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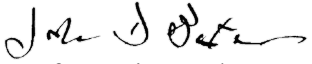
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MEMORANDUM

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. *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.

\* \* \* \* \*

(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 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.

<b>Civil Rule</b>	<b>Bankruptcy Rule</b>	<b>Time Under Bankruptcy Rule</b>
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:

\* \* \* \* \*

**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<sup>1</sup>**

- 1 **Rule 6. Appeal in a Bankruptcy Case or**  
2 **Proceeding**
- 3 **(a) Appeal From a Judgment, Order, or Decree of a**  
4 **District Court Exercising Original Jurisdiction in**  
5 **a Bankruptcy Case or Proceeding.** An appeal to a  
6 court of appeals from a final judgment, order, or  
7 decree of a district court exercising original  
8 jurisdiction in a bankruptcy case or proceeding under  
9 28 U.S.C. § 1334 is taken as any other civil appeal  
10 under these rules. But the reference in  
11 Rule 4(a)(4)(A) to the time allowed for motions  
12 under certain Federal Rules of Civil Procedure must  
13 be read as a reference to the time allowed for the  
14 equivalent motions under the applicable Federal

---

<sup>1</sup> New material is underlined; matter to be omitted is lined through.



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

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

21 (1) **Applicability of Other Rules.** These rules  
22 apply to an appeal to a court of appeals under  
23 28 U.S.C. § 158(d)(1) from a final judgment,  
24 order, or decree of a district court or  
25 bankruptcy appellate panel exercising  
26 appellate jurisdiction in a bankruptcy case or  
27 proceeding under 28 U.S.C. § 158(a) or (b),  
28 but with these qualifications:

29 \* \* \* \* \*

30 (C) when the appeal is from a bankruptcy  
31 appellate panel, “district court,” as

32 used in any applicable rule, means  
33 “bankruptcy appellate panel”; and

34 \* \* \* \* \*

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

38 (A) **Motion for Rehearing.**

39 \* \* \* \* \*

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

50                   The notice or amended notice  
51                   must be filed within the time  
52                   prescribed by Rule 4—  
53                   excluding Rules 4(a)(4) and  
54                   4(b)—measured from the  
55                   entry of the order disposing of  
56                   the motion.

57                   \* \* \* \* \*

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

59                   \* \* \* \* \*

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

68 of the docket entries be made  
69 available in place of the  
70 redesignated record. But at  
71 any time during the appeal's  
72 pendency, any party may  
73 request ~~at any time during the~~  
74 ~~pendency of the appeal~~ that  
75 the redesignated record be  
76 made available.

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

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

89 (1) **Applicability of Other Rules.** These rules  
90 apply to a direct appeal from a judgment,  
91 order, or decree of a bankruptcy court by  
92 permission authorization under 28 U.S.C.  
93 § 158(d)(2), but with these qualifications:

94 (A) Rules 3–4, ~~5(a)(3)~~ (except as  
95 provided in this Rule 6(c)), 6(a), 6(b),  
96 8(a), 8(c), 9–12, 13–20, 22–23, and  
97 24(b) do not apply; and

98 (B) as used in any applicable rule,  
99 “district court” or “district clerk”  
100 includes—to the extent appropriate—  
101 a bankruptcy court or bankruptcy  
102 appellate panel or its clerk; ~~and~~

103                   ~~(C) — the reference to “Rules 11 and~~  
104                                   ~~12(e)” in Rule 5(d)(3) must be read~~  
105                                   ~~as a reference to Rules 6(c)(2)(B) and~~  
106                                   ~~(C).~~

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

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

- 121                    **(B) Contents of the Petition.** The  
122                    petition must include the material  
123                    required by Rule 5(b)(1) and an  
124                    attached copy of:
- 125                    (i) the certification; and  
126                    (ii) the notice of appeal of the  
127                    bankruptcy court’s judgment,  
128                    order, or decree filed under  
129                    Bankruptcy Rule 8003 or  
130                    8004.
- 131                    **(C) Answer or Cross-Petition; Oral**  
132                    **Argument.** Rule 5(b)(2) governs an  
133                    answer or cross-petition. Rule 5(b)(3)  
134                    governs oral argument.
- 135                    **(D) Form of Papers; Number of**  
136                    **Copies; Length Limits.** Rule 5(c)  
137                    governs the required form, number of  
138                    copies to be filed, and length limits

