

United States Court of Appeals

Eleventh Circuit
56 Forsyth Street, NW
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

www.ca11.uscourts.gov

Peter F. Busscher
Chief Deputy Clerk

August 5, 2024

MEMORANDUM

Enclosed are proposed amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit. Text to be added is in bold and double-underlined, while text to be deleted is lined-through.

Comments on the proposed amendments may be submitted in writing at the above address, or electronically at <http://www.ca11.uscourts.gov/rules/proposed-revisions>, no later than Wednesday, September 4, 2024.

David J. Smith

UNITED STATES
COURT OF APPEALS
for the
ELEVENTH CIRCUIT

PROPOSED REVISIONS TO ELEVENTH CIRCUIT RULES

- FEDERAL RULES OF APPELLATE PROCEDURE
- ELEVENTH CIRCUIT RULES
- *INTERNAL OPERATING PROCEDURES*

August 2024

FRAP 10. The Record on Appeal

(a) Composition of the Record on Appeal. The following items constitute the record on appeal:

- (1) the original papers and exhibits filed in the district court;**
- (2) the transcript of proceedings, if any; and**
- (3) a certified copy of the docket entries prepared by the district clerk.**

(b) The Transcript of Proceedings.

(1) Appellant's Duty to Order. Within 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

(A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals and with the following qualifications:

- (i) the order must be in writing;**
- (ii) if the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order must so state; and**
- (iii) the appellant must, within the same period, file a copy of the order with the district clerk; or**

(B) file a certificate stating that no transcript will be ordered.

(2) Unsupported Finding or Conclusion. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion.

(3) Partial Transcript. Unless the entire transcript is ordered:

(A) the appellant must—within the 14 days provided in Rule 10(b)(1)—file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement;

(B) by the district court before or after the record has been forwarded; or

(C) by the court of appeals.

(3) All other questions as to the form and content of the record must be presented to the court of appeals.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; May 1, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 26, 2009, eff. Dec. 1, 2009.)

* * * *

~~11th Cir. R. 10-1 Ordering the Transcript - Duties of Appellant and Appellee. Appellant's written order for a transcript or certification that no transcript will be ordered, as required by FRAP 10(b), shall be on a form prescribed by the court of appeals. Counsel and pro se parties shall file the form with the district court clerk and the clerk of the court of appeals, and send copies to the appropriate court reporter(s) and all parties, in conformance with instructions included on the form. The form must be filed and sent as indicated above within 14 days after filing the notice of appeal or after entry of an order disposing of the last timely motion of a type specified in FRAP 4(a)(4).~~

~~—If an appellee designates additional parts of the proceedings to be ordered, orders additional parts of the proceedings, or moves in the district court for an order requiring appellant to do so, as provided by FRAP 10(b), a copy of such designation, transcript order, or motion shall be simultaneously sent to the clerk of this court in addition to being filed and served on other parties as provided by FRAP 10(b).~~

* * * *

~~*I.O.P. - Ordering the Transcript. Transcript Order Form. The form that an appellant should use to order a transcript or certify that no transcript will be ordered pursuant to FRAP 10(b)(1) is available at The transcript order form prescribed by the court of appeals may be obtained from the court's website at www.call.uscourts.gov. Financial arrangements for payment of the costs of the transcript which are satisfactory to the reporter must be made before the transcript order is complete and signed by appellant. The clerk may send to the district court a transcript order mistakenly filed in this court. The clerk's office will ask the district courts to electronically notify this court when a transcript order or certification is filed in their courts.*~~

- must clearly identify the person or entity that has been added, deleted, corrected, or otherwise changed; and
- if represented by counsel, must update the web-based CIP to reflect the amendments on the same day the amended CIP is filed.

If an amended CIP that deletes a person or entity is filed, every other party must, within 10 days after the filing of the amended CIP, file a notice indicating whether or not it agrees that the deletion is proper.

11th Cir. R. 26.1-5 Failure to Submit a CIP or Complete the Web-based CIP.

(a) The court will not act upon any papers requiring a CIP, including emergency filings, until the CIP is filed and the web-based CIP is completed, except to prevent manifest injustice.

(b) The clerk is not authorized to submit to the court any brief, petition, answer, motion, response, or reply that does not contain the CIP, or any of those papers in a case or appeal where the web-based CIP has not been completed, but may receive and retain the papers pending supplementation of the papers with the required CIP and pending completion of the web-based CIP.

