

Availability of En Banc Consideration and Rehearing in the Federal Circuit Courts of Appeal and State Courts

Leane C. Medford
Rose•Walker, L.L.P.¹

The procedural vehicles allowing en banc hearings or rehearings, both in state and federal appellate courts, reflect a strong disfavor for such rehearings, which are perceived as taxing an entire appellate court's judicial staff. In federal appellate courts, a uniform rule of appellate procedure specifically addresses rehearings en banc and discourages an en banc rehearing unless it is needed to secure uniformity of the court's decisions or involves a question of exceptional importance. Fed. R. App. P. 35. Many circuits' internal operating procedures also require the certification of counsel and warn appellate practitioners about the possibility of sanctions. In state appellate courts, en banc hearings and rehearings are also often discouraged through a lack of procedural rules or instruction. On a whole, the states that have adopted en banc procedures also disfavor the procedures as a drain on judicial resources, and many apply the same "uniformity of decision" and "exceptional importance" standards of Federal Rule 35.

Attached are federal and state guides to en banc rules and procedures. The following is a brief summary of those procedures under federal and state law.

Circuit Courts of Appeal

It is well established that the Circuit Courts of Appeal have the power to order the hearing of an appeal en banc. *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 73 S. Ct. 656, 97 L. Ed. 986 (1953); *Textile Mills Sec. Corp. v. C.I.R.*, 314 U.S. 326, 62 S. Ct. 272, 86 L. Ed. 249 (1941); *Schwegmann Bros. Giant Super Markets v. Hoffmann-La Roche, Inc.*, 221 F.2d 326 (5th Cir. 1955). Statutory provisions relating to hearings en banc merely grant power to the court of appeals and do not restrict the power of that court, which is free to devise its own procedures for en banc rehearings. *Sbenker v. Baltimore & O. R. Co.*, 374 U.S. 1, 83 S. Ct. 1667, 10 L. Ed. 2d 709 (1963). Litigants can merely suggest, but cannot compel, that any particular case be heard en banc. *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 73 S. Ct. 656, 97 L. Ed. 986 (1953).

Although Federal Rule of Appellate Procedure 35 governs en banc proceedings in the Circuit Courts of Appeal, each circuit has its own procedural requirements for initiating en banc review. En banc hearings are not favored and ordinarily will not be ordered unless en banc consideration is necessary to secure or maintain uniformity of the court's decisions, or the proceeding involves a question of exceptional importance. Rule 35 allows a majority of the circuit judges who are in regular active service to order that an appeal be heard or reheard by the court of appeals en banc. Fed. R. App. P. 35(a).

¹ The author would like to thank Steven D. Sanfelippo and Kenneth McKay Cunningham for their assistance in preparing this summary.

As illustrated by several internal operating procedures and Circuit rules, the majority of the Circuit Courts deter litigants from seeking en banc review. For example, the Third Circuit requires counsel to include a statement in the petition for en banc rehearing that the panel decision is contrary to the decisions of the Third Circuit or U.S. Supreme Court and that en banc consideration is necessary to maintain uniformity, or that the appeal involves a question of exceptional importance.

Similarly, several Circuits have promulgated rules warning counsel that frivolous petitions for rehearing en banc may draw court-imposed sanctions. The Fifth Circuit emphasizes that, "given the extraordinary nature of the petitions for en banc consideration, it is fully justified in imposing sanctions on its own initiative under Fed. R. App. P. 38 and 28 U.S.C. § 1927, upon the person who signed the petitions, the represented party, or both, for manifest abuse of procedure." See 5th Cir. R. 35.

Such admonitory provisions coupled with the "extraordinary nature" of obtaining relief through an en banc rehearing are illustrative of the limited liability of en banc review.

State Rules

Obviously, there is no uniform rule among the states governing en banc procedures. In fact, only 13 states even have rules addressing en banc hearings and rehearings. It should be noted, however, that some states' appellate courts hear all appeals en banc (Alaska and Hawaii are two such examples) and therefore they do not have en banc rules.

