

DECEMBER 1, 2024

New Local Rule 40

*FIFTH CIRCUIT RULE 40*

**40.1 Panel Rehearing.** *The court requires separate petitions for Panel and En Banc Review.*

**40.1.1 Copies.** *Four copies of all petitions for rehearing will be filed. A party seeking panel rehearing must attach to the petition an unmarked copy of the opinion or order sought to be reviewed. If the party contemporaneously files a petition for rehearing en banc and attaches a copy of the opinion or order required by 5TH CIR. R. 40.2.2.10, the party does not have to attach a copy to the petition for panel rehearing.*

**40.1.2 Limited Nature of Petition for Panel Rehearing.** *A petition for rehearing is intended to bring to the attention of the panel claimed errors of fact or law in the opinion. It is not used for reargument of the issue previously presented or to attack the court's well- settled summary calendar procedures. Petitions for rehearing of panel decisions are reviewed by panel members only.*

**40.1.3 Length.** *See FED. R. APP. P. 40(d)(3).*

**40.1.4 Time for Filing.** *The clerk must receive a petition for rehearing within the time prescribed in FED. R. APP. P. 40(d)(1).*

**40.2 Determination of Causes by the Court En Banc.**

**40.2.1 Caution.** *Counsel are reminded that in every case the duty of counsel is fully discharged without filing a petition for rehearing en banc unless the case meets the rigid standards of FED. R. APP. P. 40(b)(2)(A)-(D). As is noted in FED. R. APP. P. 40(g) and 40(c), en banc hearing or rehearing is not favored. Among the reasons is that each request for en banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. Counsel have a duty to the court commensurate with that owed their clients to read with attention and observe with restraint the standards of FED. R. APP. P. 40(b)(2). The court takes the view that, given the extraordinary nature of petitions for en banc consideration, it is fully justified in imposing sanctions on its own initiative under, *inter alia*, FED. R. APP. P. 38 and 28 U.S.C. § 1927, upon the person who signed the petitions, the represented party, or both, for manifest abuse of the procedure.*

**40.2.2 Form of Petition.** *Twenty copies of every petition for en banc*

*consideration, whether upon initial hearing or rehearing, must be filed. The petition must not be incorporated in the petition for rehearing before the panel, if one is filed, but must be complete in itself. In no case will a petition for en banc consideration adopt by reference any matter from the petition for panel rehearing or from any other briefs or motions in the case. A petition for en banc consideration must contain the following items, in order:*

*40.2.2.1 Certificate of interested persons required for briefs by 5TH CIR. R. 28.2.1.*

*40.2.2.2 If the party petitioning for en banc consideration is represented by counsel, a statement as set forth in **FED. R. APP. P. 40(b)(2)**.*

*40.2.2.3 Table of contents and authorities.*

*40.2.2.4 Statement of the issue or issues asserted to merit en banc consideration. It will rarely occur that these will be the same as those appropriate for panel rehearing. A petition for en banc consideration must be limited to the circumstances enumerated in **FED. R. APP. P. 40(b)(2)(A)-(D)**.*

*40.2.2.5 Statement of the course of proceedings and disposition of the case.*

*40.2.2.6 Statement of any facts necessary to the argument of the issues.*

*40.2.2.7 Argument and authorities. These will concern only the issues required by paragraph (.2.2.4) hereof and shall address specifically, not only their merit, but why they are contended to be worthy of en banc consideration.*

*40.2.2.8 Conclusion.*

*40.2.2.9 A certificate of service if required by FED. R. APP. P. 25(d).*

*40.2.2.10 A copy of the opinion or order sought to be reviewed. The opinion or order will be bound with the petition and shall not be marked or annotated.*

**40.2.3 Response to Petition.** *No response to a petition for en banc consideration*

*will be received unless requested by the court.*

**40.2.4 Time and Form - Extensions.** *Any petition for rehearing en banc must be received in the clerk's office within the time specified in **FED. R. APP. P. 40(d)(1)**. Counsel should not request extensions of time except for the most compelling reasons.*

**40.2.5 Length.** *See **FED. R. APP. P. 40(d)(3)**. The statement required by **FED. R. APP. P. 40(b)(2)** is included in the limit and is not a "certificate[ ]of counsel" that is excluded **FED. R. App. P. 32(f)**.*

**40.2.6 Determination of Causes En Banc and Composition of En Banc Court.** *A cause will be heard or reheard en banc when it meets the criteria for en banc set out in **FED. R. APP. P. 40(b)(2)**.*

*The en banc court will be composed of all active judges of the court. Any senior circuit judge of this circuit shall be eligible (1) to participate, at his or her election and upon designation and assignment pursuant to 28 U.S.C. § 294(c) and the rules of this court, as a member of an en banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court en banc at a time when such judge was in regular active service. An election to participate is to be communicated timely to the chief judge and clerk.*

**I.O.P.**

## **PETITION FOR REHEARING**

**NECESSITY FOR FILING - IT IS NOT NECESSARY TO FILE A PETITION FOR REHEARING IN THE COURT OF APPEALS AS A PREREQUISITE TO FILING A PETITION FOR CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES.**