(c) The failure to comply with 11th Cir. Rules 26.1-1 through 26.1-4 may result in dismissal of the case or appeal under 11th Cir. R. 42-1(b), return of deficient documents without action, or other sanctions on counsel, the party, or both.

Cross-Reference: FRAP 5, 5.1, 21, 27, 28, 29,~~35~~

- (a) it is without legal merit and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law, or the establishment of new law; or
- (b) it contains assertions of material facts that are false or unsupported by the record; or
- (c) it is presented for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Sanctions may be monetary or nonmonetary in nature. Monetary sanctions may include an order to pay a penalty into the court, or an order directing payment to another party of some or all of the attorney's fees and expenses incurred by that party as a result of the frivolous motion, or both.

When a motion to impose sanctions is filed under this rule, the court may, if warranted, award to the party prevailing on the motion reasonable attorney's fees and expenses incurred in presenting or opposing the motion.

11th Cir. R. 27-5 Motions to Reinstate. No action will be taken on a motion to reinstate a dismissed appeal unless the deficiencies that caused the appeal to be dismissed have been remedied. The clerk's office will notify the parties when no action is taken pursuant to this rule.

* * * *

I.O.P. -

1. Routing Procedures to Judges. *Pre-submission motions requiring consideration by judges are assigned to motions panels. Composition of these panels is changed at the beginning of each court year in October, and upon a change in the court's membership. The clerk submits the motion papers to the judges assigned in rotation from a routing log, the effect of which is to route motions randomly to judges based on filing date. In matters requiring panel action, the papers are sent to the first judge (initiating judge), who will transmit them to the second judge with a recommendation. The second judge in turn sends them on to the third judge who returns the file and an appropriate order to the clerk.*

2. Emergency Motion Procedure. *Emergency motions are assigned in rotation from a separate emergency routing log. The papers are forwarded to all panel members simultaneously. If the matter requires that counsel contact panel members individually, the clerk after first securing panel approval will advise counsel (or parties) of the identity of the panel members to whom the appeal is assigned.*

3. Motions to Expedite Appeals. *Except as otherwise provided in these rules, and unless the court directs otherwise, an appeal may be expedited only by the court upon motion and for good cause shown. Unless the court otherwise specifies, the clerk will fix an appropriate briefing schedule which will permit the appeal to be heard at an early date.*

file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for the response.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 28, 2010, effective Dec. 1, 2010; Apr. 28, 2016, eff. Dec. 1, 2016; Apr. 26, 2018, eff. Dec. 1, 2018.)

* * * *

11th Cir. R. 29-1 Motions for Leave. Motions for leave to file a brief of amicus curiae must comply with FRAP 27 and 11th Cir. R. 27-1, including the requirement of a Certificate of Interested Persons and Corporate Disclosure Statement as described in FRAP 26.1 and the accompanying circuit rules.

11th Cir. R. 29-2 Amicus Brief. In addition to the requirements of FRAP 29(a)(4), an amicus brief must contain items (a), (b), (d), (e), (h), (j), (k), (l), (m) and (n) of 11th Cir. R. 28-1.

11th Cir. R. 29-3 Motion for Leave to File Amicus Brief in Support of Petition for Rehearing En Banc. A request for leave to file an amicus brief in support of a petition for rehearing en banc must be made by motion accompanied by the proposed brief in conformance with 11th Cir. R. ~~35-5~~40-3, except that ~~subsections~~subsection (f) and (k) may be omitted. The proposed amicus brief must not exceed the length limits set out in FRAP 29(b)(4), exclusive of items required by 11th Cir. R. ~~35-5~~40-3(a), (b), (c), (d), and (j). The cover must be green. An amicus curiae must file its proposed brief, accompanied by a motion for filing when necessary, no later than seven days after the petition for rehearing en banc being supported is filed. Unless the court directs otherwise, no response to the motion may be filed.

11th Cir. R. 29-4 Motion for Leave to File Amicus Brief in Support of Petition for Panel Rehearing. A request for leave to file an amicus brief in support of a petition for panel rehearing must be made by motion accompanied by the proposed brief in conformance with FRAP 29(a)(3) and (a)(4) and the corresponding circuit rules. The proposed amicus brief must not exceed the length limits set out in FRAP 29(b)(4), exclusive of items that do not count towards page limitations as described in 11th Cir. R. 32-4. The cover must be green. An amicus curiae must file its proposed brief, accompanied by a motion for filing when necessary, no later than seven days after the petition for panel rehearing being supported is filed. Unless the court directs otherwise, no response to the motion may be filed.

