

RULE 40. PETITION FOR REHEARING

(a) Procedure and Limitations.

(1) **Time.** Unless the time is shortened or enlarged by order, any party may file a petition for rehearing ~~may be filed~~ within 18 days after the filing of the appellate court's decision under Rule 36. The 3-day mailing period set forth in Rule 26(c) does not apply to the time limits set by this Rule.

(2) **Contents.** The petition ~~shall~~ must state briefly and with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended and contain argument in support of those points. ~~shall contain such argument in support of the petition as the petitioner desires to present.~~ Oral argument in support of the petition will not be permitted. Any claim that the court has overlooked or misapprehended a material fact ~~shall~~ must be supported by a reference to the page of the transcript, appendix or record where the matter is to be found; any claim that the court has overlooked or misapprehended a material question of law or has overlooked, misapplied or failed to consider controlling authority ~~shall~~ must be supported by a reference to the page of the brief where petitioner has raised the issue.

(3) **Petitions in Criminal Appeals; Exhaustion of State Remedies.** A decision by a panel of the Supreme Court, the en banc Supreme Court, or the Court of Appeals 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. Rehearing is available only under the limited circumstances set forth in Rule 40(c). Petitions for rehearing filed on the pretext of exhausting state remedies may result in sanctions under Rule 40(g).

(b) **Form of Petition, ~~and Answer~~ Response, and Reply; Number of Copies; Length; Certificate of Compliance; Filing Fee.**

Commented [DW1]: Per discussion on 3/14/22, the subcommittee recommends using consistent language in NRAP 40, 40A and 40B indicating that "any party" may file a petition.

Commented [DW2]: Our subcommittee agreed to recommend replacing the word "shall" with "may" or "must" which are used throughout the FRAPs and which comports with the more modern approach.

Commented [DW3]: The federal rules governing panel rehearings (FRAP 40) and en banc determinations (FRAP 35) both utilize the word "Response" instead of "Answer." We recommend making this change here as well.
https://www.law.cornell.edu/rules/frap/rule_35
https://www.law.cornell.edu/rules/frap/rule_40

(1) Decision of Court of Appeals or Supreme Court Panel. A petition for rehearing of a decision of the Court of Appeals or of a panel of the Supreme Court, or ~~an answer~~a response to such petition, ~~shall~~must comply in form with Rule 32, and, ~~unless e-filed, the an original and 5 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.

(2) En Banc Decision. A petition for rehearing of a decision of the en banc Supreme Court, or ~~an answer~~a response to the petition, ~~shall~~must comply in form with Rule 32, and, ~~unless e-filed, the an original and 9 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.

(3) Length. ~~Except by permission of the court, a petition for rehearing, or an a response answer to the petition, may not exceed 10 pages or 4,667 words or, if it uses a monospaced typeface, 433 lines of text. shall 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. A reply may not exceed one half of the page or type-volume limitations of the petition.~~

(4) Certificate of Compliance. A petition for rehearing, ~~or an answer~~a response, or a reply ~~shall~~must include a certificate that the submission complies with the formatting requirements of Rule 32(a)(4)-(6) and the page- or type-volume limitation of this Rule, computed in compliance with Rule 32(a)(7)(C). The petition ~~or, answer, response, or reply~~ must be accompanied by a completed certificate of compliance substantially similar to Form 16 in the Appendix of Forms.

Commented [DW4]: Our subcommittee recommends deleting references to filing of copies, since everything is e-filed these days, and since the references to “5 copies” is most likely a vestige of the days when the Supreme Court only had 5 Justices. We also suggest this recommendation be adopted throughout the NRAPs wherever the rules require the filing of a specified # of copies.

Commented [DW5]: To maintain consistency in the language governing the length of petitions & responses in NRAP 40, 40A and 40B, we recommend simplifying the language in NRAP 40(b)(3) and NRAP 40A(d) to make it more like the current language in NRAP 40B(d), and then using the same language in all three rules.

Note: NRAP 40B(d) contains the following sentence. “The petition may not exceed 10 pages or 4,667 words or, if it uses a monospaced typeface, 433 lines of text.”

Commented [DW6]: We recommend allowing a reply brief to be filed in the event the Court orders an answer to the petition. If the Commission agrees, then we need to add this language addressing the length of a reply brief in this section.

(5) Filing Fee. Except as otherwise provided by statute, a \$150 filing fee ~~shall~~ must be paid to the clerk at the time a petition for rehearing is submitted for filing.

(c) Scope of Application; When Rehearing Considered.

(1) Except as necessary to establish the grounds for rehearing set forth in NRAP 40(c)(2), ~~M~~matters presented in the briefs and oral arguments may not be reargued ~~in the petition for rehearing~~, and no point may be raised for the first time ~~on rehearing~~.

(2) The court may consider rehearings in the following circumstances:

(A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, ~~or~~

(B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case, or

(C) When a new rule of law, directly controlling on the disposition of the issues in the case, has issued after the court announced its order or opinion but within the time fixed for filing.

(d) ~~Answer~~Response; ~~and~~ Reply. No ~~answer-response~~ to a petition for rehearing ~~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 rehearing ~~shall~~ must be filed within 14 days after entry of the order requesting the ~~answer-response~~. A petition for rehearing will ordinarily not be granted in the absence of a request for an ~~answer-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.

Commented [DW7]: This language is not found in the analogous FRAP; however, the subcommittee preferred to keep it in our rule. The additional language clarifies that a party may direct the court to matters already raised in the briefs/arguments when necessary to establish grounds for rehearing. The language also clarifies that a party may argue the grounds for rehearing (which is necessarily a “point ... raised for the first time on rehearing”).

Commented [DW8]: Subcommittee recommends we provide for rehearing in the event that new authorities came out during the 18-day window for filing rehearing. This is not part of the federal rule, but we are offering it for the Commission’s consideration, nonetheless.

Commented [DW9]: FRAP 40 does not address the filing of a reply brief. However, our subcommittee felt that a reply brief should be permitted in the event that the Court orders a response to a petition. If the Commission agrees with this proposal, then we recommend striking the words, “or reply to an answer” from the first sentence of the rule. This language is similar to the language in NRAP 27(a)(4).

(e) Action by Court if Granted. If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case. A petition for rehearing of a decision of a panel of the Supreme Court ~~shall~~must be reviewed by the panel that decided the matter. If the panel determines that rehearing is warranted, rehearing before that panel will be held. The full court ~~shall~~must consider a petition for rehearing of an en banc decision.

(f) Untimely Petitions; Unrequested ~~Answer-Response~~ or Reply. A petition for rehearing 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.

(g) Sanctions. Petitions for rehearing which do not comply with this Rule may result in the imposition of appropriate sanctions.

Commented [DW10]: Note -- If we decide to permit the filing of a reply brief when a response is ordered, then we may want to consider changing this language to reflect that a response/reply must be returned in the absence of an order requesting a response; there will not be any order requesting a reply brief. Proposal would be to change the word "same" to "response."