

RULE 40A. PETITION FOR EN BANC RECONSIDERATION OF A SUPREME COURT PANEL DECISION

(a) Grounds for En Banc Reconsideration. En banc reconsideration of a decision of a Supreme Court panel 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.

(b) 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 must demonstrate that the panel's decision is contrary to prior, published opinions of the Supreme Court or Court of Appeals and must include specific citations to those cases. A petition based on grounds that the proceeding involves a substantial precedential, constitutional, or public policy issue must concisely set forth the issue, must specify the nature of the issue, and must demonstrate the impact of the panel's decision beyond the litigants involved. The petition must be supported by points and authorities and must contain argument in support of these points. Except as necessary to establish the grounds for reconsideration set forth in Rule 40A(a), 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. Oral argument in support of the petition will not be permitted.

(c) Time for Filing. Unless the time is shortened or enlarged by order, any party may petition for en banc reconsideration of a Supreme Court panel's decision within 14 days after the filing of the panel's decision under Rule 36 or, if the party timely filed a petition for rehearing, within 14 days after the filing

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 the filing of the decision.

(d) Response to Petition and Reply. No response to a petition for en banc reconsideration may be filed unless requested by the court. The response to a petition for en banc reconsideration must be filed within 14 days after entry of the order requesting the response, unless otherwise directed by the court. A petition for en banc reconsideration will ordinarily not be granted in the absence of a request for a response. 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.

(e) Form of Petition, Response, and Reply; Number of Copies; Certificate of Compliance. A petition for en banc reconsideration of a Supreme Court panel's decision, a response to such a petition, or a reply must comply in form with Rule 32, and unless e-filed, the original must be filed with the clerk. One copy must be served on counsel for each party separately represented. The petition, response, or reply must include the certification required by Rule 40(f) and must be substantially similar to the Certificate of Compliance for Rules 40, 40A, and 40B Form on the Nevada Supreme Court website.

(f) Length of Petition, Response, and Reply. Except by permission of the court, a petition for en banc reconsideration, or 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. Any reply may not exceed one half of the page or type-volume limitation of the petition.

(g) Decision by Supreme Court. Any two justices may compel the court to grant a petition for en banc reconsideration. The Supreme Court's decision to grant or deny a petition for en banc reconsideration is final and not subject to further requests for rehearing or reconsideration.

(h) Action by Supreme Court When Petition Granted. If a petition for en banc reconsideration is granted, the court may make a final disposition of the cause without argument or may place it on the en banc calendar for argument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(i) Untimely Petition. 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 must not receive or file an untimely petition, but must return the petition unfiled or, if the petition was e-filed, must reject the petition.

(j) Unrequested Response. Absent an order requesting a response, the clerk must not receive or file a response, but must return it unfiled or, if the response was e-filed, must reject it.

(k) Petition in Criminal Appeals; Exhaustion of State Remedies. A decision of a Supreme Court panel resolving a claim of error in a criminal case, including a claim for postconviction relief, is 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).

REVIEWING NOTE

The proposed amendments to this Rule are both stylistic and substantive. Initially, the NRAP Commission sought to bring NRAP 40, 40A, and 40B into harmony with one another, by utilizing similar structure and language throughout all three rules. Like the analogous federal rule (FRAP 35), subdivision (c) allows a party to file a petition for en banc reconsideration without first filing a petition for rehearing under Rule 40. However, a petition for en banc reconsideration may not be filed while a petition for rehearing is pending before the panel. The “answer” to a petition for en banc reconsideration is now referred to as the “response” throughout Rule 40A, in conformity with the federal rules. In the event the court orders a response to a petition for en banc reconsideration, subdivision (d) now expressly provides for the filing of a reply within 7 days after service of the response.