* * * *

I.O.P. -

1. Citation of Supplemental Authorities. After an amicus brief has been filed, counsel for amicus may direct a letter to the clerk with citations to supplemental authorities. *See* FRAP 28(j). The body of the letter must not exceed 350 words, including footnotes. If a new case is not reported, copies should be appended. When such a letter is filed in paper, four copies must be filed, with service on counsel for the parties and other amicus curiae in the appeal.

2. Length of Amicus Brief in a Cross-Appeal. The maximum length of an amicus brief in a cross-appeal, regardless of the party supported, is one-half the maximum length authorized by FRAP 28.1(e) for an appellant/cross-appellee's principal brief.

Cross-Reference: FRAP 26.1

- Motion to proceed In Forma Pauperis
- Motion for a Certificate of Appealability or to expand a Certificate of Appealability
- Motion of a type specified in FRAP 4(a)(4)(A) or FRAP 4(b)(3)(A)
- Determination of excusable neglect or good cause as specified in FRAP 4(a)(5)(A) or FRAP 4(b)(4)
- Assessment of fees pursuant to the ~~Prisoner~~Prison Litigation Reform Act
- Appointment and/or withdrawal of counsel
- Request for transcript at government expense
- Designation by appellee of additional parts of the proceedings to be ordered from the court reporter, order by appellee of such parts, or motion by appellee for an order requiring appellant to order such parts, as provided by FRAP 10(b)(3)(B) and (C)
- Motion to consolidate appeals, provided that such motion is filed on or before the date the appellant's brief is due in any of the appeals which are the subject of such motion

Except as otherwise provided below, if any of the foregoing motions or matters are pending in either the district court or the court of appeals after the appellant (or appellant/cross-appellee) has served and filed a brief, the appellee (or appellee/cross-appellant) shall serve and file a brief within 30 days after the date on which the district court or the court of appeals rules on the motion or resolves the matter, and the appeal is allowed to proceed, or within 30 days after the date on which the supplemental record is deemed filed as provided by 11th Cir. R. 12-1, whichever is later.

When a motion to consolidate appeals is filed or is pending after an appellant has served and filed a brief in any of the appeals which are the subject of such motion, the due date for filing appellee's brief shall be postponed until the court rules on such motion. If the motion is granted, the appellee (or appellee/cross-appellant) shall serve and file a brief in the consolidated appeals within 30 days after the date on which the court rules on the motion, or within 30 days after service of the last appellant's brief, whichever is later. If the motion is denied, the appellee (or appellee/cross-appellant) shall serve and file a brief in each separate appeal within 30 days after the date on which the court rules on the motion, or within 30 days after service of the last appellant's brief in that separate appeal, whichever is later.

(c) Effect of Other Pending Motions on Time for Serving and Filing Brief. Except as otherwise provided in this rule, a pending motion does not postpone the time for serving and filing any brief. However, the filing of a motion to dismiss a criminal appeal based on an appeal waiver in a plea agreement or of a motion for summary affirmance or summary reversal shall postpone the due date for the filing of any remaining brief until the court rules on such motion. In addition, a motion to file a brief out-of-time, a motion to file a brief that does not comply with the court's rules, or a motion to file a replacement brief shall postpone the due date for filing an opposing party's response brief or reply brief until the court rules on such motion.

(e) Response. No response may be filed to a petition for an en banc consideration unless the court orders a response. The length limits in Rule 35(b)(2) apply to a response.

(f) Call for a Vote. A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 25, 2005, eff. Dec. 1, 2005; Apr. 28, 2016, eff. Dec. 1, 2016; Apr. 27, 2020, eff. Dec. 1, 2020.)

