useful as a management tool for the court to monitor progress in the MDL proceedings.

Item (iv) recognizes that another important role for leadership counsel in some MDL proceedings is to facilitate resolution of claims. Resolution may be achieved by such

means as early exchange of information, expedited discovery, pretrial motions, bellwether trials, and settlement negotiations.

An additional task of leadership counsel is to communicate with the court and with nonleadership counsel as proceedings unfold. Item (v) directs the parties to report how leadership counsel will communicate with the court and nonleadership counsel. In some instances, the court or leadership counsel have created websites that permit nonleadership counsel to monitor the MDL proceedings, and sometimes online access to court hearings provides a method for monitoring the proceedings.

Another responsibility of leadership counsel is to organize the MDL proceedings in accordance with the court's initial management order under Rule 16.1(c). In some MDL proceedings, there may be tension between the approach that leadership counsel takes in handling pretrial matters and the preferences of individual parties and nonleadership counsel. As item (vi) recognizes, it may be necessary for the court to give priority to leadership counsel's pretrial plans when they conflict with initiatives sought by nonleadership counsel. The court should, however, ensure that nonleadership counsel have suitable opportunities to express their views to the court, and take care not to interfere with the responsibilities nonleadership counsel owe their clients.

Finally, item (vii) addresses whether and when to establish a means to compensate leadership counsel for their added responsibilities. Courts have entered orders pursuant to the common benefit doctrine establishing specific protocols for the management of case staffing, timekeeping, cost reimbursement, and related common benefit issues. But it may be best to defer entering a specific order relating to a

common benefit fee and expenses until well into the proceedings, when the court is more familiar with the effects of such an order and the activities of leadership counsel.

If proposed class actions are included within the MDL proceeding, Rule 23(g) applies to appointment of class counsel should the court eventually certify one or more classes, and the court may also choose to appoint interim class counsel before resolving the certification question. In such MDL proceedings, the court must be alert to the relative responsibilities of leadership counsel under Rule 16.1 and class counsel under Rule 23(g). Rule 16.1 does not displace Rule 23.

Rule 16.1(b)(2)(B)-(E) and (3). Rule 16.1(b)(2) and (3) identify a number of matters that often are important in the management of MDL proceedings. The matters identified in Rule 16.1(b)(2)(B)-(E) frequently call for early action by the court. The matters identified by Rule 16.1(b)(3) are in a separate paragraph of the rule because, in the absence of appointment of leadership counsel should appointment be warranted, the parties may be able to provide only their initial views on these matters at the conference.

Rule 16.1(b)(2)(B). When multiple actions are transferred to a single district pursuant to 28 U.S.C. § 1407, those actions may have reached different procedural stages in the district courts from which they were transferred. In some, Rule 26(f) conferences may have occurred and Rule 16(b) scheduling orders may have been entered. Those scheduling orders are likely to vary. Managing the centralized MDL proceedings in a consistent manner may warrant vacating or modifying scheduling orders or other orders entered in the transferor district courts, as well as any scheduling orders previously entered by the transferee judge.

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Agenda E-19
Rules
September 2024

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 4, 2024. All members participated.

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FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed amendments to Civil Rules 16 and 26, and new Rule 16.1. The Standing Committee unanimously approved the Advisory Committee's recommendations, with minor changes to the proposed amendments to new Rule 16.1.

Rule 16 (Pretrial Conferences; Scheduling; Management) and Rule 26 (Duty to Disclose; General Provisions Governing Discovery)

The proposed amendments would call for early identification of a method to comply with Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Specifically, the proposed amendment to Rule 26(f)(3)(D) would require the parties to address in their discovery plan the timing and method for complying with Rule 26(b)(5)(A). The proposed amendment to Rule 16(b) would

provide that the court may address the timing and method of such compliance in its scheduling order.

After public comment, the Advisory Committee recommended final approval of the proposed amendments as published with minor changes to the committee notes.

New Rule 16.1 (Multidistrict Litigation)

Proposed new Rule 16.1 is designed to provide a framework for the initial management of multidistrict litigation (MDL) proceedings. After several years of work by its MDL subcommittee, extensive discussions with interested bar groups, consideration of multiple drafts, three public hearings on the published draft, and subsequent revisions based on public comment, the Advisory Committee unanimously recommended final approval of new Rule 16.1.

