

# ADOPTED January 2, 2015

## UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

### AMENDMENT TO LOCAL RULE 35

PLEASE TAKE NOTICE that the Court intends to amend Local Rule 35, En Banc Proceedings.

The proposed amendment provides for additional briefing following the grant of hearing or rehearing en banc. If the Court determines, on motion by a party or on its own initiative, that additional briefing is desirable, 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.

The proposed amendment will take effect on January 2, 2015, subject to amendment in light of comments received. Interested parties may submit comments on or before December 30, 2014, to:

Patricia S. Connor, 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](mailto:rulecomments@ca4.uscourts.gov)

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

November 12, 2014

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~~ **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.
- (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.** 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.~~
- (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.