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

141 **(E) Notice of Appeal; Calculating**

142 **Time.** A notice of appeal to the court  
143 of appeals need not be filed. The date  
144 when the order authorizing the direct  
145 appeal is entered serves as the date of  
146 the notice of appeal for calculating  
147 time under these rules.

148 **(F) Notification of the Order**

149 **Authorizing Direct Appeal; Fees;**  
150 **Docketing the Appeal.**

151 **(i)** When the court of appeals  
152 enters the order authorizing  
153 the direct appeal, the circuit  
154 clerk must notify the  
155 bankruptcy clerk and the  
156 district court clerk or



157 bankruptcy-appellate-panel  
158 clerk of the entry.  
159 (ii) Within 14 days after the order  
160 authorizing the direct appeal  
161 is entered, the appellant must  
162 pay the bankruptcy clerk any  
163 unpaid required fee,  
164 including:  
165 • the fee required for the  
166 appeal to the district court  
167 or bankruptcy appellate  
168 panel; and  
169 • the difference between the  
170 fee for an appeal to the  
171 district court or  
172 bankruptcy appellate  
173 panel and the fee required

174 for an appeal to the court  
175 of appeals.

176 (iii) The bankruptcy clerk must  
177 notify the circuit clerk once  
178 the appellant has paid all  
179 required fees. Upon receiving  
180 the notice, the circuit clerk  
181 must enter the direct appeal on  
182 the docket.

183 (G) Stay Pending Appeal. Bankruptcy  
184 Rule 8007 governs any stay pending  
185 appeal.

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

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

194 ~~(B)~~(I) **Making the Record Available.**

195 Bankruptcy Rule 8010 governs  
196 completing the record and making it  
197 available. When the court of appeals  
198 enters the order authorizing the direct  
199 appeal, the bankruptcy clerk must  
200 make the record available to the  
201 circuit clerk.

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

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

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

213 ~~(E)~~(K) **Filing a Representation Statement.**

214 Unless the court of appeals designates  
215 another time, within 14 days after  
216 ~~entry of the order granting permission~~  
217 ~~to appeal~~ authorizing the direct appeal  
218 is entered, the attorney for each party  
219 to the appeal ~~the attorney who sought~~  
220 ~~permission~~ must file a statement with  
221 the circuit clerk naming the parties  
222 that the attorney represents on appeal.

223 **Committee Note**

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

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

233           The Bankruptcy Rules partially incorporate the  
234 relevant Civil Rules but in some instances shorten the  
235 deadlines for motions set out in the Civil Rules. *See* Fed. R.  
236 Bankr. P. 9015(c) (any renewed motion for judgment under  
237 Civil Rule 50(b) must be filed within 14 days of entry of  
238 judgment); Fed. R. Bankr. P. 7052 (any motion to amend or  
239 make additional findings under Civil Rule 52(b) must be  
240 filed within 14 days of entry of judgment); Fed. R. Bankr. P.  
241 9023 (any motion to alter or amend the judgment or for a  
242 new trial under Civil Rule 59 must be filed within 14 days  
243 of entry of judgment).

244           Motions for attorney’s fees in bankruptcy cases or  
245 proceedings are governed by Bankruptcy  
246 Rule 7054(b)(2)(A), which incorporates without change the  
247 14-day deadline set in Civil Rule 54(d)(2)(B). Under  
248 Appellate Rule 4(a)(4)(A)(iii), such a motion resets the time  
249 to appeal only if the district court so orders pursuant to Civil  
250 Rule 58(e), which is made applicable to bankruptcy cases  
251 and proceedings by Bankruptcy Rule 7058.