Rule 16.1(a) encourages the transferee court to schedule an initial MDL management conference soon after transfer, recognizing that this is currently regular practice among transferee judges. An initial management conference allows for early attention to matters identified in Rule 16.1(b), which may be of great value to the transferee judge and the parties. Because it is important to maintain flexibility in managing MDL proceedings, proposed new Rule 16.1(a) says that the transferee court "should" (not "must") schedule such a conference.

Rule 16.1(b)—a revised version of what was published as subdivision (c)—encourages the court to order the parties to submit a report prior to the initial management conference. The report must address any topic the court designates—including any matter under Rule 16—and unless the court orders otherwise, the report must also address the topics listed in Rules 16.1(b)(2)-(3). Rule 16.1(b)(2) directs the parties to provide their views on appointment of leadership counsel; previously entered scheduling or other orders; additional management conferences; new actions in the MDL proceeding; and related actions in other courts. Rule 16.1(b)(3) calls for the parties' "initial views" on consolidated pleadings; principal factual and legal issues; exchange of information about factual bases for claims and defenses; a

discovery plan; pretrial motions; measures to facilitate resolving some or all actions before the court; and referral of matters to a magistrate judge or master. Because court action on some matters identified in paragraph (b)(3) may be premature before leadership counsel is appointed, those topics are categorized separately from those in paragraph (b)(2). Rule 16.1(b)(4) permits the parties to address other matters that they wish to bring to the court's attention.

Rule 16.1(c) prompts courts to enter an initial MDL management order after the initial MDL management conference. The order should address the matters listed in Rule 16.1(b) and may address other matters in the court's discretion. This order controls the MDL proceedings unless and until modified.

Following public comment, the Advisory Committee made some minor changes to the proposed new rule as published. In response to extensive public input, it removed a provision inviting courts to consider appointing "coordinating counsel." For the reasons noted above, it restructured the list of matters to be included in the parties' report into the "views" called for by Rule 16.1(b)(2) and the "initial views" called for by Rule 16.1(b)(3), and it revised those provisions to direct parties to address the listed topics unless the court orders otherwise (rather than obligating the court to affirmatively set out minimum topics to be addressed). It also made stylistic changes based on input from the Standing Committee's style consultants.

At its meeting, the Standing Committee made minor changes to the rule and committee note to improve style and promote consistency. In the committee note, language was refined to clarify measures to facilitate resolution of MDL proceedings.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 16 and 26, and new Rule 16.1, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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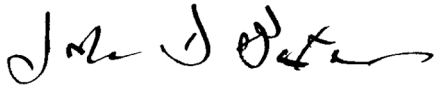
Respectfully submitted,



John D. Bates, Chair

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Excerpt from the May 10, 2024 Report of the Advisory Committee on Civil Rules

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Robin L. Rosenberg, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules*

DATE: May 10, 2024

Introduction

The Civil Rules Advisory Committee met in Denver, Colorado, on April 9, 2024. Members of the public attended in person, and public on-line attendance was also provided. * * *

In August 2023 proposed amendments to Rule 16(b)(3)(B)(iv) and 26(f)(3)(D) dealing with privilege log issues, and a new proposed Rule 16.1 on MDL proceedings, were published for public comment. The first hearing on the proposed amendments and rule was held in Washington, D.C. on Oct. 16, 2023. 24 witnesses signed up to speak at that in-person hearing.

* A copy of the full committee report can be found in the June 2024 Standing Committee agenda book publicly available on www.uscourts.gov.

Additional public hearings were held by remote means on Jan. 16 and Feb. 6, 2024, and presented the views of more than 60 additional witnesses. The public comment period ended on Feb. 14, 2024. At its April 9 meeting, the Advisory Committee unanimously voted to forward the "privilege log" amendments to Rules 16(b)(3)(B)(iv) and 26(f)(3)(D) to the Standing Committee for adoption. It also unanimously voted to forward Rule 16.1, as revised after the public comment period, to the Standing Committee for adoption.