Similarly, although a given state does not have a formal en banc rehearing rule, appellate districts within that state may address en banc consideration through local rules or operating procedures. As such, practitioners in states where no formal en banc rehearing rule exists are encouraged to consult the local rules of the appellate district in which they may be appearing.

With respect to the 13 states that have en banc rehearing rules, although strict uniformity among those states' rules is lacking, a few similarities are evident. For example, three states expressly note in their rules that en banc rehearing is disfavored (Nevada, South Carolina, and Texas). Three states' rules contain formal procedures for judges to vote on whether to rehear or reconsider a case en banc (Georgia, Mississippi, and South Carolina). Six states require that en banc rehearing or reconsideration not be granted unless necessary to maintain uniformity of decisions or because a particular case involves some issue of exceptional importance (Connecticut, Florida, Missouri, Nevada, South Carolina, and Texas).

Michigan is the easy winner when it comes to the most complex procedure for en banc rehearing or reconsideration—its rule details an intricate procedure in which a special panel may be convened to consider outcome-determinative questions in a case in which the court of appeals indicates in the text of an opinion that it followed a prior published opinion only because it was required to do so under Michigan rules. On the other end of the spectrum is Virginia, whose rule simply states that any party aggrieved by a decision of the Supreme Court or a panel of the court of appeals may file a petition for en banc review.

Leane Capps Medford
Rose•Walker, L.L.P.
3500 Maple Avenue, Suite 900
Dallas, Texas 75219
214-752-8600
214-752-8700 (fax)
lmedford@rosewalker.com
www.rosewalker.com

Professional Activities

Partner, Rose•Walker, L.L.P., a trial boutique with a national practice specializing in complex civil cases
Head of Appellate Section

Appellate practice includes commercial litigation, trade secrets litigation, aviation,
wrongful death, personal injury, insurance litigation and products liability

Member, Council of Appellate Lawyers since 2001
Publications Committee
Program Committee

Member, American Bar Association Committee on Appellate Practice

Member, Aviation Litigation Committee of the American Bar Association's Litigation Section
Assisted in drafting the Committee's Model Jury Instructions for Aviation Litigation

Member, American Bar Association Products Liability Litigation Committee

Member, American Bar Association Tort, Trial and Insurance Practice Section

Member, American Bar Association Forum on Air & Space Law

Member, State Bar of Texas and its appellate, aviation and litigation sections

Education

Baylor University School of Law, Waco, Texas

Juris Doctorate, *cum laude*, May 1996

Moot Court Team

National and Texas Mock Trial Teams

Order of Barristers

Student Assistant, Professor Brian J. Serr,

Supreme Court Seminar, Criminal Procedure

Co-Author, Student Text, *The International Rights of Women* 1996

Texas Christian University, Fort Worth, Texas

Bachelor of Science, Psychology, December 1990

National Honor Society of Psychology

Admitted

All state and federal courts in Texas

United States District Courts for Colorado and the Eastern and Middle Districts of Tennessee

Courts of Appeals for the Third, Fifth, Sixth and Tenth Circuits

Recent Publications

Courts Discuss Expert Testimony, American Trial Lawyers Association, Aviation Law Section, Vol. 12, No. 2, Winter 2005

Expert Testimony, Aviation and Space Law Committee Newsletter, Spring 2004

The Continuing Controversy over the Precedential Effect of Unpublished Opinions, American Bankruptcy Institute Journal, Vol. XX, No. 9, November 2001

Recent Trial Support and Appeals:

Delta Air Lines, Inc. v. ARC Sec., Inc., 164 S.W.3d 666 (Tex. App.—Fort Worth Apr. 28, 2005, pet. denied). Obtained summary judgment on air carrier's claim for contractual indemnity claims against subcontractor for third-party claims. Summary judgment affirmed on appeal and the Texas Supreme Court denied the petition for review.

