

DECEMBER 1, 2024

NEW FRAP 40

Rule 40. Panel Rehearing; En Banc Determination

- (a) **A Party's Options.** A party may seek rehearing of a decision through a petition for panel rehearing, a petition for rehearing en banc, or both. Unless a local rule provides otherwise, a party seeking both forms of rehearing must file the petitions as a single document. Panel rehearing is the ordinary means of reconsidering a panel decision; rehearing en banc is not favored.
- (b) **Content of a Petition.**
 - (1) **Petition for Panel Rehearing.** A petition for panel rehearing must:
 - (A) state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended; and
 - (B) argue in support of the petition.
 - (2) **Petition for Rehearing En Banc.** A petition for rehearing en banc must begin with a statement that:
 - (A) the panel decision conflicts with a decision of the court to which the petition is addressed (with citation to the conflicting case or cases) and the full court's consideration is therefore necessary to secure or maintain uniformity of the court's decisions;
 - (B) the panel decision conflicts with a decision of the United States Supreme Court (with

citation to the conflicting case or cases);

(C) the panel decision conflicts with an authoritative decision of another United States court of appeals (with citation to the conflicting case or cases); or

(D) the proceeding involves one or more questions of exceptional importance, each concisely stated.

(c) **When Rehearing En Banc May Be Ordered.** On their own or in response to a party's petition, a majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be reheard en banc. Unless a judge calls for a vote, a vote need not be taken to determine whether the case will be so reheard. Rehearing en banc is not favored and ordinarily will be allowed only if one of the criteria in Rule 40(b)(2)(A)-(D) is met.

(d) **Time to File; Form; Length; Response; Oral Argument.**

(1) **Time.** Unless the time is shortened or extended by order or local rule, any petition for panel rehearing or rehearing en banc must be filed within 14 days after judgment is entered—or, if the panel later amends its decision (on rehearing or otherwise), within 14 days after the amended decision is entered. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry of judgment or of an amended decision if one of the parties is:

- (A) the United States;
 - (B) a United States agency;
 - (C) a United States officer or employee sued in an official capacity; or
 - (D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf— including all instances in which the United States represents that person when the court of appeals' judgment is entered or files that person's petition.
- (2) **Form of the Petition.** The petition must comply in form with Rule 32. Copies must be filed and served as Rule 31 prescribes, except that the number of filed copies may be prescribed by local rule or altered by order in a particular case.
- (3) **Length.** Unless the court or a local rule allows otherwise the petition (or a single document containing a petition for panel rehearing and a petition for rehearing en banc) must not exceed:
- (A) 3,900 words if produced using a computer; or
 - (B) 15 pages if handwritten or typewritten.
- (4) **Response.** Unless the court so requests, no response to the petition is permitted. Ordinarily, the petition will not be granted without such a request. If a response is requested, the requirements of Rule 40(d)(2)-(3) apply to the response.

- (5) **Oral Argument.** Oral argument on whether to grant the petition is not permitted.
- (e) **If a Petition Is Granted.** If a petition for panel rehearing or rehearing en banc is granted, the court may:
 - (1) dispose of the case without further briefing or argument;
 - (2) order additional briefing or argument; or
 - (3) issue any other appropriate order.
- (f) **Panel's Authority After a Petition for Rehearing En Banc.** The filing of a petition for rehearing en banc does not limit the panel's authority to take action described in Rule 40(e).
- (g) **Initial Hearing En Banc.** On its own or in response to a party's petition, a court may hear an appeal or other proceeding initially en banc. A party's petition must be filed no later than the date when its principal brief is due. The provisions of Rule 40(b)(2), (c), and (d)(2)-(5) apply to an initial hearing en banc. But initial hearing en banc is not favored and ordinarily will not be ordered.