NRAP 40A – Proposed

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 the filing 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 must 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 [GU1]: CF - suggest written entry for consistency

Commented [DW2]: Per discussion item 1, 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 [DW3]: Per discussion item 1, our subcommittee unanimously recommends *against* adopting the portion of FRAP 35 which allows for petitions for rehearing and reconsideration to be filed simultaneously.

Commented [GU4R3]: I suggest: "A petition for rehearing may not be filed … ." The word "may" reads better to me in context and it connotes a mandatory command even in the form of "may." I think "must" on the other hand used in these sentences is awkward and almost suggests the "end of the world" or something bad will happen if the petitioner files both at the same time. JRP

Commented [GU5]: CF - Is the latter half of this language redundant of the language we are adding above?

Commented [DW6R5]: I think this is different because it addresses the right to petition for reconsideration after the panel *grants* rehearing. The former language addresses the filing of a petition for reconsideration after the panel *denies* rehearing.

(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~~. The purpose of a petition for en banc reconsideration is to demonstrate how the legal standard for reconsideration has been met. 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.

(d) Form of Petition, ~~and~~ Answer, 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 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 to such a petition, ~~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

Commented [DW7]: Per discussion item 11, 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 [DW8]: Per discussion item 3, our subcommittee noted that the analogous federal rule (FRAP 35) does **not** contain a statement that "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." Two members of our subcommittee recommended deleting the language in its entirety on the basis that it is self-contradictory and unnecessary; however, three members of our subcommittee wanted to keep the language, but preface it with clarifying language indicating that it is not intended to interfere with a party's ability to satisfy the legal standard for reconsideration. This is the solution we came up with, for the Commission's consideration.

Commented [DW9]: After our meeting, Steve Silva pointed out that NRAP 40 and 40A utilize the word "Answer" while NRAP 40B utilizes the word "Response" to describe the responsive document filed after a Petition. He recommends that the Commission consider which term is more appropriate and pick one to use throughout the three rules (he prefers the term, "Response"). Our Subcommittee has left the word "answer" unchanged here.

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, 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 and Reply. No answer 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 answer to a petition for en banc reconsideration ~~shall~~ must be filed within 14 days after entry of the order requesting the answer. A petition for en banc reconsideration will ordinarily not be granted in the absence of a request for an answer. If an answer to the petition is ordered, the petitioner may file a reply within 7 days after service of the answer. A reply must not present matters that do not relate to the answer.

(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 [DW10]: Per discussion item 9, the subcommittee agreed to recommend making the language in NRAP 40(b)(3) and 40A(d) the same as in NRAP 40B(d), but the subcommittee did not decide which language was preferable. John and Sharon expressed a preference for the language currently used in NRAP 40(b)(3), which is split up into 2 sentences, while Steve expressed a preference for the language currently used in NRAP 40B(d) which is contained in 1 sentence (e.g.: "Except by permission of the court, a petition for rehearing, or an answer to the petition, may not exceed 10 pages or 4,667 words or, if it uses a monospaced typeface, 433 lines of text.") The Subcommittee recommends that the Commission pick one and use it consistently throughout.

Commented [DW11]: Per discussion item 11, our subcommittee agreed to 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 language addressing the length of a reply brief in this section.

Commented [DW12]: FRAP 40 does not address the filing of a reply brief. However, per discussion item 11, a majority of our subcommittee felt that a reply brief should be permitted in the event that the Court orders an answer 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).

(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. The clerk ~~shall~~ must return unfiled any answer or reply submitted for filing in the absence of an order requesting the same.

Commented [DW13]: Note -- If we decide to permit the filing of a reply brief when an answer is ordered, then we may want to consider changing this language to reflect that an answer/reply must be returned in the absence of an order requesting an answer; there will not be any order requesting a reply brief. Proposal would be to change the word "same" to "answer."