Whatley v. Lindeman, Inc., No. 04-04-00315-CV, 2005 WL 291469 (Tex. App.—San Antonio Feb. 9, 2005, pet. denied). Successfully defended appeal of judgment allocating settlement credits to defendant from group settlements not allocated by plaintiff and the payment by the insurer on the value of the hull of the aircraft and jury's failure to award plaintiff attorney's fees for any appeal. Judgment was affirmed on appeal and the Texas Supreme Court denied the petition for review.

Diane Coggins, Individually and as Natural Parent, Guardian and Next Friend of Lindsey Garretson, Deceased, et al. vs. KLLM, Inc. et al., Civil Action No. 3:01-0232, in the United States District Court for the Middle District of Tennessee.

- Participated in wrongful death trial as appellate counsel representing mother of teenager killed by trucking company.
- Argued jury charge and successfully submitted amendment to Tennessee's pattern jury instruction for recoverable damages for wrongful death, which allowed the jury to award divorced parents separate amounts for loss of consortium instead of one award contained in pattern instruction.
- Argued and successfully submitted punitive damages claims against driver and employer for violations of its own safety standards.
- Post verdict, obtained reallocation of attorneys' fees and costs to mother from natural father's award under common fund theories as a result of substantial work performed by plaintiff's counsel.
- Use of amended verdict form and award of punitive damages affirmed in ***Coggins v. KLLM, Inc., et al.***, 2005 WL 1869512, (6th Cir. Tenn. Aug. 1, 2005) (*pet. withdrawn*).

White v. Yellow Freight System, Inc., 905 So.2d 506 (Miss. Dec. 16, 2004) (en banc).

- Participated in second trial of wrongful death claim as appellate counsel representing defendant trucking company granted a new trial because of jury's failure to understand jury instruction on causation.
- Submitted and argued new special verdict form requiring jury to first find decedent was still alive when truck came into contact with him, resulting in a defense verdict in 10 minutes.

- Successfully defended before the Mississippi Supreme Court the appeal of trial court's decision to grant a new trial, plaintiff's motion to recuse trial judge for ex parte discussions with jurors after the first trial, verdict and judgment.

Interstate Southwest, Ltd., v. Avco Corp., Cause No. 29,385; in the 278th District Court of Grimes County, Texas (2004-2005).

- Participated in all pretrial matters as appellate counsel in representation of plaintiff forging corporation accused of causing largest recall of engines in FAA history and its contract and fraud claims against the manufacturer of the engines and request for declaratory relief on the manufacturer's demand for contractual indemnification.
- Obtained summary judgment on defendant's key affirmative defenses before trial, eliminating all issues regarding standing.
- Successfully defended two emergency mandamus actions complaining of the trial court's denial of the defendant's attempt to disqualify plaintiff's counsel and stay the trial two days before it began. *In re Avco Corp.*, 2004 WL 2801197, Tex. App.—Houston [14 Dist.] 2004 (orig. proceeding) (unpublished); *In re Avco Corp.*, 14-04-01147-CV, __S.W.3d __, 12—03-04 (Tex. 2004).
- Conducted a day long evidentiary hearing and argument during trial resulting in the exclusion of the defendant's report adopted by the FAA on the cause of the recall.
- Successfully argued motion during trial to sanction the defendant by striking its metallurgical and causation experts for hiding testing under the theory that the testing was conducting under the consulting expert privilege.
- Obtained trial amendment, jury question and jury finding that the defendant obtained the execution of a document by deception under rarely-used statute lifting the statutory cap on punitive damages resulting in \$86 million punitive award and the entry of a \$96 million judgment.

Other representative opinions: *Hyer v. Geo-Seis Helicopters, Inc.*, 269 F.3d 1190 (10th Cir., Colo. 2001); *In re Learjet Inc.*, 59 S.W.3d 842 (Tex. App.—Texarkana 2001) (orig. proceeding); *Michel v. Rocket Engineering Corp.*, 45 S.W.3d 658 (Tex. App.—Fort Worth 2001, pet. denied); *Jun v. Lloyds and Other Various Insurers*, 37 S.W.3d 59 (Tex. App.—Austin 2000, pet. denied).