* * * *

~~11th Cir. R. 35-1 Number of Copies and Length. Four copies of a petition for en banc consideration pursuant to FRAP 35 shall be filed whether for initial hearing or rehearing. A petition for en banc consideration shall not exceed the length limitations set out in FRAP 35(b)(2), exclusive of items required by 11th Cir. R. 35-5(a), (b), (c), (d), (j), and (k). If a petition for en banc consideration is made with a petition for rehearing (whether or not they are combined in a single document) the combined documents shall not exceed the length limitations set out in FRAP 35(b)(2), exclusive of items required by 11th Cir. R. 35-5(a), (b), (c), (d), (j), and (k).~~

~~—Use of the ECF system does not modify the requirement that filers must provide to the court four paper copies of a petition for en banc consideration, whether for initial hearing or rehearing. Filers will be considered to have complied with this requirement if, on the day the electronic petition is filed, the filer sends four paper copies to the clerk using one of the methods outlined in FRAP 25(a)(2)(A)(ii).~~

~~11th Cir. R. 35-2 Time - Extensions. A petition for en banc rehearing must be filed within 21 days of entry of judgment, except that a petition for en banc rehearing in a civil appeal in which the United States or an agency or officer thereof is a party must be filed within 45 days of entry of judgment. Judgment is entered on the opinion filing date. No additional time is allowed for mailing. Counsel should not request extensions of time except for the most compelling reasons. For purposes of this rule, a “civil appeal” is one that falls within the scope of 11th Cir. R. 42-2(a).~~

~~11th Cir. R. 35-3 Extraordinary Nature of Petitions for En Banc Consideration. A petition for en banc consideration, whether upon 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, and, with specific reference to a petition for en banc consideration upon 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 this 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.~~

~~—Counsel are reminded that the duty of counsel 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.~~

~~11th Cir. R. 35-4 Matters Not Considered En Banc. A petition for rehearing en banc tendered with respect to any of the following orders will not be considered by the court en banc, but will be referred as a motion for reconsideration to the judge or panel that entered the order sought to be reheard:~~

~~—(a) Administrative or interim orders, including but not limited to orders ruling on requests for the following relief: stay or injunction pending appeal; appointment of counsel; leave to appeal in forma pauperis; and, permission to appeal when an appeal is within the court’s discretion.~~

~~—(b) Any order dismissing an appeal that is not published including, but not limited to, dismissal for failure to prosecute or because an appeal is frivolous.~~

~~11th Cir. R. 35-5 Form of Petition. A petition for en banc consideration shall be bound in a white cover which is clearly labeled with the title “Petition for Rehearing (or Hearing) En Banc.” A petition for en banc consideration shall contain the following items in this sequence:~~

~~—(a) a cover page as described in 11th Cir. R. 28-1(a);~~

~~—(b) a Certificate of Interested Persons and Corporate Disclosure Statement as described in FRAP 26.1 and the accompanying circuit rules;~~

~~—(c) where the party petitioning for en banc consideration is represented by counsel, one or both of the following statements of counsel as applicable:~~

~~————— 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 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]~~

~~————— 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]~~

~~_____/s/_____~~

~~_____ATTORNEY OF RECORD FOR_____~~

~~—(d) table of contents and citations;~~

~~—(e) statement of the issue(s) asserted to merit en banc consideration;~~

~~—(f) statement of the course of proceedings and disposition of the case;~~

~~—(g) statement of any facts necessary to argument of the issues;~~

- ~~—(h) argument and authorities. These shall concern only the issues and shall address specifically not only their merit but why they are contended to be worthy of en banc consideration;~~
- ~~—(i) conclusion;~~
- ~~—(j) certificate of service, if required by FRAP 25(d);~~
- ~~—(k) a copy of the opinion sought to be reheard.~~

~~11th Cir. R. 35-6 Response to Petition. A response to a petition for en banc consideration may not be filed unless requested by the court.~~

~~11th Cir. R. 35-7 En Banc Briefs. An en banc briefing schedule shall be set by the clerk for all appeals in which rehearing en banc is granted by the court. Ten copies of en banc briefs must be filed and served. En banc briefs should be prepared in the same manner and form as opening briefs and conform to the requirements of FRAP 28 and 32. The covers of all en banc briefs shall be of the color required by FRAP 32 and shall contain the title “En Banc Brief.” Unless otherwise directed by the court, the page and type-volume limitations described in FRAP 32(a)(7) apply to en banc briefs.~~

~~—Use of the ECF system does not modify the requirement that filers must provide to the court ten paper copies of en banc briefs. Filers will be considered to have complied with this requirement if, on the day the electronic brief is filed, the filer sends ten paper copies to the clerk using one of the methods outlined in FRAP 25(a)(2)(A)(ii).~~

