

RULE 40A. PETITION FOR EN BANC RECONSIDERATION

(a) Grounds for En Banc Reconsideration. En banc reconsideration of a decision of a panel of the Supreme Court is not favored and ordinarily will not be ordered except when (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue. The court considers a decision of a panel of the court resolving a claim of error in a criminal case, including a claim for postconviction relief, to be final for purposes of exhaustion of state remedies in subsequent federal proceedings. En banc reconsideration is available only under the limited circumstances set forth in Rule 40A(a). Petitions for en banc reconsideration in criminal cases filed on the pretext of exhausting state remedies may result in the imposition of sanctions under Rule 40A(g).

(b) Time for Filing; Effect of Filing on Finality of Judgment. Any party may petition for en banc reconsideration of a Supreme Court panel's decision within 14 days after written entry of the panel's decision under Rule 36 or, if the party timely filed a petition of rehearing, within 14 days after written entry of the panel's decision to deny rehearing. A petition for en banc reconsideration may not be filed while a petition for rehearing is pending before the panel. The 3-day mailing period set forth in Rule 26(c) does not apply to the time limits set by this Rule. No petition for en banc reconsideration of a Supreme Court panel's decision to grant rehearing is allowed; however, if a panel grants rehearing, any party may petition for en banc reconsideration of the panel's decision on rehearing within 14 days after written entry of the decision. If no petition for rehearing of the Supreme Court panel's decision is filed, then no petition for en banc reconsideration is allowed.

Commented [DW1]: Our subcommittee unanimously recommends omitting the requirement of first filing a petition for rehearing before filing a petition for en banc reconsideration. This requirement is not found in the analogous FRAP 35 and creates an unnecessary hoop for litigants to jump through to obtain en banc reconsideration.

Commented [DW2]: Our subcommittee unanimously recommends *against* adopting the portion of FRAP 35 which allows for petitions for rehearing and reconsideration to be filed simultaneously. This proposed language is similar to the language in NRAP 40B(c), which prohibits a petition for review from being filed while a petition for rehearing is pending

Commented [DW3]: Our subcommittee unanimously recommends omitting the requirement of first filing a petition for rehearing before filing a petition for en banc reconsideration.

(c) Content of Petition. A petition based on grounds that full court reconsideration is necessary to secure and maintain uniformity of the decisions of the Supreme Court or Court of Appeals ~~shall~~ must demonstrate that the panel's decision is contrary to prior, published opinions of the Supreme Court or Court of Appeals and ~~shall~~ must include specific citations to those cases. ~~If the~~ A petition ~~is~~ based on grounds that the proceeding involves a substantial precedential, constitutional, or public policy issue, ~~the petition shall~~ must concisely set forth the issue, ~~shall~~ must specify the nature of the issue, and ~~shall~~ must demonstrate the impact of the panel's decision beyond the litigants involved. The petition ~~must~~ shall be supported by points and authorities and ~~shall~~ must contain ~~such~~ argument ~~in support of the petition~~ in support of those points, as the petitioner desires to present. Except as necessary to establish the grounds for reconsideration set forth in NRAP 40A(a), ~~M~~ matters presented in the briefs and oral arguments may not be reargued ~~in the petition~~, and no point may be raised for the first time.

(d) Form of Petition, ~~and Answer~~ Response, and Reply; Number of Copies; Length; Certificate of Compliance. A petition for en banc reconsideration of a Supreme Court panel's decision, ~~or an answer~~ a response to such a petition, ~~or a reply~~ shall must comply in form with Rule 32, and ~~unless e-filed, an~~ the original ~~and 8 copies shall~~ must be filed with the clerk ~~unless the court by order in a particular case shall direct a different number~~. One copy ~~shall~~ must be served on counsel for each party separately represented. Except by permission of the court, a petition for en banc reconsideration, or an ~~answer~~ a response to such a petition, may not exceed 10 pages or 4,667 words or, if it uses a monospaced typeface, 433 lines of text. ~~shall may not exceed 10 pages. Alternatively, the petition or answer is acceptable if it contains no more than 4,667 words, or if it uses a monospaced typeface, and contains no more~~

~~than 433 lines of text.~~ Any reply may not exceed one half of the page or type-volume limitations of the petition. The petition ~~or, answer~~ response, or reply ~~shall~~ must include the certification required by NRAP 40(b)(4) in substantially the form suggested in Form 16 of the Appendix of Forms.

(e) ~~Answer-Response~~ and Reply. No ~~answer-response~~ to a petition for en banc reconsideration ~~or reply to an answer shall~~ may be filed unless requested by the court. Unless otherwise ordered by the court, the ~~answer-response~~ to a petition for en banc reconsideration ~~shall~~ must be filed within 14 days after entry of the order requesting the ~~answer-response~~. A petition for en banc reconsideration will ordinarily not be granted in the absence of a request for a ~~response~~ answer. If a response to the petition is ordered, the petitioner may file a reply within 7 days after service of the response. A reply must not present matters that do not relate to the response.

(f) Action by Court if Granted. Any two justices may compel the court to grant a petition for en banc reconsideration. If a petition for en banc reconsideration is granted, the court may make a final disposition of the cause without reargument or may place it on the en banc calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(g) Frivolous Petitions; Costs Assessed. Unless a case meets the rigid standards of Rule 40A(a), the duty of counsel is discharged without filing a petition for en banc reconsideration of a panel decision. Counsel filing a frivolous petition ~~shall~~ will be deemed to have multiplied the proceedings in the case and to have increased costs unreasonably and vexatiously. At the discretion of the court, counsel personally may be required to pay an appropriate sanction, including costs and attorney fees, to the opposing party.

(h) Untimely Petitions; Unrequested ~~Answer-Response~~ or Reply. A petition for en banc reconsideration is timely if e-filed, mailed, or sent by commercial carrier to the clerk within the time fixed for filing. The clerk ~~shall~~ must not receive or file an untimely petition, but ~~shall-must~~ return the petition unfiled. The clerk ~~shall-must~~ return unfiled any ~~answer-response~~ or reply submitted for filing in the absence of an order requesting the same.