Personal

Married to William L. Medford, Jr. since 1998

Hobbies include gardening, saltwater fishing, skeet shooting, photography and travel.



SUMMARY GUIDE TO FEDERAL CIRCUITS' EN BANC RULES AND PROCEDURES

Circuit Court	En Banc Rehearing	En Banc Circuit Rule	Notes
1 st Circuit	Yes	1 st Cir. R. 35 and Internal Operating Procedure X.	Voting Judges Whether a case should be heard or reheard en banc is a decision to be made solely by the circuit judges who are in regular active service. A rehearing en banc will be ordered only upon the affirmative votes of a majority of the judges in regular active service, provided that the judges who are not disqualified constitute a majority of the judges who are in regular active service. A court en banc may include any senior circuit judge of the First Circuit.
			Petition for Rehearing If a petitioner files a petition for panel rehearing and a petition for rehearing en banc stemming from the same decisions or order of the court, the two petitions must be combined into a single document and the document is subject to the 15-page limitation. The page limit may be enlarged on motion for good cause shown.
			Response Unless the court requests, no response to the petition is permitted.
			Sanctions If a petition for rehearing en banc is found to be wholly without merit, vexatious, multifarious, or filed principally for delay, the court may tax a sum not exceeding \$250 as additional costs, payable to the Clerk of the Court or the opposing party, as the court may direct.
2 nd Circuit	Yes	2nd Cir. R. 35	Voting Judges Neither vacancies nor disqualified judges are counted in determining the base on which "a majority of the circuit judges of the circuit who are in regular active service"

SUMMARY GUIDE TO FEDERAL CIRCUITS' EN BANC RULES AND PROCEDURES

Circuit Court	En Banc Rehearing	En Banc Circuit Rule	Notes
---------------	-------------------	----------------------	-------

are calculated.

3rd Circuit

Yes

3rd Cir. R. 35

and

Internal Operating Procedure 9

Statement by Counsel

When the party suggesting rehearing en banc is represented by counsel, the suggestion shall contain the following statement of counsel:

“I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court, i.e., the panel's decision is contrary to the decision of this court or the Supreme Court in [citing specifically the case or cases], OR, that this appeal involves a question of exceptional importance, i.e. [set forth in one sentence].”

Counsel have a duty to the court commensurate with that owed their clients to read with attention and observe with restraint the required statement for rehearing en banc set forth in 3rd Cir. LAR 35.1.

Initial Rehearing En Banc

The Third Circuit Internal Operating Procedures allow for an initial hearing en banc, as well as a rehearing en banc, but it is very difficult to get an initial en banc hearing.

Initial en banc hearing is labeled as “extraordinary;” it is ordered only when a majority of the active judges determine that the case is controlled by a prior decision of the court which should be reconsidered and the case is of such immediate importance that exigent circumstances require initial consideration by the full court.

SUMMARY GUIDE TO FEDERAL CIRCUITS' EN BANC RULES AND PROCEDURES

Circuit
Court

En Banc
Rehearing

En Banc Circuit Rule

Notes

Criteria for Rehearing En Banc

In Section 9.3 of the Third Circuit's Internal Operating Procedures, emphasis is given on the high threshold that must be met before rehearing en banc is considered.

This court does not ordinarily grant rehearing en banc when the panel's statement of the law is correct and the controverted issue is solely the application of the law to the circumstances of the case. Similarly, rehearing en banc is ordinarily not granted when the only issue presented is one of state law.

Voting Judges

To determine the majority number necessary to grant a petition for rehearing, all circuit judges in current regular active service who are not disqualified will be counted.

Only active judges of the Third Circuit may vote on questions of rehearing en banc.