~~11th Cir. R. 35-8 En Banc Amicus Briefs. The United States or its officer or agency or a state may file an en banc amicus brief without the consent of the parties or leave of court. Any other amicus curiae must request leave of court by filing a motion accompanied by the proposed brief in conformance with FRAP 29(a)(3) through (a)(5) and the corresponding circuit rules. An amicus curiae must file its en banc brief, accompanied by a motion for filing when necessary, no later than the due date of the principal en banc brief of the party being supported. An amicus curiae that does not support either party must file its en banc brief, accompanied by a motion for filing when necessary, no later than the due date of the appellant’s or petitioner’s principal en banc brief. An amicus curiae must also comply with 11th Cir. R. 35-7.~~

~~11th Cir. R. 35-9 Senior Circuit Judges’ Participation. Senior circuit judges of the Eleventh Circuit assigned to duty pursuant to statute and court rules may sit en banc reviewing decisions of panels of which they were members and may continue to participate in the decision of a case that was heard or reheard by the court en banc at a time when such judge was in regular active service.~~

~~11th Cir. R. 35-10 Effect of Granting Rehearing En Banc. Unless otherwise expressly provided, the effect of granting a rehearing en banc is to vacate the panel opinion and the corresponding judgment.~~

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~~I.O.P.—~~

~~1. Time. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing en banc whether or not combined with a petition for rehearing is timely only if received by the clerk within the time specified in 11th Cir. R. 35-2.~~

~~2. Panel Has Control. A petition for rehearing en banc will also be treated as a petition for rehearing before the original panel. Although a copy of the petition for rehearing en banc is distributed to each panel judge and every active judge of the court, the filing of a petition for rehearing en banc does not take the appeal out of plenary control of the panel deciding the appeal. The panel may, on its own, grant rehearing by the panel and may do so without action by the full court. A petition for rehearing will not be treated as a petition for rehearing en banc.~~

~~3. Requesting a Poll. Within 30 days of the date that the clerk transmits the petition for rehearing en banc, any active Eleventh Circuit judge may advise the “notify judge” that in the event the panel declines to grant rehearing, the judge requests that a poll be taken regarding en banc consideration. The “notify judge” is the writing judge if that judge is a member of this court. If the writing judge is a visiting judge, the notify judge will be the senior active judge of this court on the panel or, if none, the senior non-active judge of this court on the panel. At the same time the judge shall notify the clerk to withhold the mandate, and the clerk will enter an order withholding the mandate.~~

~~————— If the panel, after such notice, concludes not to grant rehearing, the notify judge will inform the chief judge of that fact and that a request was made that a poll be taken regarding en banc consideration. After giving the other judges a reasonable time to respond to the poll request, the chief judge then polls the court by written ballot on whether rehearing en banc is to be granted.~~

~~4. No Poll Request. If after expiration of the specified time for requesting a poll, the notify judge has not received a poll request from any active member of the court, the panel, without further notice, may take such action as it deems appropriate on the petition for rehearing en banc. In its order disposing of the appeal or other matter and the petition, the panel must note that no poll was requested by any judge of the court in regular active service.~~

~~5. Requesting a Poll on Court’s Own Motion. Any active Eleventh Circuit judge may request that the court be polled on whether rehearing en banc should be granted whether or not a petition for rehearing en banc has been filed by a party. This is ordinarily done by a letter from the requesting judge to the chief judge with copies to the other active and senior judges of the court and any other panel member. At the same time the judge shall notify the clerk to withhold the mandate, and the clerk will enter an order withholding the mandate. The identity of the judge will not be disclosed in the order.~~

~~6. Polling the Court. Upon request to poll, the chief judge will give the other judges a reasonable time to respond to the poll request and then conducts a poll. Each active judge receives a form ballot that is used to cast a vote. A copy of each judge’s ballot is sent to all other active judges. The ballot form indicates whether the judge voting desires oral argument if en banc is granted.~~

~~7. Effect of Recusal or Disqualification on Number of Votes Required. A recused or disqualified judge is not counted in the base when calculating whether a majority of circuit judges in regular~~

~~active service have voted to rehear an appeal en banc. If, for example, there are 12 circuit judges in regular active service on this court, and five of them are recused or disqualified in an appeal, rehearing en banc may be granted by affirmative vote of four judges (a majority of the seven non-recused and non-disqualified judges).~~