252           Motions for relief under Civil Rule 60 in bankruptcy  
253 cases or proceedings are governed by Bankruptcy  
254 Rule 9024. Appellate Rule 4(a)(4)(A)(vi) provides that a  
255 motion for relief under Civil Rule 60 resets the time to  
256 appeal only if the motion is made within the time allowed  
257 for filing a motion under Civil Rule 59. In a bankruptcy case  
258 or proceeding, motions under Civil Rule 59 are governed by  
259 Bankruptcy Rule 9023, which, as noted above, requires such  
260 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

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

265 **Subdivision (b).** Minor stylistic and clarifying  
 266 changes are made to the header of subdivision (b) and to  
 267 subdivision (b)(1). Subdivision (b)(1)(C) is amended to  
 268 correct the omission of the word “bankruptcy” from the  
 269 phrase “bankruptcy appellate panel.” Stylistic changes are  
 270 made to subdivision (b)(2).

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

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

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

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

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

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

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

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

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



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

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

371           **Subdivision (c)(2).** The language “to the rules made  
372 applicable by (c)(1)” is added to the first sentence for  
373 consistency with other subdivisions of Rule 6.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF APPELLATE PROCEDURE<sup>1</sup>**

1 **Rule 39. Costs**

2 (a) ~~Against Whom Assessed~~ Allocating Costs Among

3 the Parties. The following rules apply to allocating

4 taxable costs among the parties unless the law

5 provides, the parties agree, or the court orders

6 otherwise:

7 (1) if an appeal is dismissed, costs are ~~taxed~~

8 allocated against the appellant, ~~unless the~~

9 ~~parties agree otherwise~~;

10 (2) if a judgment is affirmed, costs are ~~taxed~~

11 allocated against the appellant;

12 (3) if a judgment is reversed, costs are ~~taxed~~

13 allocated against the appellee;

---

<sup>1</sup> New material is underlined; matter to be omitted is lined through.

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

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

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

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

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

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

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

42 (B) the docketing fee; and

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

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

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

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

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

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



66           ~~(3)~~ (C) The clerk must prepare and certify an  
67                                   itemized statement of costs for  
68                                   insertion in the mandate, but issuance  
69                                   of the mandate must not be delayed  
70                                   for taxing costs. If the mandate issues  
71                                   before costs are finally determined,  
72                                   the district clerk must—upon the  
73                                   circuit clerk’s request—add the  
74                                   statement of costs, or any amendment  
75                                   of it, to the mandate.

76   ~~(e)~~(f) **Costs on Appeal Taxable in the District Court.**

77           The following costs on appeal are taxable in the  
78           district court for the benefit of the party entitled to  
79           costs ~~under this rule~~:

80   \* \* \* \* \*

81   **Committee Note**

82           In *City of San Antonio v. Hotels.com*, 141 S. Ct. 1628  
83           (2021), the Supreme Court held that Rule 39 does not permit  
84           a district court to alter a court of appeals’ allocation of the  
85           costs listed in subdivision (e) of that Rule. The Court also

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

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

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

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

114           **Subdivision (d).** The amendment uses the word  
115 “allocated” to match subdivision (a).

116           **Subdivision (e).** The amendment specifies which  
117 costs are taxable in the court of appeals and clarifies that the  
118 procedure in that subdivision governs the taxation of costs  
119 taxable in the court of appeals. The docketing fee, currently  
120 \$500, is established by the Judicial Conference of the United  
121 States pursuant to 28 U.S.C. § 1913. The reference to filing  
122 fees paid in the court of appeals is not a reference to the \$5  
123 fee paid to the district court required by 28 U.S.C. § 1917 for  
124 filing a notice of appeal from the district court to the court of  
125 appeals. Instead, the reference is to filing fees paid in the  
126 court of appeals, such as the fee to file a notice of appeal  
127 from a bankruptcy appellate panel.

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

**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

**NOTICE**

**NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE  
UNLESS APPROVED BY THE CONFERENCE ITSELF.**

**Excerpt from the September 2024 Report of the Committee on Rules of Practice and Procedure**

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.