An active judge who does not communicate with the authoring judge concerning rehearing within ten (10) days after the date of the Clerk's letter transmitting the petition for rehearing is presumed not to desire rehearing en banc.

Schedule of the Hearing

An en banc hearing is held only at a regularly scheduled en banc session of the court, unless a majority of the active judges vote to expedite the hearing.

The Chief Judge, when requested by a majority of the en banc court, may direct the Clerk to advise counsel to submit supplemental briefs on specific issues or to be prepared to discuss at oral argument any other relevant issues.

SUMMARY GUIDE TO FEDERAL CIRCUITS' EN BANC RULES AND PROCEDURES

Circuit Court	En Banc Rehearing	En Banc Circuit Rule	Notes
----------------------	--------------------------	-----------------------------	--------------

4th Circuit	Yes	4 th Cir. R. 35 and Internal Operating Procedure 35	<p>Petition for Rehearing En Banc</p> <p>A petition for rehearing en banc must be made at the same time, and in the same document, as a petition for rehearing. Petitions for rehearing en banc must be distributed to all active and senior judges of the Court, and to any visiting judge who may have heard and decided the appeal.</p>
-------------------------------	-----	--	---

Voting Judges

A majority of the circuit judges who are in regular active service may grant a hearing or rehearing en banc. The term "majority" means all judges of the Court in regular active service who are presently serving, without regard to whether a judge is disqualified. A judge who joins the Court after a petition has been submitted to the Court, and before an order has been entered, will be eligible to vote on the decision to hear or rehear a case en banc.

5th Circuit	Yes	5 th Cir. R. 35 and Internal Operating Procedure 35	<p>Sanctions/Caution</p> <p>The Fifth Circuit warns counsel that in every case the duty of counsel is fully discharged without filing a petition for rehearing en banc unless the case meets the rigid standards of Fed. R. App. P. 35(a). En banc hearing or rehearing is not favored.</p>
-------------------------------	-----	--	--

The Court states that among the reasons for disfavored en banc proceedings is that each request for en banc consideration must be studied by every active judge of the court and is a serious strain on limited judicial resources. Counsel have a duty to the court commensurate with that owed their clients to read with attention and observe with restraint the standards of Fed. R. App. P. 35(b)(1).

The Fifth Circuit takes the view that, given the extraordinary nature of petitions for en banc consideration, it is fully justified in imposing sanctions on its own initiative under Fed. R. App. P. 38 and 28 U.S.C. § 1927, upon the person who signed the

SUMMARY GUIDE TO FEDERAL CIRCUITS' EN BANC RULES AND PROCEDURES

Circuit Court	En Banc Rehearing	En Banc Circuit Rule	Notes
---------------	-------------------	----------------------	-------

petitions, the represented party, or both, for manifest abuse of the procedure.

Petition for Rehearing En Banc

A petition for en banc consideration must include the following items: a statement that the issue or issues asserted merit en banc consideration.

Argument and authorities. These must specifically address, not only their merit, but why they are worthy of en banc consideration.

Extraordinary Nature of Petitions for Rehearing En Banc

A petition for rehearing en banc is an extraordinary procedure that is intended to bring to the attention of the entire court an error of exceptional public importance or an opinion that directly conflicts with prior Supreme Court, Fifth Circuit or state law precedent. Alleged errors in the facts of the case (including sufficiency of the evidence) or in the application of correct precedent to the facts of the case are generally matters for panel rehearing but not for rehearing en banc.

The Rules admonish the overuse of petitions for rehearing en banc as the most abused prerogative of appellate advocates in the Fifth Circuit. Fewer than 1% of the cases decided by the court on the merits are reheard en banc; and frequently those rehearings granted result from a request for en banc reconsideration by a judge of the court rather than a petition by the parties.