8. ~~Negative Poll. If the vote on the poll is unfavorable to en banc consideration, the chief judge enters the appropriate order.~~

9. ~~En Banc Rehearing Procedures Following Affirmative Poll.~~

~~a. Appeal Managers. When an appeal is voted to be reheard en banc, the chief judge shall designate as appeal managers a group of active judges of this court. The chief judge will ordinarily designate the judge who authored the panel opinion, the judge who requested that the court be polled regarding whether the appeal should be reheard en banc, and a judge who dissented from or specially concurred in the panel opinion, if they are active circuit judges of this court. The chief judge may, however, designate other active circuit judges as appeal managers.~~

~~b. Initial Notice to Counsel. The clerk meanwhile notifies counsel that rehearing en banc has been granted but that they should not prepare en banc briefs until they are advised of the issue(s) to be briefed and length limitations on briefs.~~

~~c. Notice of Issue(s) to be Briefed. The appeal managers prepare and circulate to the other members of the en banc court a proposed notice to the parties advising which issue(s) should be briefed to the en banc court, length limitations on briefs, and whether the appeal will be orally argued or submitted on briefs. The notice may also set the time limits for oral argument. In appeals with multiple appellants or appellees, the notice may direct parties to file a single joint appellants' or appellees' en banc brief. In such cases the side directed to file a single joint brief may be allotted some extension of the length limitations that would otherwise apply to the brief. Members of the en banc court thereafter advise the appeal managers of any suggested changes in the proposed notice. Provided that no member of the en banc court objects, counsel may be advised that the en banc court will decide only specified issues, and after deciding them, remand other issues to the panel. Once the form of the notice has been approved by the court, the clerk issues the notice to counsel.~~

~~d. Oral Argument. Appeals to be reheard en banc will ordinarily be orally argued unless fewer than three of the judges of the en banc court determine that argument should be heard.~~

Cross-Reference: FRAP 40, 41

FRAP 40. Petition for Panel Rehearing

(a) Time to File; Contents; Response; Action by the Court if Granted.

(1) Time. Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry of judgment if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the court of appeals' judgment is entered or files the petition for that person.

(2) Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

(3) Response. Unless the court requests, no response to a petition for panel rehearing is permitted. Ordinarily, rehearing will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(b) apply to the response.

(4) Action by the Court. If a petition for panel rehearing is granted, the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:

(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 28, 2016, eff. Dec. 1, 2016; Apr. 27, 2020, eff. Dec. 1, 2020.)

* * * *

~~11th Cir. R. 40-1 Contents. A copy of the opinion sought to be reheard shall be included as an addendum to each petition for rehearing. This addendum does not count towards length limitations.~~

11th Cir. R. 40-2-1 Number of Copies. Four copies of a petition for initial hearing en banc, petition for panel rehearing, or petition for rehearing en banc pursuant to FRAP 40 shall be filed. Use of the ECF system does not modify the requirement that filers must provide to the court four paper copies of a petition ~~for rehearing~~. Filers will be considered to have complied with this requirement if, on the day the electronic petition is filed, the filer sends four paper copies to the clerk using one of the methods outlined in FRAP 25(a)(2)(A)(ii).

11th Cir. R. 40-3-2 Time - Extensions. A petition for panel rehearing or rehearing en banc must be filed within 21 days of entry of judgment, except that a petition for panel rehearing or rehearing en banc in a civil appeal in which the United States or an officer or agency thereof is a party must be filed within 45 days of entry of judgment. ~~Judgment is entered on the opinion filing date. No additional time shall be allowed for mailing.~~ Counsel should not request extensions of time except for the most compelling reasons. For purposes of this rule, a “civil appeal” is one that falls within the scope of 11th Cir. R. 42-2(a). Counsel should not request extensions of time except for the most compelling reasons.

