

ADOPTED December 3, 2024

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

AMENDMENTS TO LOCAL RULES 35 and 40

PLEASE TAKE NOTICE that the Court intends to amend Local Rules 35 and 40 to conform to amendments to Federal Rules of Appellate Procedure 35 and 40, which were adopted by the Supreme Court of the United States pursuant to 28 U.S.C. § 2072.

The provisions of Local Rule 35 will be transferred to Local Rule 40.

Local Rule 40 will be expanded to incorporate the provisions of the former Local Rule 35. Specifically, the contents of Local Rule 35(a) will be added to Local Rule 40(a), and the remaining subsections 35(b) – (e) will be added as new subsections of Local Rule 40. Additionally, Local Rule 40(d) will be renumbered Local Rule 40(h).

The amendments to Federal Rules of Appellate Procedure 35 and 40 take effect December 1, 2024. Accordingly, the attached amendments to Local Rules 35 and 40 also are scheduled to take effect December 1, 2024, subject to revision in light of comments received. Interested parties may submit comments on or before December 6, 2024, to:

Nwamaka Anowi, Clerk
U.S. Court of Appeals for the Fourth Circuit
1100 E. Main Street, Suite 501
Richmond, Virginia 23219

or via email to:

rulecomments@ca4.uscourts.gov

The Fourth Circuit Rulebook is available [here](#).

November 25, 2024

Date

/s/ Nwamaka Anowi

Clerk

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Local Rule 35. En Banc Proceedings. [\(Transferred to Local Rule 40\)](#)

- ~~(a) **Petition for Rehearing En Banc.** A petition for rehearing en banc must be made at the same time, and in the same document, as a petition for rehearing. The request for en banc consideration shall be stated plainly in the title of the petition. Petitions for rehearing en banc will be distributed to all active judges of the Court, to senior judges who request distribution, and to any senior or visiting judge who may have heard and decided the appeal.~~
- ~~(b) **Decision to Hear or Rehear a Case En Banc.** A majority of the circuit judges who are in regular active service and who are not disqualified may grant a hearing or rehearing en banc. A poll on whether to rehear a case en banc may be requested, with or without a petition, by an active judge of the Court or by a senior or visiting judge who sat on the panel that decided the case originally. Unless a judge requests that a poll be taken on the petition, none will be taken. If no poll is requested, the panel's order on a petition for rehearing will bear the notation that no member of the Court requested a poll. If a poll is requested and hearing or rehearing en banc is denied, the order will reflect the vote of each participating judge. A judge who joins the Court after a petition has been submitted to the Court, and before an order has been entered, will be eligible to vote on the decision to hear or rehear a case en banc.~~
- ~~(c) **Decision of Cases Heard or Reheard En Banc.** A court en banc shall consist of all eligible, active and participating judges of the Court, except that any senior judge of the Court may (1) participate in en banc rehearing of a decision of a panel of which the judge was a member or (2) continue to participate in the decision of a case or controversy that was heard or reheard by the en banc court at a time when the judge was in regular active service. A judge who joins the Court after argument of a case to an en banc Court will not be eligible to participate in the decision of the case. A judge who joins the Court after submission of a case to an en banc Court without oral argument will participate in the decision of the case. Granting of rehearing en banc vacates the previous panel judgment and opinion; the rehearing is a review of the judgment or decision from which review is sought and not a review of the judgment of the panel.~~
- ~~(d) **Additional Briefing for En Banc Hearing or Rehearing.** If the Court grants hearing or rehearing en banc, and if a majority of the Court agrees additional briefing is desirable, the Court, on motion by a party or on its own initiative, may order full en banc briefing or supplemental en banc briefing addressing issues specified by the Court. If additional briefing is required, the Court's en banc briefing schedule will indicate whether full briefs or supplemental briefs must be filed and, where appropriate, the issue(s) to be addressed. As appropriate, full or supplemental en banc briefs should address (i) the necessity of securing or maintaining uniformity of the Court's decisions; (ii) whether the Court should revise existing circuit precedent; (iii) intervening precedent; and (iv) any other issue(s) identified by the Court in the briefing order.~~
- ~~(e) **Reproduction Costs for Briefs and Appendices Required for En Banc Review.** Each party will bear the initial cost of additional copies of its own briefs required by the Court for en banc review. The party that requested the hearing or rehearing en banc will bear the initial cost of filing additional copies of the appendix or supplemental appendix required for en banc review. In the event that cross petitions for hearing or rehearing en banc are granted, the parties will share equally the initial cost of preparing additional copies of the appendix or supplemental appendix required for en banc review.~~

Local Rule 40(a). Filing of Petition.

Although petitions for rehearing are filed in a great many cases, few are granted. Filing a petition solely for purposes of delay or in order merely to reargue the case is an abuse of privilege.

