

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

NOTICE OF CONFORMING AMENDMENT TO LOCAL RULE 35(b)

PLEASE TAKE NOTICE that the Court intends to amend Local Rule 35(b) to conform to an amendment to Rule 35(a) of the Federal Rules of Appellate Procedure scheduled to take effect December 1, 2005. This Court's current local rule provides that a hearing or rehearing en banc may be granted by a majority of the active circuit judges, without regard to disqualification. As amended, Fed. R. App. P. 35(a) will provide that a hearing or rehearing en banc may be granted by a majority of the active circuit judges who are not disqualified in the case.

The attached amendment modifies the "absolute majority" approach of current Local Rule 35(b) to conform to the "case majority" approach of Fed. R. App. P. 35(a). The conforming amendment to the local rule will take effect on December 1, 2005, the same date as the amendment to Fed. R. App. P. 35(a). Comments may be submitted on or before November 30, 2005, to:

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

October 17, 2005

Date

/s/ Patricia S. Connor

Clerk

Local Rule 35. En Banc Proceedings.

(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 and senior judges of the Court, and to any 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. ~~For purposes of determining a majority under this rule, the term majority means of all judges of the Court in regular active service who are presently serving, without regard to whether a judge is disqualified.~~ 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. An en banc hearing will be before all eligible, active and participating judges of the Court. An en banc rehearing will be before all eligible and participating active judges, and any senior judge of the Court who sat on the panel that decided the case originally. An active judge who takes senior status after a case is heard or reheard by an en banc Court will be eligible to participate in the en banc decision. 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. (The circuit takes the position that the change of wording in 28 U.S.C. § 46(c) referring to participation in en banc decisions does not alter the long-standing rule that the en banc court reviews the decision from which review is sought in this Court, not the decision of a panel.)

(d) Additional Copies of Briefs and Appendix for En Banc Hearing or Rehearing. The Court's order granting hearing or rehearing en banc may require the parties to file additional copies of the briefs and appendix. Each party will bear the initial cost of additional copies of its own briefs. The party that requested the hearing or rehearing en banc will bear the initial cost of filing additional copies of the appendix. 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.