**Excerpt from the September 2024 Report of the Committee on Rules of Practice and Procedure**

**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

JOHN D. BATES  
CHAIR

H. THOMAS BYRON III  
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE  
APPELLATE RULES

REBECCA B. CONNELLY  
BANKRUPTCY RULES

ROBIN L. ROSENBERG  
CIVIL RULES

JAMES C. DEVER III  
CRIMINAL RULES

PATRICK J. SCHILTZ  
EVIDENCE RULES

**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

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\* A copy of the full committee report can be found in the June 2024 Standing Committee agenda book publicly available on [www.uscourts.gov](http://www.uscourts.gov).

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

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.



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

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.<sup>1</sup>

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.

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<sup>1</sup> 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.

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

### **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 20<sup>th</sup> 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

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

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

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

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<sup>1</sup>**

- (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.**

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<sup>1</sup> 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<sup>1</sup>**

\* \* \* \* \*

- (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.

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<sup>1</sup> The changes indicated are to the restyled version of Rule 8006, not yet in effect.

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF BANKRUPTCY PROCEDURE<sup>1</sup>**

1 **Rule 3002.1. ~~Notice Relating to Chapter 13—~~**  
2 **~~Claims—~~Claim Secured by a**  
3 **Security Interest in the Debtor’s**  
4 **Principal Residence in a Chapter**  
5 **13 Case<sup>2</sup>**

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

---

<sup>1</sup> New material is underlined; matter to be omitted is lined through.

<sup>2</sup> The changes indicated are to the restyled version of Rule 3002.1, not yet in effect.

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

18 (1) *Notice by the Claim Holder—In General.*

19 The claim holder must file a notice of any  
20 change in the payment amount, ~~of an~~  
21 ~~installment payment~~ including any change  
22 one resulting from an interest-rate or escrow-  
23 account adjustment. ~~At least 21 days before~~  
24 ~~the new payment is due,~~ The notice must  
25 be ~~filed and~~ served on:

- 26 • the debtor;
- 27 • the debtor's attorney; and
- 28 • the trustee.

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



33 ~~modify this requirement.~~

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

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

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

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

49 (ii) include a reconciliation  
50 amount to account for any

51 overpayment or  
52 underpayment during the  
53 prior year.

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

59 (D) Effective Date. The new payment  
60 amount stated in the annual notice  
61 (disregarding the reconciliation  
62 amount) is effective on the first  
63 payment due date after the payment  
64 under (C) has been made and remains  
65 effective until a new notice becomes  
66 effective.

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

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

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

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

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

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

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

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

- 108                     • ~~the debtor;~~
- 109                     • ~~the debtor's attorney; and~~
- 110                     • ~~the trustee.~~

111   **(d) Filing Notice as a Supplement to a Proof of Claim.**

112           A notice under (b) or (c) must be filed as a  
113           supplement to ~~the~~a proof of claim using Form 410S-  
114           1 or 410S-2, respectively. The notice is not subject  
115           to Rule 3001(f).

116   **(e) Determining Fees, Expenses, or Charges.** On a

117           party in interest's motion ~~filed within one year after~~  
118           ~~the notice in (c) was served~~, the court must, after  
119           notice and a hearing, determine whether paying any  
120           claimed fee, expense, or charge is required by the

121 underlying agreement and applicable nonbankruptcy  
122 law, ~~to cure a default or maintain payments under~~  
123 ~~§ 1322(b)(5).~~ The motion must be filed within one  
124 year after the notice under (c) was served, unless a  
125 party in interest requests and the court orders a  
126 shorter period.

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

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

- 137 • the debtor and the debtor’s
- 138 attorney, if the trustee is the
- 139 movant;
- 140 • the trustee, if the debtor is the
- 141 movant; and
- 142 • the claim holder.