11th Cir. R. 40-3 Form. The form of a petition for panel rehearing is governed by FRAP 32(c)(2). A petition for en banc consideration shall be bound in a white cover titled “Petition for Rehearing (or Hearing) En Banc.” A petition for en banc consideration shall contain the following items in this sequence:

(a) a cover page as described in 11th Cir. R. 28-1(a);

(b) a Certificate of Interested Persons and Corporate Disclosure Statement as described in FRAP 26.1 and the accompanying circuit rules;

(c) where the party petitioning for en banc consideration is represented by counsel, one or both of the following statements of counsel as applicable:

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 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]

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]

/s/ _____

ATTORNEY OF RECORD FOR

- (d) table of contents and citations;
- (e) statement of the issue(s) asserted to merit en banc consideration;
- (f) statement of the course of proceedings and disposition of the case;
- (g) statement of any facts necessary to argument of the issues;
- (h) argument and authorities. These shall concern only the issues and shall address specifically not only their merit but why they are contended to be worthy of en banc consideration;
- (i) conclusion; and
- (j) certificate of service, if required by FRAP 25(d).

11th Cir. R. 40-4 Length. A petition for panel rehearing, for initial hearing en banc, for rehearing en banc, or for both panel and en banc rehearing, shall not exceed the length limitations in FRAP 40(d)(3), exclusive of items required by 11th Cir. R. 35-5(a), (b), (c), (d), and (j).

11th Cir. R. 40-5 Supplemental Authorities. If pertinent and significant authorities come to a party's attention while a party's petition for **panel** rehearing or petition for rehearing en banc is pending, a party may promptly advise the clerk by letter, with a copy to all other parties. The body of the letter must not exceed 350 words, including footnotes. If a new case is not reported, copies should be appended. When such a letter is filed in paper, four copies must be filed.

11th Cir. R. ~~40-4~~ [Rescinded] 40-6 Extraordinary Nature of Petitions for En Banc Consideration. A petition for en banc consideration, whether upon 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, and, with specific reference to a petition for en banc consideration upon 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 this 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.

11th Cir. R. 40-7 Matters Not Considered En Banc. A petition for rehearing en banc tendered with respect to any of the following orders will not be considered by the court en banc, but will

be referred as a motion for reconsideration to the judge or panel that entered the order sought to be reheard:

(a) Administrative or interim orders, including but not limited to orders ruling on requests for the following relief: stay or injunction pending appeal; appointment of counsel; leave to appeal in forma pauperis; and, permission to appeal when an appeal is within the court's discretion.

(b) Any order dismissing an appeal that is not published including, but not limited to, dismissal for failure to prosecute or because an appeal is frivolous.

11th Cir. R. 40-8 En Banc Briefs. An en banc briefing schedule shall be set by the clerk for all appeals in which initial hearing en banc or rehearing en banc is granted by the court. Ten copies of en banc briefs must be filed and served. En banc briefs should be prepared in the same manner and form as opening briefs and conform to the requirements of FRAP 28 and 32. The covers of all en banc briefs shall be of the color required by FRAP 32 and shall contain the title "En Banc Brief." Unless otherwise directed by the court, the page and type-volume limitations described in FRAP 32(a)(7) apply to en banc briefs.

Use of the ECF system does not modify the requirement that filers must provide to the court ten paper copies of en banc briefs. Filers will be considered to have complied with this requirement if, on the day the electronic brief is filed, the filer sends ten paper copies to the clerk using one of the methods outlined in FRAP 25(a)(2)(A)(ii).

11th Cir. R. 40-9 En Banc Amicus Briefs. The United States or its officer or agency or a state may file an en banc amicus brief without the consent of the parties or leave of court. Any other amicus curiae must request leave of court by filing a motion accompanied by the proposed brief in conformance with FRAP 29(a)(3) through (a)(5) and the corresponding circuit rules. An amicus curiae must file its en banc brief, accompanied by a motion for filing when necessary, no later than the due date of the principal en banc brief of the party being supported. An amicus curiae that does not support either party must file its en banc brief, accompanied by a motion for filing when necessary, no later than the due date of the appellant's or petitioner's principal en banc brief. An amicus curiae must also comply with 11th Cir. R. 40-8.

11th Cir. R. 40-10 Senior Circuit Judges' Participation. Senior circuit judges of the Eleventh Circuit assigned to duty pursuant to statute and court rules may sit en banc reviewing decisions of panels of which they were members and may continue to participate in the decision of a case that was heard or reheard by the court en banc at a time when such judge was in regular active service.

11th Cir. R. 40-11 Effect of Granting Rehearing En Banc. Unless otherwise expressly provided, the effect of granting a rehearing en banc is to vacate the panel opinion and the corresponding judgment.