[A petition for rehearing en banc must be made at the same time, and in the same document, as a petition for rehearing. The request for en banc consideration shall be stated plainly on the cover and in the title of the petition. Petitions for rehearing en banc will be distributed to all active judges of the Court, to senior judges who request distribution, and to any senior or visiting judge who may have heard and decided the appeal.](#)

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~~Whenever a request for rehearing en banc is contained in a petition, such fact must be stated plainly on the cover of and in the title of the document.~~ Only the original petition for rehearing or rehearing en banc is required unless additional copies are requested by the Clerk.

Local Rule 40(b). Statement of Purpose.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist:

- i. A material factual or legal matter was overlooked in the decision.
- ii. A change in the law occurred after the case was submitted and was overlooked by the panel.
- iii. The opinion is in conflict with a decision of the United States Supreme Court, this Court, or another court of appeals and the conflict is not addressed in the opinion.
- iv. The proceeding involves one or more questions of exceptional importance.

A petition should only be made to direct the Court's attention to one or more of the above situations. The points to be raised should be succinctly listed in counsel's statement of purpose.

Local Rule 40(c). Time Limits for Filing Petitions.

The Court strictly enforces the time limits for filing petitions for rehearing and petitions for rehearing en banc. The Clerk's Office will deny as untimely any petition received in the Clerk's Office later than 45 days after entry of judgment in any civil case where the United States, or an agency or officer thereof is a party, or 14 days after the entry of judgment in any other case. The only grounds for an extension of time to file a petition, or to accept an untimely petition, are as follows:

- i. the death or serious illness of counsel, or of a member of counsel's immediate family (or in the case of a party proceeding without counsel, the death or serious illness of the party or a member of the party's immediate family); or
- ii. an extraordinary circumstance wholly beyond the control of counsel or of a party proceeding without counsel.

Petitions for rehearing and petitions for en banc rehearing from incarcerated persons proceeding without the assistance of counsel are deemed filed when they are delivered to prison or jail officials. All other such petitions are deemed filed only when received in the Clerk's Office.

Local Rule 40(d). Decision to Hear or Rehear a Case En Banc.

A majority of the circuit judges who are in regular active service and who are not disqualified may grant a hearing or rehearing en banc. A poll on whether to rehear a case en banc may be requested, with or without a petition, by an active judge of the Court or by a senior or visiting judge who sat on the panel that decided the case originally. Unless a judge requests that a poll be taken on the petition, none will be taken. If no poll is requested, the panel's order on a petition for rehearing will bear the notation that no member of the Court requested a poll. If a poll is requested and hearing or rehearing en banc is denied, the order will reflect the vote of each participating judge. A judge who joins the Court after a petition has been submitted to the Court, and before an order has been entered, will be eligible to vote on the decision to hear or rehear a case en banc.

Local Rule 40(e). Decision of Cases Heard or Reheard En Banc.

A court en banc shall consist of all eligible, active and participating judges of the Court, except that any senior judge of the Court may (1) participate in en banc rehearing of a decision of a panel of which the judge was a member or (2) continue to participate in the decision of a case or controversy that was heard or reheard by the en banc court at a time when the judge was in regular active service. A judge who joins the Court after argument of a case to an en banc Court will not be eligible to participate in the decision of

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the case. A judge who joins the Court after submission of a case to an en banc Court without oral argument will participate in the decision of the case. Granting of rehearing en banc vacates the previous panel judgment and opinion; the rehearing is a review of the judgment or decision from which review is sought and not a review of the judgment of the panel.

Local Rule 40(f). Additional Briefing for En Banc Hearing or Rehearing.

If the Court grants hearing or rehearing en banc, and if a majority of the Court agrees additional briefing is desirable, the Court, on motion by a party or on its own initiative, may order full en banc briefing or supplemental en banc briefing addressing issues specified by the Court. If additional briefing is required, the Court's en banc briefing schedule will indicate whether full briefs or supplemental briefs must be filed and, where appropriate, the issue(s) to be addressed. As appropriate, full or supplemental en banc briefs should address (i) the necessity of securing or maintaining uniformity of the Court's decisions; (ii) whether the Court should revise existing circuit precedent; (iii) intervening precedent; and (iv) any other issue(s) identified by the Court in the briefing order.

Local Rule 40(g). Reproduction Costs for Briefs and Appendices Required for En Banc Review.

Each party will bear the initial cost of additional copies of its own briefs required by the Court for en banc review. The party that requested the hearing or rehearing en banc will bear the initial cost of filing additional copies of the appendix or supplemental appendix required for en banc review. In the event that cross petitions for hearing or rehearing en banc are granted, the parties will share equally the initial cost of preparing additional copies of the appendix or supplemental appendix required for en banc review.

Local Rule 40(d~~h~~). Papers Filed After Denial of a Petition for Rehearing.

Except for timely petitions for rehearing en banc, cost and attorney fee matters, and other matters ancillary to the filing of an application for writ of certiorari with the Supreme Court, the Office of the Clerk shall not receive motions or other papers requesting further relief in a case after the Court has denied a petition for rehearing or the time for filing a petition for rehearing has expired.