Part I of this report presents these two action items. * * * The "privilege log" rule amendments remained exactly the same, but the Committee Note was shortened. The proposal of a new Rule 16.1 for MDL proceedings was revised by removal of the coordinating counsel provision and reorganized to focus on sequencing of management activities. As detailed in the notes of the MDL Subcommittee's two online meetings considering the public comment, careful thought was given to these changes. After that subcommittee effort was completed, further style revisions were adopted on recommendation of the Standing Committee's Style Consultants. Accordingly, the revised rule proposal * * * reflects the style consultants' contributions as well as the Subcommittee's revisions.

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I. ACTION ITEMS

A. Privilege log amendments proposed for adoption

In August 2023, amendments to Rules 26(f)(3)(D) and 16(b)(3)(B)(iv) were published for public comment. There was much comment, from both "producer" and "requester" viewpoints. * * *

After the public comment period, the Discovery Subcommittee met to discuss the comments. * * * There was no consideration of changing the rule amendments themselves, but considerable attention was given to the Committee Note to the Rule 26(f) amendment. The Standing Committee recommended during its January 2023 meeting that this Note be shortened, and the Subcommittee decided after the public comment period to shorten it further.

Though various proposals were made during the public comment period for Note language or rule language to prescribe what should be in a log, the Subcommittee's view was that "no one size fits all." Largely for this reason, it seemed that observations in the Note about burdens and methods of ameliorating those burdens are not likely to be particularly useful in individual cases. Nevertheless, there was extensive commentary about the Note. Some urged that it overly favored producing parties. Others urged that it be strengthened to support positions often adopted by producing parties.

The Subcommittee's consensus was to avoid Note language that seems to favor one "side" or the other. Thus, although the burdens on the producing party of preparing a detailed log can be large, the burdens on the requesting party to make use (perhaps even make sense) of a privilege log are often very heavy as well. Much depends on the circumstances of a given case.

Another challenging aspect going forward is the potential role of technology. Whether or not the term "metadata log" has meaning, it seems clear that many say the term means different

things to different people. And though some witnesses contended that pretty soon technological advances will supplant existing methods of dealing with logging and simplify (and speed up) the process, it is not possible to be confident about what technology will bring, or when.

Altogether, these thoughts pointed toward pruning controversial statements from the Note. Accordingly, the revised Note below sets the scene for early consideration of privilege log issues while avoiding taking positions on many of the issues raised by participants in the public comment process.

Rule 26(b)(5)(A) cross-reference amendment: There have been proposals that a cross-reference be added to Rule 26(b)(5)(A) itself. But the Subcommittee did not favor taking this additional step. Because it was proposed by several who testified at hearings or submitted written comments, some explanation may be helpful.

In the first place, though adding this change to the existing amendment package should not require republication, it really seems not to add anything. The published amendment directs the parties to address compliance with this rule in their 26(f) meeting. That being the case, it seems odd to add something to this rule to remind people that Rule 26(f) applies. Anyone interested in what must be done at a 26(f) meeting presumably should begin by consulting 26(f); checking 26(b)(5)(A) as well seems an odd effort.

It somewhat seems that proponents of an amendment to 26(b)(5)(A) (from the "producer" perspective) were hoping that the revision there would either disapprove judicial decisions calling for a document-by-document log and/or promote categorical logs. The Subcommittee does not favor taking these steps; the "chaste" draft discussed on Feb. 7 avoided taking such positions.

And there is a more general rulemaking point here: Making cross-references might well be avoided unless necessary. To take a tendentious example, one might think that a cross-reference to Rule 11 might be included in Rule 8(a)(2). Surely Rule 11(b) bears on what attorneys should do as they devise their allegations to satisfy Rule 8(a)(2). The cross-reference idea might lead to a slippery slope toward multiple additions to rules that do not do more than call attention to other rules.

In sum, the Subcommittee recommended adoption of the published rule amendments with a shortened Note, but no change to Rule 26(b)(5)(A) itself.