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

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

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

159 **(fg) ~~Notice of the Final Cure Payment. Trustee’s End-~~**  
160 **~~of-Case Notice of Disbursements Made; Response; Court~~**  
161 **Determination.**

162 (1) ~~Contents of a Notice~~ **Timing and Content.**

163 Within ~~30~~45 days after the debtor completes  
164 all payments due to the trustee under a  
165 Chapter 13 plan, the trustee must file a notice:

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

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



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

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

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

- 183 • the claim holder;
- 184 • the debtor; and
- 185 • the debtor’s attorney.

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

191 response must be prepared using Form  
192 410C13-NR and be served on the individuals  
193 listed in (b)(1).

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

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

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

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

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

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

215 (B) Response. If the claim holder  
216 disagrees with the facts set forth in the  
217 motion, it must file a response within  
218 28 days after the motion is served.  
219 The response must be prepared using  
220 Form 410C13-M2R and be served on  
221 the individuals listed in (b)(1).

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

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

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

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

236 ~~(A)~~ — indicates whether:

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

241 ~~(ii)~~ — the debtor is otherwise  
242 current on all payments under  
243 § 1322(b)(5); and

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

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

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

- 250 ~~• the debtor;~~
- 251 ~~• the debtor's attorney; and~~
- 252 ~~• the trustee.~~

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

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

262 ~~(ih) **Claim Holder's Failure to Give Notice or**~~

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

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

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

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

277                             **Committee Note**

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

284 subdivision headings have been changed to reflect the  
285 amended content.

286 Subdivision (a), which describes the rule’s  
287 applicability, is amended to delete the words “contractual”  
288 and “installment” in the phrase “contractual installment  
289 payments” in order to clarify and broaden the rule’s  
290 applicability. The deletion of “contractual” is intended to  
291 make the rule applicable to home mortgages that may be  
292 modified and are being paid according to the terms of the  
293 plan rather than strictly according to the contract, including  
294 mortgages being paid in full during the term of the plan. The  
295 word “installment” is deleted to clarify the rule’s  
296 applicability to reverse mortgages. They are not paid in  
297 installments, but a debtor may be curing a default on a  
298 reverse mortgage under the plan. If so, the rule applies.

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

313  
314 As a sanction for noncompliance, subdivision (b)(3)  
315 now provides that late notices of a payment increase do not  
316 go into effect until the first payment due date after the  
317 required notice period (at least 21 days) expires. The claim

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

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

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

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



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

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

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

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF BANKRUPTCY PROCEDURE<sup>1</sup>**

1 **Rule 8006. Certifying a Direct Appeal to the**  
2 **Court of Appeals<sup>2</sup>**

3 \* \* \* \* \*

4 **(g) Request After Certification for ~~Leave to Take a~~**  
5 **~~Direct Appeal to a Court of Appeals After~~**  
6 **~~Certification~~ to Authorize a Direct Appeal. Within**  
7 30 days after the certification has become effective  
8 under (a), ~~a request for leave to take a direct appeal~~  
9 ~~to a court of appeals must be filed~~ any party to the  
10 appeal may ask the court of appeals to authorize a  
11 direct appeal by filing a petition with the circuit clerk  
12 in accordance with Fed. R. App. P. 6(c).

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<sup>1</sup> New material is underlined; matter to be omitted is lined through.

<sup>2</sup> The changes indicated are to the restyled version of Rule 8006, not yet in effect.

13

**Committee Note**

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

**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.

\* \* \* \* \*

**NOTICE**

**NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE  
UNLESS APPROVED BY THE CONFERENCE ITSELF.**

**Excerpt from the September 2024 Report of the Committee on Rules of Practice and Procedure**

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.

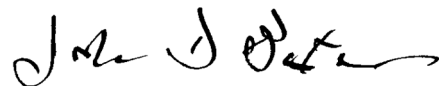
\* \* \* \* \*

**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	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 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

JOHN D. BATES  
CHAIR

H. THOMAS BYRON III  
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAY S. BYBEE  
APPELLATE RULES

REBECCA B. CONNELLY  
BANKRUPTCY RULES

ROBIN L. ROSENBERG  
CIVIL RULES

JAMES C. DEVER III  
CRIMINAL RULES

PATRICK J. SCHILTZ  
EVIDENCE RULES

**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

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\* A copy of the full committee report can be found in the June 2024 Standing Committee agenda book publicly available on [www.uscourts.gov](http://www.uscourts.gov).