**CAPITAL CASES - CONSISTENT WITH LONG ESTABLISHED LEGAL PRINCIPLE AND UNIFORMLY FOLLOWED PRACTICE, THE FILING OF A PETITION FOR REHEARING DOES NOT CONSTITUTE OR OPERATE AS A STAY OF EXECUTION AND DOES NOT PRECLUDE CARRYING OUT AN EXECUTION.**

## **PETITION FOR REHEARING EN BANC**

**EXTRAORDINARY NATURE OF PETITIONS FOR REHEARING EN BANC** - A PETITION FOR REHEARING EN BANC IS AN EXTRAORDINARY PROCEDURE THAT IS INTENDED TO BRING TO THE ATTENTION OF THE ENTIRE COURT AN ERROR OF EXCEPTIONAL PUBLIC IMPORTANCE OR AN OPINION THAT DIRECTLY CONFLICTS WITH PRIOR SUPREME COURT, FIFTH CIRCUIT OR STATE LAW PRECEDENT, SUBJECT TO THE FOLLOWING: ALLEGED ERRORS IN THE FACTS OF THE CASE (INCLUDING SUFFICIENCY OF THE EVIDENCE) OR IN THE APPLICATION OF CORRECT PRECEDENT TO THE FACTS OF THE CASE ARE GENERALLY MATTERS FOR PANEL REHEARING BUT NOT FOR REHEARING EN BANC.

**THE MOST ABUSED PREROGATIVE** - PETITIONS FOR REHEARING EN BANC ARE THE MOST ABUSED PREROGATIVE OF APPELLATE ADVOCATES IN THE FIFTH CIRCUIT. FEWER THAN 1% OF THE CASES DECIDED BY THE COURT ON THE MERITS ARE REHEARD EN BANC; AND FREQUENTLY THOSE REHEARINGS GRANTED RESULT FROM A REQUEST FOR EN BANC RECONSIDERATION BY A JUDGE OF THE COURT RATHER THAN A PETITION BY THE PARTIES.

### **HANDLING OF PETITION BY THE JUDGES**

**PANEL HAS CONTROL** - ALTHOUGH EACH PANEL JUDGE AND EVERY ACTIVE JUDGE RECEIVES A COPY OF THE PETITION FOR REHEARING EN BANC, THE FILING OF A PETITION FOR REHEARING EN BANC DOES NOT TAKE THE CASE OUT OF THE CONTROL OF THE PANEL DECIDING THE CASE. A PETITION FOR REHEARING EN BANC IS TREATED AS A PETITION FOR REHEARING BY THE PANEL IF NO PETITION IS FILED. THE PANEL MAY GRANT REHEARING WITHOUT ACTION BY THE FULL COURT.

**REQUESTING A POLL** - WITHIN 10 DAYS OF THE FILING OF THE PETITION, ANY ACTIVE JUDGE OF THE COURT OR ANY MEMBER OF

THE PANEL RENDERING THE DECISION, WHO DESIRES THAT THE CASE BE REHEARD EN BANC, MAY NOTIFY THE WRITING JUDGE (THE SENIOR ACTIVE FIFTH CIRCUIT JUDGE IF THE WRITING JUDGE IS A NON-ACTIVE MEMBER) TO THIS EFFECT ON OR BEFORE THE DATE SHOWN ON THE CLERK'S FORM THAT TRANSMITS THE PETITION. THIS NOTIFICATION IS ALSO NOTICE THAT IF THE PANEL DECLINES TO GRANT REHEARING, AN EN BANC POLL IS DESIRED.

IF THE PANEL DECIDES NOT TO GRANT THE REHEARING AFTER SUCH NOTICE, IT NOTIFIES THE CHIEF JUDGE, WHO THEN POLLS THE COURT BY WRITTEN BALLOT ON WHETHER EN BANC REHEARING SHOULD BE GRANTED.

**REQUESTING A POLL ON COURT'S OWN MOTION** - ANY ACTIVE MEMBER OF THE COURT OR ANY MEMBER OF THE PANEL RENDERING THE DECISION MAY REQUEST A POLL OF THE ACTIVE MEMBERS OF THE COURT WHETHER REHEARING EN BANC SHOULD BE GRANTED, WHETHER OR NOT A PARTY FILED A PETITION FOR REHEARING EN BANC. A REQUESTING JUDGE ORDINARILY SENDS A LETTER TO THE CHIEF JUDGE WITH COPIES TO THE OTHER ACTIVE JUDGES OF THE COURT AND ANY OTHER PANEL MEMBER.

**POLLING THE COURT** - WHEN A REQUEST TO POLL THE COURT IS MADE, EACH ACTIVE JUDGE OF THE COURT CASTS A BALLOT AND SENDS A COPY TO ALL OTHER ACTIVE JUDGES OF THE COURT AND ANY SENIOR FIFTH CIRCUIT JUDGE WHO IS A PANEL MEMBER. THE BALLOT INDICATES WHETHER THE JUDGE VOTING DESIRES ORAL ARGUMENT IF EN BANC IS GRANTED.