Rule 45 amendment possibility: During the public comment period, some urged that Rule 45 also be amended to address compliance with Rule 26(b)(5)(A) by nonparties subject to subpoenas. The Subcommittee discussed this possibility during its Feb. 7 meeting and decided it did not warrant action.

Putting aside the possibility that this change could call for republication, a major concern was that the current amendment package is keyed to the Rule 26(f) meeting, which does not involve nonparties who receive subpoenas. Moreover, though there have been many reports about the burdens on parties caused by privilege log requirements, there has not been a comparable level of comment about such problems resulting from subpoenas. In addition, Rule 45(d) already specifically commands those serving subpoenas to "take reasonable steps to avoid

imposing undue burden or expense" on the person served with the subpoena, and also says that the court "must enforce this duty and impose an appropriate sanction * * * on a party or attorney who fails to comply."

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B. New Rule 16.1 for adoption

The Rule 16.1 proposal received a great deal of commentary during the public comment period. * * * The MDL Subcommittee met twice after the public comment period to consider changes to the rule proposal and to the Committee Note. The first meeting was on Feb. 23, 2024, and the second on March 5, 2024. * * *

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Here is a quick roadmap of the revised rule proposal * * *:

(1) Eliminating the "coordinating counsel" position: Proposed Rule 16.1(b) invited the court to consider appointing an attorney to act as "coordinating counsel." After the public comment period was completed, on Feb. 23 the Subcommittee considered whether this position might be retained as "liaison counsel," with invocation of the Manual for Complex Litigation (4th) use of the term in § 10.221 (referring to "liaison counsel" who would deal with "essentially administrative matters"). But discussion led the Subcommittee to conclude that the strong reaction against creation of this new position provided a reason for removing it from the rule entirely. It no longer appears in the rule.

(2) Providing that unless the court orders otherwise, the parties must address all the topics listed in the rule: The published draft made the parties' obligation to address certain matters depend on the court taking the initiative to order them to address those specific matters. But requiring affirmative action by the court to get a report on the listed matters seems unnecessary, particularly since the parties can tell the court that it's premature to address certain items. That is implicit in the breakout of certain matters listed in Rule 16.1(b)(3), on which the parties are directed only to provide their "initial views." And the rule continues to say the parties may raise whatever matters they wish to raise whether or not the court ordered them to do so. This shift in no way limits the court's discretion, but it may sometimes reduce the burden on the court and also perhaps suggest to the parties that they might suggest that the court excuse a report on certain topics. The goal is to prepare the court to make the most effective use of the initial management conference.

(3) Subdividing the topics listed in published Rule 16.1(c) into two categories, one directing the parties to provide their views on certain topics and the other calling for the parties' "initial views": These two categories of reporting responsibilities would be divided between Rule 16.1(b)(2) and Rule 16.1(b)(3). These groupings are:

> Group 1, in Rule 16.1(b)(2) provides that the parties must provide their views on the following:

(A) Whether leadership counsel should be appointed, and if so address a number of matters bearing on the appointment of leadership counsel.

(B) Previously entered scheduling or other orders that should be vacated or modified;

(C) A schedule for additional management conferences;

(D) How to manage the filing of new actions in the MDL proceedings;

(E) Whether related actions have been filed or are expected to be filed, and whether to consider possible methods of coordinating with those actions.

Group 2 in Rule 16.1(b)(3) provides that the parties must provide the court with their "initial views" on the following unless the court orders otherwise:

(A) Whether consolidated pleadings should be prepared to account for the multiple actions in the MDL proceedings.

(B) Principal legal and factual issues likely to be presented;

(C) How and when the parties will exchange information about the facial bases for their claims and defenses. The revised Note makes clear that this is not discovery, and mentions that the court may employ expedited procedures to resolve some claims or defenses based on this information exchange. It also provides that the court should take care to ensure that the parties have adequate access to needed information.

(D) Anticipated discovery;

(E) Likely pretrial motions;

(F) Whether the court should consider measures to facilitate resolution; and

(G) Whether matters should be referred to a magistrate judge or a master.

(4) Initial management order: The court should enter an initial management order regarding how leadership counsel would be appointed if that is to occur and adopting an initial management plan that controls the MDL proceedings until the court modifies it.

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