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

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—

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

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



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

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. *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.

**Rule 16.1(b)(2)(D).** When large numbers of tagalong actions (actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceeding) are anticipated, some parties have stipulated to “direct filing” orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address other matters that can arise, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate district court for remand at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed. Sometimes liaison counsel may be appointed specifically to report on developments in related litigation (e.g., state courts and bankruptcy courts) at the case management conferences.

**Rule 16.1(b)(2)(E).** On occasion there are actions in other courts that are related to the MDL proceeding. Indeed, a number of state court systems have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may happen that a party to an MDL proceeding is a party to another action that presents issues related to or bearing on issues in the MDL proceeding.

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).

**Rule 16.1(b)(3)(B).** In some MDL proceedings, concerns have been raised on both the plaintiff side and the defense side that some claims and defenses have been asserted without the inquiry called for by Rule 11(b). Experience has shown that in many cases an early exchange of information about the factual bases for claims and defenses can facilitate efficient management. Some courts have utilized “fact sheets” or a “census” as methods to take a survey of the claims and defenses presented, largely as a

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.

**Rule 16.1(b)(3)(E).** The court may consider measures to facilitate the resolution of some or all actions before the court. In MDL proceedings, in addition to mediation and other dispute resolution alternatives, focused discovery orders, timely adjudication of principal legal issues, selection of representative bellwether trials, and coordination with state courts may facilitate resolution. Ultimately, the question of whether parties reach a settlement is just that—a decision to be made by the parties.

**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<sup>1</sup>**

1   **Rule 16.     Pretrial     Conferences;     Scheduling;**  
2                   **Management**

3                                   \* \* \* \* \*

4   **(b)     Scheduling and Management.**

5                                   \* \* \* \* \*

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

7                                   \* \* \* \* \*

8                           **(B)     *Permitted Contents.***

9                                   \* \* \* \* \*

10                           **(iv)**   include the timing and method  
11   for     complying     with  
12   Rule 26(b)(5)(A) and any  
13   agreements the parties reach  
14   for   asserting   claims   of

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<sup>1</sup> New material is underlined; matter to be omitted is lined through.

15 privilege or of protection as  
16 trial-preparation material after  
17 information is produced,  
18 including agreements reached  
19 under Federal Rule of  
20 Evidence 502;

21 \* \* \* \* \*

22 **Committee Note**

23 Rule 16(b) is amended in tandem with an amendment  
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27 instances do more than establish a schedule in its Rule 16(b)  
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31 parties to discuss and include in their discovery plan a  
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33 Rule 26(b)(5)(A). It also directs that the discovery plan  
34 address the timing for compliance with this requirement, in  
35 order to avoid problems that can arise if issues about  
36 compliance emerge only at the end of the discovery period.

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

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

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

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF CIVIL PROCEDURE<sup>1</sup>**

1    **Rule 16.1.    Multidistrict Litigation**

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

7    **(b)    Report for the Conference.**

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

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

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<sup>1</sup> New material is underlined.

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

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

19 **(i)** the timing of the  
20 appointments;

21 **(ii)** the structure of leadership  
22 counsel;

23 **(iii)** the procedure for selecting  
24 leadership and whether the  
25 appointments should be  
26 reviewed periodically;

27 **(iv)** their responsibilities and  
28 authority in conducting  
29 pretrial activities and any role  
30 in facilitating resolution of the  
31 MDL proceedings;

- 32                   (v) the proposed methods for  
33                                 regularly communicating with  
34                                 and reporting to the court and  
35                                 nonleadership counsel;
- 36                   (vi) any limits on activity by  
37                                 nonleadership counsel; and
- 38                   (vii) whether and when to establish  
39                                 a means for compensating  
40                                 leadership counsel;
- 41                   **(B)** any previously entered scheduling or  
42                                 other orders that should be vacated or  
43                                 modified;
- 44                   **(C)** a schedule for additional management  
45                                 conferences with the court;
- 46                   **(D)** how to manage the direct filing of  
47                                 new actions in the MDL proceedings;  
48                                 and

