Long, Strange Trips: Upcoming Changes to the Federal Rules of Appellate, Bankruptcy and Civil Procedure

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There is an adage that lawyers learn the version of the rules of evidence and procedure that are current when they are in law school and never look at them again. While that is (hopefully) an exaggeration, it is always worth noting when there are substantive changes to the rules that govern our practices. Barring action by the United States Supreme Court or Congress, amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure will take effect on December 1, 2025.

Before going into the substance of the changes, a summary of the process might be worthwhile. The Rules Enabling Act, 28 U.S.C. 2071 *et seq.* gives the United States Supreme Court the authority to create federal rules in connection the Judicial Conference of the United States. The Judicial Conference of the United States has a Committee on Rules of Practice and Procedure, commonly referred to the "Standing Committee." There are five advisory committees on the appellate, civil, criminal, and evidence rules that make recommendations to the Standing Committee.

Interested parties make recommendations for rule changes to the advisory committees. If an advisory committee decides to recommend a rule amendment, it will draft a proposed amendment and, with the approval of the Standing Committee, issue it for a six-mouth period of public comment. It may also hold hearings to allow interested parties to testify.

Based on the comments, an advisory committee then reconsiders the proposed amendment. If an advisory committee decides that substantial revisions are necessary, it may reissue the rule for another six-month comment period. When an advisory committee decides on the final form of the proposed amendment, it sends it to the Standing Committee. The Standing Committee may accept, reject, or modify the proposed amendment. If it decides an amendment is appropriate, it sends it the full Judicial Conference. The Judicial Conference then considers the proposed amendment at its September annual meeting.

Amendments approved by the Judicial Conference are then sent to the United States Supreme Court. The Supreme Court must approve the proposed amendment and send it Congress by May 1st of the year when the amendment is to take effect. If Congress does not pass legislation to reject, modify, or defer the amendment, it automatically takes effect on December 1st of that year.

As this "brief" summary of the process suggests, amending federal rules is not a quick or simple task. Practically speaking, once a proposed amendment is approved by the Supreme Court, it is almost certain to become effective.

This year, several amendments are currently awaiting approval by the Supreme Court by the May 1, 2025, deadline.

Federal Rules of Appellate Procedure 6 is being amended to clarify the time-periods for? post-judgment motions in bankruptcy court and the procedure for direct appeals from a bankruptcy

court. Federal Rule of Appellate Procedure 39 is being amended in response to the Supreme Court holding in *City of San Antonio v. Hotels.com*, 141 S.Ct. 1628 (2021). The proposed 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. 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.

There are also proposed amendments pending to Federal Rules of Bankruptcy Procedure 3002.1 and 8006 that address mortgages in Chapter 13 bankruptcies and parallel the changes to the Appellate Rules.

There are also proposed amendments to the Federal Rules of Civil Procedure. There is a proposed new Federal Rule of Civil Procedure 16.1 designed to provide a framework for the initial management of multidistrict litigation. Finally, there are proposed amendments to Federal Rule of Civil Procedure 16(b) and Rule 26(f)(3)(D) that require parties to address in their discovery plan the timing and method for complying with the Rule 26(b)(5)(A) requirement that producing parties describe materials withheld based on the attorney-client privilege or work-product doctrine. The legislative history of these proposed amendments make it clear the goal is to address privilege issues early in litigation to avoid expensive and potentially unnecessary in camera reviews and privilege log disputes.

While these are changes to federal rules, they also have implications for practice in Ohio state courts. Ohio has repeatedly amended its rules to maintain consistency with federal rules. The proposed amendments to Federal Civil Rules 16 and 26 might be particularly relevant in this context, given pending cases before the Ohio Supreme Court and various courts of appeals concerning in camera review, the need for privilege logs, the burden to substantiate privilege claims, and a trial court's discretion to manage all these issues. Parallel changes to the Ohio Civil Rules to address these issues at the beginning of the litigation process, consistent with other relatively recent changes to the Ohio Rules of Civil Procedure to encourage meaningful early case management in civil cases, could benefit parties and the courts.