

REHEARING & REHEARING EN BANC

Grounds for Rehearing or Rehearing En Banc

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 the privilege. Loc. R. 40(a).

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

1. a material factual or legal matter was overlooked in the decision;
2. a change in the law occurred after the case was submitted and was overlooked by the panel;
3. the opinion is in conflict with a decision of the U.S. Supreme Court, this court, or another court of appeals and the conflict is not addressed in the opinion; or
4. the proceeding involves one or more questions of exceptional importance.

The points to be raised should be succinctly listed in counsel's statement of purpose. Loc. R. 40(b). The petition must state with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Fed. R. App. P. 40.

Grounds for Initial Hearing En Banc

Initial hearing en banc is not favored and ordinarily will not be ordered. Fed. R. App. P.40(g). The provisions of Fed. R. App. P. 40(b)(2), (c), and (d)(2)-(5), and Loc. R. 40(d), (e), (f), and (g) apply to an initial hearing en banc.

Length & Format of Petition

Format must comply with Fed. R. App. P. 32. No cover is required, but the title page must state plainly whether it is a petition for rehearing or petition for rehearing and 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. Except by permission of the court, a petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3,900 words (15 pages if typewritten or handwritten) and must be accompanied by a certificate of compliance with type-volume limit if produced by computer. Fed. R. App. P.40(d)(3).

Filing Period

A petition for rehearing and/or rehearing en banc must be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. However, in all civil cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing is 45 days after entry of judgment unless the time is shortened or enlarged by order. Fed. R. App. P.40(d)(1).

A party's petition for initial hearing en banc must be filed by the date its principal brief is due. Fed. R. App. P.40(g).

The court strictly enforces the time limits for filing petitions for rehearing and petitions for rehearing en banc. The clerk's office will deny a late petition as untimely unless one of the following grounds is presented for extension: (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 a party proceeding without counsel. Loc. R. 40(c).

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. Loc. R. 40(c).

Submission to the Court

The clerk's office will hold any petition for rehearing or petition for rehearing en banc until the time for filing all such petitions, or any extension thereof granted in the particular case, has run. Thereafter, all petitions for rehearing in the same case will be distributed to the court simultaneously. IOP 40.1. A petition for rehearing is submitted to the panel that decided the case. A petition for rehearing en banc is distributed to all active judges of the court, to senior judges of the court who request distribution, and to any senior or visiting judge who may have heard and decided the appeal. Loc. R.40(a).

Response

No response to a petition for rehearing may be filed unless ordered by the court. Fed. R. App. P.40(d)(4). A response to a petition for rehearing, with or without rehearing en banc, may not exceed 3,900 words (15 pages if typewritten or handwritten) and must be accompanied by a certificate of compliance with type-volume limit if produced by computer. Fed. R. App. P.40(d)(2)-(3).

Filing of Amicus Briefs During Consideration of Whether to Grant Rehearing

Amicus filings during the court's consideration of whether to grant panel or en banc rehearing are governed by Fed. R. App. P. 29(b).

The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court. Fed. R. App. P. 29(b)(2).

The content requirements for a brief at the petition for rehearing stage are the same as those at the merits stage of the case. An amicus brief at the petition for rehearing stage may not exceed 2,600 words. Fed. R. App. P. 29(b)(4). The filing of a paper copy of the amicus brief is not required at the petition for rehearing stage. Loc. R. 29(b)(2).

An amicus curiae supporting a petition for rehearing or rehearing en banc or supporting neither party must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the petition is filed. An amicus curiae opposing the petition must file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for the response. Fed. R. App. P. 29(b)(5).

Panel Rehearing

The panel of judges who heard and decided the appeal will rule on the petition for rehearing. Such panel may include a senior circuit judge or a visiting judge sitting in the Fourth Circuit by designation. IOP 40.2. If a petition for rehearing is granted, the original judgment and opinion of the court are vacated and the case will be reheard before the original panel. IOP 40.2. The panel may make a final disposition of the case without reargument, restore the case to the calendar for reargument or resubmission, or issue any other appropriate order. Fed. R. App. P.40(e). The court may direct the filing of additional briefs, or the parties may seek leave of court to file additional briefs. IOP 40.2.

Decision to Hear or Rehear a Case En Banc

A majority of the circuit judges who are in regular active service and not disqualified in a case may grant a hearing or rehearing en banc. 28 U.S.C. § 46(c); Fed. R. App. P. 40(d). A senior or visiting judge does not vote on a petition for rehearing en banc, even if the senior or visiting judge sat on the panel that decided the case. 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. Loc. R. 40(d).

Poll

Unless a judge requests that a poll be taken on the petition for rehearing en banc, none will be taken. Loc. R. 40(d). 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. 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. Loc. R. 40(d). If a poll is requested and hearing or rehearing en banc is denied, the order will reflect the vote of each participating judge. Loc. R. 40(d). If the court votes to grant a hearing or rehearing en banc, the order will simply recite that a majority of the judges in regular active service voted to grant hearing or rehearing en banc, but will not reflect the vote of each judge.

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. Loc. R.40(f). The order granting rehearing en banc will also typically schedule the case before the en banc court.

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. Loc. R.40(g). 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. Loc. R. 40(g).

Panel Judgment Vacated

Granting of rehearing or 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. Loc. R.40(e); IOP 40.2.

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 hearing 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. Loc. R. 40(e). 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. Loc. R. 40(e).

Effect of Petition on Time to Petition for Certiorari

If a petition for rehearing or petition for rehearing en banc is timely filed, the time to petition for certiorari runs from the date of the denial of the petition for rehearing or petition for rehearing en banc. S. Ct. R. 13.3.

Papers Following Denial of Rehearing or Expiration of Rehearing Period

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 (such as a motion to stay issuance of the mandate), the clerk's office will not accept 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. Loc. R.40(h).

Related Links

- [Rule 40, Panel Rehearing;En Banc Determination \(with Local Rules\)](#)
- [Rule 29, Brief of an Amicus Curiae \(with Local Rules\)](#)