

RULE 40. PETITION FOR REHEARING

(a) Grounds for Rehearing Procedure and Limitations. ~~The court may~~ consider rehearing in the following circumstances: (1) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, (2) 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 (3) 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.

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(b) Petition 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(a).

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(c) Time for Filing. Unless the time is shortened or enlarged by order, any party may file a petition for rehearing ~~may be filed~~ within ~~1418~~ 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.

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

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(e) Contents of Petition. 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 ~~must~~shall 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 ~~must~~shall be supported by a reference to the page of the brief where petitioner has raised the issue. Except as necessary to establish the grounds for rehearing set forth in Rule 40(a), matters presented in the briefs and oral arguments may not be reargued, and no point may be raised for the first time.

Commented [pdw1]: Moved from subsection (a), because it fits better here.

~~(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(e). Petitions for rehearing filed on the pretext of exhausting state remedies may result in sanctions under Rule 40(g).~~

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~~(f) Response to Petition and Reply. No response to a petition for rehearing may be filed unless requested by the court. The response to a petition for rehearing must be filed within 14 days after entry of the order requesting the response, unless otherwise directed by the court. A petition for rehearing 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.~~

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~~(g) Form of Petition, Response, and Reply; Certificate of Compliance and Answer; Number of Copies; Length; Certificate of Compliance; Filing Fee. A petition for rehearing of a decision of the Court of Appeals or of a panel of the Supreme Court, or 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 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), and must be accompanied by a completed certificate of compliance substantially similar to Form 16 in the Appendix of Forms.

~~(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 to such petition, shall comply in form with Rule 32, and an original and 5 copies shall be filed with the clerk unless the court by order in a particular case shall direct a different number. One copy shall 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 to the petition, shall comply in form with Rule 32, and an original and 9 copies shall be filed with the clerk unless the court by order in a particular case shall direct a different number. One copy shall be served on counsel for each party separately represented.

~~(h3) Length of Petition, Response, and Reply.~~ Except by permission of the court, a petition for rehearing, or a response ~~an answer~~ to the petition, ~~may~~ shall not exceed 10 pages or 4,667 words or, if it uses a monospaced typeface, 433 lines of text. ~~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 shall include a certificate that the submission complies with the formatting

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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 must be accompanied by a completed certificate of compliance substantially similar to Form 16 in the Appendix of Forms.

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

Commented [pdw5]: Relocated to NRAP 40(d), above.

(e) Scope of Application; When Rehearing Considered.

(1) 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.

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(d) Answer; Reply. No answer to a petition for rehearing or reply to an answer shall be filed unless requested by the court. Unless otherwise ordered by the court, the answer to a petition for rehearing shall be filed within 14 days after entry of the order requesting the answer. A petition for rehearing will ordinarily not be granted in the absence of a request for an answer.

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(i) Decision by Court. A court's decision to grant or deny a petition for rehearing is final and not subject to further requests for rehearing.

Commented [pdw8]: This section is new -- was not part of NRAP 40, but this limitation is found in NRAP 40B(f). Should we include language on how many votes are necessary to grant a petition for rehearing? Similar language on # of votes is included in NRAP 40A(f) and NRAP 40B(f).

(je) Action by Court When Petitionif 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

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circumstances of the particular case. A petition for rehearing of a decision of a panel of the Supreme Court mustshall 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 mustshall consider a petition for rehearing of an en banc decision.

~~**(k)** Untimely Petitions; Unrequested Answer 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 mustshall not receive or file an untimely petition, but mustshall return the petition unfiled or, if the petition was e-filed, must reject the petition. ~~The clerk shall return unfiled any answer or reply submitted for filing in the absence of an order requesting the same.~~

~~**(l) 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.

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