

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.

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.

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 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 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. 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.

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(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.

I.O.P.-40.1. Submission of Petitions for Rehearing 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.

-40.2. 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.

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. The Court may direct the filing of additional briefs, or the parties may seek leave of Court to file additional briefs.

Former I.O.P.-40.1 redesignated Local Rule 40(a) December 1, 1995; amended December 1, 1998, October 5, 2004, and April 1, 2008. Local Rule 35(a) transferred to Local Rule 40(a), and Local Rule 40(a) amended December 1, 2024. Former I.O.P.-40.5 redesignated former I.O.P.-40.4 December 1, 1994; redesignated Local Rule 40(b) December 1, 1995; amended December 1, 1998.

Former I.O.P.-40.2 amended December 1, 1994; redesignated Local Rule 40(c) December 1, 1995; amended December 1, 1998.

Local Rule 35(b) redesignated as Local Rule 40(d) December 1, 2024.

Local Rule 35(c) redesignated as Local Rule 40(e) December 1, 2024.

Local Rule 35(d) redesignated as Local Rule 40(f) December 1, 2024.

Local Rule 35(e) redesignated as Local Rule 40(g) December 1, 2024.

I.O.P.- Former 40.7 amended January 1, 1994; redesignated former I.O.P.-40.6 December 1, 1994; redesignated Local Rule 40(d) December 1, 1995; amended December 1, 1998; redesignated Local Rule 40(h) December 1, 2024.

Former I.O.P.-40.4 redesignated former I.O.P.-40.3 December 1, 1994; redesignated I.O.P. 40.1 December 1, 1995; amended December 1, 1998.

Former I.O.P.-40.6 redesignated former I.O.P.-40.5 December 1, 1994; amended and redesignated I.O.P.-40.2 December 1, 1995.

Former I.O.P.-40.3 rescinded December 1, 1994.