Petition for Rehearing En Banc

A suggestion for a hearing or rehearing en banc may be made as provided in FRAP 35 or by any member of the en banc Court. The granting of a rehearing en banc serves to vacate the previous opinion and judgment of the Court, to stay the mandate and to restore the case on the docket as a pending appeal. Any petition for rehearing

6th Circuit Yes 6th Cir. R. 35
and
Internal Operating
Procedure 35

SUMMARY GUIDE TO FEDERAL CIRCUITS' EN BANC RULES AND PROCEDURES

Circuit Court	En Banc Rehearing	En Banc Circuit Rule	Notes
----------------------	--------------------------	-----------------------------	--------------

containing a suggestion for rehearing en banc must state so plainly on the cover and in the title to the document.

Sanctions/Caution

The Sixth Circuit admonishes practitioners by stating that en banc consideration of a case is an extraordinary measure, and in every case the duty of counsel is fully discharged without filing a suggestion for rehearing en banc unless the case meets the rigid standards of FRAP 35(a). The filing of a petition for rehearing, with or without a suggestion for rehearing en banc, is not a prerequisite to the filing of a petition for writ of certiorari.

A petition for rehearing en banc is intended to bring to the attention of the entire Court a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Sixth Circuit precedent. Alleged errors in the determination of state law or in the facts of the case (including sufficient evidence), or errors in the application of correct precedent to the facts of the case, are matters for panel rehearing but not for rehearing en banc.

7th Circuit

Yes

7th Cir. R. 35

and

Internal Operating Procedure 5

Voting Judges

A simple majority of the voting active judges is required to grant a rehearing en banc.

(2) Time for Voting. Judges are expected to vote within 10 days of the request for a vote or within 10 days of the filing of the answer pursuant to the request for a vote, whichever is later.

Only Seventh Circuit active judges and any Seventh Circuit senior judge who was a member of the original panel may participate in rehearsings en banc.

SUMMARY GUIDE TO FEDERAL CIRCUITS' EN BANC RULES AND PROCEDURES

Circuit Court	En Banc Rehearing	En Banc Circuit Rule	Notes
------------------	----------------------	----------------------	-------

8th Circuit	Yes	8 th Cir. R. 35 and Internal Operating Procedure IV (D)	<p>Petition for En Banc Hearing</p> <p>In the Eighth Circuit, a petition must not refer to or adopt by reference any matter from other briefs or motions in the case.</p>
-------------------------------	-----	---	--

Sanctions/Caution

The court may assess costs against counsel who files a frivolous petition for rehearing en banc deemed to have multiplied the proceedings in the case and to have increased costs unreasonably and vexatiously. At the court's order, counsel personally may be required to pay those costs to the opposing party.

Extraordinary Nature of Petitions for Rehearing En Banc

Petitions for rehearing are not favored by the Eighth Circuit and are granted infrequently. The Court notes that petitions for rehearing en banc require substantial processing and the expenditure of time by judges who have not participated in the case, as well as by the hearing panel, and should be reserved for cases necessary to maintain and secure the uniformity of decisions or that raise questions of exceptional importance.

The Court reminds practitioners that the issue of whether a case should be reheard en banc is separate and distinct from the issue of whether the case should be reheard by the panel. A panel may rehear a case if it questions whether its decision was correct. The court may rehear a case en banc if the case "is of such significance to the full court that it deserves the attention of the full court."

Petition for Rehearing En Banc

9th Circuit	Yes	9 th Cir. R. 35	<p>Where a party petitions for hearing or rehearing en banc, the Court will not order a hearing or rehearing without giving the other parties an opportunity to express their views whether hearing or rehearing en banc is appropriate. Where no petition for en</p>
-------------------------------	-----	----------------------------	---

SUMMARY GUIDE TO FEDERAL CIRCUITS' EN BANC RULES AND PROCEDURES

Circuit
Court

En Banc
Rehearing

En Banc Circuit Rule

Notes

banc review is filed, the Court will not ordinarily order a hearing or rehearing en banc without giving counsel an opportunity to respond on the appropriateness of such a hearing.