**NEGATIVE POLL** - IF THE VOTE IS UNFAVORABLE TO THE GRANT OF EN BANC CONSIDERATION, THE CHIEF JUDGE ADVISES THE WRITING JUDGE. THE PANEL ORIGINALLY HEARING THE CASE THEN ENTERS AN APPROPRIATE ORDER.

**AFFIRMATIVE POLL** - IF A MAJORITY OF THE JUDGES IN ACTIVE SERVICE WHO ARE NOT DISQUALIFIED, VOTE FOR EN BANC HEARING OR REHEARING, THE CHIEF JUDGE INSTRUCTS THE CLERK AS TO AN APPROPRIATE ORDER. THE ORDER INDICATES A REHEARING EN BANC WITH OR WITHOUT ORAL ARGUMENT HAS BEEN GRANTED, AND SPECIFIES A BRIEFING SCHEDULE FOR FILING OF ADDITIONAL BRIEFS. THE APPELLANT'S BRIEF WILL HAVE A BLUE COVER; THE APPELLEE'S WILL HAVE A RED COVER.

EVERY PARTY MUST THEN FURNISH TO THE CLERK 20 ADDITIONAL COPIES OF EVERY BRIEF THE PARTY PREVIOUSLY FILED.

**NO POLL REQUEST** - IF THE SPECIFIED TIME FOR REQUESTING A POLL HAS EXPIRED AND THE WRITING JUDGE OF THE PANEL HAS NOT RECEIVED A REQUEST FROM ANY ACTIVE MEMBER OF THE COURT, OR OTHER PANEL MEMBER, THE JUDGE MAY TAKE SUCH ACTION DEEMED APPROPRIATE ON THE PETITION. HOWEVER, IN THE ORDER DISPOSING OF THE CASE AND THE PETITION, THE PANEL'S ORDER DENYING THE PETITION FOR REHEARING EN BANC MUST SHOW NO POLL WAS REQUESTED.

**CAPITAL CASES** - CONSISTENT WITH LONG ESTABLISHED LEGAL PRINCIPLE AND UNIFORMLY FOLLOWED PRACTICE, THE FILING OF A PETITION FOR REHEARING (OR HEARING) EN BANC DOES NOT CONSTITUTE OR OPERATE AS A STAY OF EXECUTION AND DOES NOT PRECLUDE CARRYING OUT AN EXECUTION.

TIMELY PETITIONS FOR REHEARING (OR HEARING) EN BANC WHICH ARE FILED IN A CAPITAL CASE WHILE A SCHEDULED EXECUTION DATE IS PENDING AND LESS THAN **22 DAYS** BEFORE THE SCHEDULED DATE WILL BE PROCESSED AND DISTRIBUTED IN THE MANNER PRESCRIBED BY THE CHIEF JUDGE OR DELEGEE. THE CHIEF JUDGE OR DELEGEE MAY ORDER EXPEDITED CONSIDERATION THEREOF AND SET A TIME LIMIT FOR EACH JUDGE

ELIGIBLE TO VOTE THEREON TO ADVISE THE CHIEF JUDGE OR DELEGEE WHETHER TO CALL FOR A POLL AND WHETHER (IF A POLL IS OR WERE TO BE TIMELY REQUESTED BY ANY JUDGE) THE JUDGE WOULD VOTE FOR OR AGAINST REHEARING (OR HEARING) EN BANC, AND THE PETITION FOR REHEARING (OR HEARING) EN BANC WILL BE DISPOSED OF ACCORDINGLY. IF NO POLL IS TIMELY REQUESTED, OR IF A POLL RESULTS IN NO REHEARING (OR HEARING) EN BANC, THE PANEL MAY ENTER AN ORDER DENYING REHEARING (OR HEARING) EN BANC. IF A POLL RESULTS IN A GRANT OF REHEARING (OR HEARING) EN BANC, THE CHIEF JUDGE, OR DELEGEE, WILL ENTER AN ORDER STAYING THE EXECUTION PENDING FURTHER ORDER OF THE COURT.

**NON-DISPOSITIVE ORDERS IN CASES OTHER THAN CAPITAL CASE APPEALS** - THE FED. R. APP. P. COVERING REHEARINGS EN BANC DO APPLY TO INTERLOCUTORY ORDERS OF THIS COURT ISSUED PURSUANT TO FED. R. APP. P. 8. THE FILING OF A PETITION FOR REHEARING EN BANC DOES NOT OPERATE AS A STAY OF THE RULE 8 ORDER. TIMELY PETITIONS FOR REHEARING EN BANC WILL BE PROCESSED IN THE MANNER PRESCRIBED BY THE CHIEF JUDGE OR DELEGEE. THE CHIEF JUDGE OR DELEGEE MAY EXPEDITE THE EN BANC REHEARING PROCEDURE AND VOTE AS NECESSARY. IF A POLL IS TAKEN, THE RESULTS SHALL BE HANDLED IN THE SAME MANNER AS OTHER EN BANC POLLS, EXCEPT THAT RESTRICTIONS MAY BE PLACED ON THE TIMING OF ORDERS OR OPINIONS CONCERNING THE RESULTS.