

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.

Commented [DW4]: Our subcommittee recommends replacing the word "shall" with "may" or "must" which are used throughout the FRAPs and which comports with the more modern approach.

(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

Commented [DW5]: 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 reconsideration. The language also clarifies that a party may argue the grounds for reconsideration (which is necessarily a "point ... raised for the first time").

Commented [DW6]: 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

~~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 ~~answer 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 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.

Commented [DW7]: 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 [DW8]: We recommend allowing a reply brief to be filed in the event the Court orders a response to the petition. If the Commission agrees, then we need to add language addressing the length of a reply brief in this section.

Commented [DW9]: If the Commission agrees with our proposal to allow a reply brief to be filed in the event the Court orders a response to the petition, 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).

(h) 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.~~

(i) 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.~~