Extraordinary Nature of Petitions for Rehearing En Banc

The Ninth Circuit states that when the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for suggesting a rehearing en banc.

Voting Judges

The en banc court, for each case or group of related cases taken en banc, shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court. In the absence of the Chief Judge, an 11th active judge shall be drawn by lot, and the most senior active judge on the panel shall preside.

10th Circuit

Yes

10th Cir. R. 35

Extraordinary Nature of Petitions for Rehearing En Banc

The Tenth Circuit states that a request for en banc consideration is disfavored. En banc review is termed as an extraordinary procedure intended to focus the entire court on an issue of exceptional public importance or on a panel decision that conflicts with a decision of the United States Supreme Court or of the Tenth Circuit Court.

Petition for Rehearing En Banc

The request for en banc consideration must appear on the cover page and in the title of the document requesting rehearing.

A copy of the opinion or order and judgment that is the subject of a request for

SUMMARY GUIDE TO FEDERAL CIRCUITS' EN BANC RULES AND PROCEDURES

Circuit Court	En Banc Rehearing	En Banc Circuit Rule	Notes
---------------	-------------------	----------------------	-------

rehearing en banc must be attached to every copy of the petition.

Extraordinary Nature of Petitions for En Banc Consideration

The Eleventh Circuit joins the majority of circuits courts by emphasizing that a petition for en banc consideration, either on initial hearing or rehearing, is an extraordinary procedure intended to bring to the attention of the entire court a precedent-setting error of exceptional importance in an appeal or other proceeding. An en banc consideration for a rehearing is intended to bring to the attention of the entire court a panel opinion that is allegedly in direct conflict with precedent of the Supreme Court or of the Eleventh Circuit.

Alleged errors in a panel's determination of state law, or in the facts of the case (including sufficiency of the evidence), or error asserted in the panel's misapplication of correct precedent to the facts of the case, are matters for rehearing before the panel but not for en banc consideration.

Sanctions/Caution

The Eleventh Circuit rules remind counsel that his/her duty is fully discharged without filing a petition for rehearing en banc if the rigid standards of FRAP 35(a) are not met, and that the filing of a petition for rehearing or rehearing en banc is not a prerequisite to filing a petition for writ of certiorari.

Statement by Counsel

One or both of the following statements of counsel must be made in seeking en banc review:

"I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the

SUMMARY GUIDE TO FEDERAL CIRCUITS' EN BANC RULES AND PROCEDURES

Circuit Court	En Banc Rehearing	En Banc Circuit Rule	Notes
---------------	-------------------	----------------------	-------

United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: [cite specifically the case or cases];” or

“I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: [set forth each question in one sentence].”

Voting Judges

D.C. Cir. R. 35

Yes

D.C. Circuit

A case will be reviewed en banc if a majority of the judges in regular active service agree to hear it en banc. Judges who are recused or disqualified from participating in the case are counted as judges in regular active service.

Statement by Counsel

A petition that an appeal be initially heard en banc must contain the following statement of counsel at the beginning:

“Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance; (set forth each question in a separate sentence).”

A petition that an appeal be reheard en banc must contain one or both of the following statements of counsel at the beginning:

“Based on my professional judgment, I believe the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedent(s) of this court: (cite specific decisions);” or

“Based on my professional judgment, I believe this appeal requires an answer to one

SUMMARY GUIDE TO FEDERAL CIRCUITS' EN BANC RULES AND PROCEDURES

Circuit Court	En Banc Rehearing	En Banc Circuit Rule	Notes
---------------	-------------------	----------------------	-------

or more precedent-setting questions of exceptional importance: (set forth each question in a separate sentence).”

Sanctions/Caution

Arguing to a Panel to Overrule a Precedent. Although only the court en banc may overrule a binding precedent, a party may argue, in its brief and oral argument, to overrule a binding precedent without petitioning for hearing en banc. The panel will decide whether to ask the regular active judges to consider hearing the case en banc.