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

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

57                    **(A) whether consolidated pleadings**  
58                    should be prepared;

59                    **(B) how and when the parties will**  
60                    exchange information about the  
61                    factual bases for their claims and  
62                    defenses;

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

65                    **(D) any likely pretrial motions;**

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

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

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

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

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



83

**Committee Note**

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

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

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

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

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

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

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

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

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

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

165 The first topic is the timing of appointment of  
166 leadership. Ordinarily, transferee judges enter orders  
167 appointing leadership counsel separately from orders  
168 addressing the matters in Rule 16.1(b)(2)(B)-(E) and  
169 16.1(b)(3).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

277           **Rule 16.1(b)(2)(C).** The Rule 16.1(a) conference is  
278 the initial management conference. Although there is no  
279 requirement that there be further management conferences,  
280 courts generally conduct management conferences  
281 throughout the duration of the MDL proceeding to  
282 effectively manage the litigation and promote clear, orderly,  
283 and open channels of communication between the parties  
284 and the court on a regular basis.

285           **Rule 16.1(b)(2)(D).** When large numbers of  
286 tagalong actions (actions that are filed in or removed to  
287 federal court after the Judicial Panel has created the MDL  
288 proceeding) are anticipated, some parties have stipulated to  
289 “direct filing” orders entered by the court to provide a  
290 method to avoid the transferee judge receiving numerous  
291 cases through transfer rather than direct filing. If a direct  
292 filing order is entered, it is important to address other matters  
293 that can arise, such as properly handling any jurisdictional or  
294 venue issues that might be presented, identifying the  
295 appropriate district court for remand at the end of the pretrial  
296 phase, how time limits such as statutes of limitations should  
297 be handled, and how choice of law issues should be  
298 addressed. Sometimes liaison counsel may be appointed  
299 specifically to report on developments in related litigation  
300 (e.g., state courts and bankruptcy courts) at the case  
301 management conferences.

302           **Rule 16.1(b)(2)(E).** On occasion there are actions in  
303 other courts that are related to the MDL proceeding. Indeed,  
304 a number of state court systems have mechanisms like  
305 § 1407 to aggregate separate actions in their courts. In  
306 addition, it may happen that a party to an MDL proceeding  
307 is a party to another action that presents issues related to or  
308 bearing on issues in the MDL proceeding.

309           The existence of such actions can have important  
310 consequences for the management of the MDL proceeding.  
311 For example, the coordination of overlapping discovery is  
312 often important. If the court is considering adopting a  
313 common benefit fund order, consideration of the relative  
314 importance of the various proceedings may be important to  
315 ensure a fair arrangement. It is important that the MDL  
316 transferee judge be aware of whether such actions in other  
317 courts have been filed or are anticipated.

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

324           **Rule 16.1(b)(3)(A).** For case management purposes,  
325 some courts have required consolidated pleadings, such as  
326 master complaints and answers, in addition to short form  
327 complaints. Such consolidated pleadings may be useful for  
328 determining the scope of discovery and may also be  
329 employed in connection with pretrial motions, such as  
330 motions under Rule 12 or Rule 56. The Rules of Civil  
331 Procedure, including the pleading rules, continue to apply in  
332 all MDL proceedings. The relationship between the  
333 consolidated pleadings and individual pleadings filed in or  
334 transferred to the MDL proceedings depends on the purpose  
335 of the consolidated pleadings in the MDL proceeding.  
336 Decisions regarding whether to use master pleadings can  
337 have significant implications in MDL proceedings, as the  
338 Supreme Court noted in *Gelboim v. Bank of America Corp.*,  
339 574 U.S. 405, 413 n.3 (2015).

