

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

Commented [WJD1]: Added at 1-17-23 meeting.

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

Commented [WJD2]: Added at 1-17-23 meeting.

(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 those points. Except as necessary to establish the grounds for reconsideration set forth in NRAP 40A(a), matters presented in the briefs and oral arguments may not be reargued, and no point may be raised for the first time.

Commented [WJD3]: At 1-17-23 meeting, we decided to move this to subsection (b).

~~**(b) Petition in Criminal Appeals; Exhaustion of State Remedies.** The court considers a A decision of a panel of the Supreme Court court resolving a claim of error in a criminal case, including a claim for postconviction relief, to be 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). Petitions for en banc reconsideration~~

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~~in criminal cases filed on the pretext of exhausting state remedies may result in the imposition of sanctions under Rule 40A(g).~~

Commented [WJD4]: At 1-17-23 meeting, we decided to move this language to the end of the rule.

~~(c)~~ **Time for Filing; Effect of Filing on Finality of Judgment.** ~~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 written entry the filing of the panel's decision under Rule 36 or, if the party timely filed a petition for~~ rehearing, within 14 days after ~~written entry 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 ~~written entry the filing 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 [WJD5]: Revised at 1-17-23 meeting.

~~(d)~~ **Filing Fee.** ~~Except as otherwise provided by statute, where a party has not previously sought rehearing, a \$150 filing fee must be paid to the clerk at the time a petition for en banc reconsideration is submitted for filing.~~

Commented [WJD6]: Deleted at 1-17-23 meeting to comply with NRS 2.250

~~(e)~~ **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.~~

Commented [WJD7]: Relocated to subsection (b) at 1-17-23 meeting

(fd) 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.

(egd) 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.** ~~The petition, response, or reply must include the certification required by NRAP Rule 40(ef) in substantially the form suggested in Form 16 of the Appendix of Forms.~~

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Commented [WJD8]: At the 1-17-23 meeting, we added "number of copies" back into the headings in Rules 40A and 40B based on the highlighted language stating, "One copy must be served on counsel for each party separately represented."

Julie Ollom asks whether this sentence (and the language in the heading) are necessary since we already have Rule 25(b) that governs service of all documents.

Rule 25(b) provides: "**Service of All Papers Required.** Unless a rule requires service by the clerk, a party or person acting for that party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel shall be made on the party's counsel."

If we agree to omit the sentence, we can take "Number of Copies" back out of the heading.

Commented [BS9R8]: The subcommittee discussed removing this sentence but did not reach a consensus.

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(hf) Length of Petition, Response, and Reply.

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~~ The answer response to a petition for en banc reconsideration shall must be filed within 14 days after entry of the order requesting the answerresponse, 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 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.

(ifg) 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.

(ih) Action by Supreme Court ~~if When Petition 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 ~~re~~argument or may place it on the en banc

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Commented [WJD10]: Committee needs to decide whether to include this language here, or if it more appropriately belongs in IOPs, where the U.S. Supreme Court's "rule of 4" is not included in its analogous rules.

Commented [BS11R10]: The majority of the subcommittee favors removing it. But some favor keeping it because most people are unaware of the IOPs and at least two other states (Oregon and Massachusetts) include this information in their rules.

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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.~~

~~**(hi) Untimely Petitions; Unrequested Answer 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, or, if the petition was e-filed, must reject the petition. ~~The clerk shall must return unfiled any answer or reply submitted for filing in the absence of an order requesting the same.~~~~

~~**(Hj) 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).~~