340           **Rule 16.1(b)(3)(B).** In some MDL proceedings,  
341 concerns have been raised on both the plaintiff side and the



342 defense side that some claims and defenses have been  
343 asserted without the inquiry called for by Rule 11(b).  
344 Experience has shown that in many cases an early exchange  
345 of information about the factual bases for claims and  
346 defenses can facilitate efficient management. Some courts  
347 have utilized “fact sheets” or a “census” as methods to take  
348 a survey of the claims and defenses presented, largely as a  
349 management method for planning and organizing the  
350 proceedings. Such methods can be used early on when  
351 information is being exchanged between the parties or  
352 during the discovery process addressed in  
353 Rule 16.1(b)(3)(C).

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

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

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

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

386           **Rule 16.1(b)(3)(E).** The court may consider  
387 measures to facilitate the resolution of some or all actions  
388 before the court. In MDL proceedings, in addition to  
389 mediation and other dispute resolution alternatives, focused  
390 discovery orders, timely adjudication of principal legal  
391 issues, selection of representative bellwether trials, and  
392 coordination with state courts may facilitate resolution.  
393 Ultimately, the question of whether parties reach a  
394 settlement is just that—a decision to be made by the parties.

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

404           **Rule 16.1(b)(3)(G).** Orderly and efficient pretrial  
405 activity in MDL proceedings can be facilitated by early  
406 identification of the principal factual and legal issues likely

407 to be presented. Depending on the issues presented, the court  
408 may conclude that certain factual issues should be pursued  
409 through early discovery, and certain legal issues should be  
410 addressed through early motion practice.

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

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

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF CIVIL PROCEDURE<sup>1</sup>**

1   **Rule 26.     Duty to Disclose; General Provisions**  
2                   **Governing Discovery**

3                                   \* \* \* \* \*

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

6                                   \* \* \* \* \*

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

9                                   \* \* \* \* \*

- 10                   **(D)**   any issues about claims of privilege  
11                                   or of protection as trial-preparation  
12                                   materials, including the timing and  
13                                   method for complying with  
14                                   Rule 26(b)(5)(A) and—if the parties

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<sup>1</sup> New material is underlined; matter to be omitted is lined through.

15                   agree on a procedure to assert these  
16                   claims after production—whether to  
17                   ask the court to include their  
18                   agreement in an order under Federal  
19                   Rule of Evidence 502;

20                   \* \* \* \* \*

21                   **Committee Note**

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

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

37                   This amendment also seeks to provide the parties  
38                   maximum flexibility in designing an appropriate method for  
39                   identifying the grounds for withholding materials.  
40                   Depending on the nature of the litigation, the nature of the  
41                   materials sought through discovery, and the nature of the

42 privilege or protection involved, what is needed in one case  
43 may not be necessary in another. No one-size-fits-all  
44 approach would actually be suitable in all cases.

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

**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 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

**NOTICE**

**NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE  
UNLESS APPROVED BY THE CONFERENCE ITSELF.**

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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



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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.

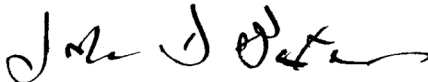
At its meeting, the Standing Committee made minor changes to the rule and committee note to improve style and promote consistency. In the committee note, language was refined to clarify measures to facilitate resolution of MDL proceedings.

**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

- |                         |                   |
|-------------------------|-------------------|
| 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 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

**JOHN D. BATES**  
CHAIR

**H. THOMAS BYRON III**  
SECRETARY

**CHAIRS OF ADVISORY COMMITTEES**

**JAY S. BYBEE**  
APPELLATE RULES

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BANKRUPTCY RULES

**ROBIN L. ROSENBERG**  
CIVIL RULES

**JAMES C. DEVER III**  
CRIMINAL RULES

**PATRICK J. SCHILTZ**  
EVIDENCE RULES

**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

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*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.

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\* A copy of the full committee report can be found in the June 2024 Standing Committee agenda book publicly available on [www.uscourts.gov](http://www.uscourts.gov).

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

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.

\* \* \* \* \*

### 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

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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

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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.”

\* \* \* \* \*

### 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. \* \* \*

\* \* \* \* \*

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:

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- (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.

\* \* \* \* \*