* * * *

I.O.P. -

1. Necessity for Filing. *As indicated in 11th Cir. R. 35-3, it **It** is not necessary to file a petition for **panel** rehearing or petition for rehearing en banc in the court of appeals as a prerequisite to the filing of a petition for writ of certiorari in the Supreme Court of the United States. Counsel are also reminded that the duty of counsel is fully discharged without filing a petition for rehearing en banc if the rigid standards of FRAP 35(a) **40(b)(2)** are not met.*

2. Petition for Panel Rehearing. *A petition for **panel** rehearing is intended to bring to the attention of the panel claimed errors of fact or law in the opinion. It is not to be used for reargument of the issues previously presented or to attack the court's non-argument calendar procedures. Petitions for **panel** rehearing are reviewed by panel members only.*

3. Time. *Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing is timely only if received by the clerk within the time specified in 11th Cir. R. 40-3.*

4. Form of Petition for Panel Rehearing. *The form of a petition for panel rehearing is governed by FRAP 32(c)(2).*

Cross-Reference: FRAP 35

3. Panel Has Control. *A petition for rehearing en banc will also be treated as a petition for panel rehearing. Although a copy of the petition for rehearing en banc is distributed to each panel judge and every active judge of the court, the filing of a petition for rehearing en banc does not take the appeal out of plenary control of the panel deciding the appeal. The panel may, on its own, grant rehearing by the panel and may do so without action by the full court. A petition for panel rehearing will not be treated as a petition for rehearing en banc.*

4. Requesting a Poll. *Within 30 days of the date that the clerk transmits the petition for rehearing en banc, any active Eleventh Circuit judge may advise the "notify judge" that in the event the panel declines to grant rehearing, the judge requests that a poll be taken regarding en banc consideration. The "notify judge" is the writing judge if that judge is a member of this court. If the writing judge is a visiting judge, the notify judge will be the senior active judge of this court on the panel or, if none, the senior non-active judge of this court on the panel. At the same time the judge shall notify the clerk to withhold the mandate, and the clerk will enter an order withholding the mandate.*

If the panel, after such notice, concludes not to grant rehearing, the notify judge will inform the chief judge of that fact and that a request was made that a poll be taken regarding en banc consideration. After giving the other judges a reasonable time to respond to the poll request, the chief judge then polls the court by written ballot on whether rehearing en banc is to be granted.

5. No Poll Request. *If after expiration of the specified time for requesting a poll, the notify judge has not received a poll request from any active member of the court, the panel, without further notice, may take such action as it deems appropriate on the petition for rehearing en banc. In its order disposing of the appeal or other matter and the petition, the panel must note that no poll was requested by any judge of the court in regular active service.*

6. Requesting a Poll on Court's Own Motion. Any active Eleventh Circuit judge may request that the court be polled on whether rehearing en banc should be granted whether or not a petition for rehearing en banc has been filed by a party. This is ordinarily done by a letter from the requesting judge to the chief judge with copies to the other active and senior judges of the court and any other panel member. At the same time the judge shall notify the clerk to withhold the mandate, and the clerk will enter an order withholding the mandate. The identity of the judge will not be disclosed in the order.

7. Polling the Court. Upon request to poll, the chief judge will give the other judges a reasonable time to respond to the poll request and then conducts a poll. Each active judge receives a form ballot that is used to cast a vote. A copy of each judge's ballot is sent to all other active judges. The ballot form indicates whether the judge voting desires oral argument if en banc is granted.

8. Effect of Recusal or Disqualification on Number of Votes Required. A recused or disqualified judge is not counted in the base when calculating whether a majority of circuit judges in regular active service have voted to rehear an appeal en banc. If, for example, there are 12 circuit judges in regular active service on this court, and five of them are recused or disqualified in an appeal, rehearing en banc may be granted by affirmative vote of four judges (a majority of the seven non-recused and non-disqualified judges).

9. Negative Poll. If the vote on the poll is unfavorable to en banc consideration, the chief judge enters the appropriate order.

10. En Banc Rehearing Procedures Following Affirmative Poll.

a. Appeal Managers. When an appeal is voted to be reheard en banc, the chief judge shall designate as appeal managers a group of active judges of this court. The chief judge will ordinarily designate the judge who authored the panel opinion, the judge who requested that the court be polled regarding whether the appeal should be reheard en banc, and a judge who dissented from or specially concurred in the panel opinion, if they are active circuit judges of this court. The chief judge may, however, designate other active circuit judges as appeal managers.

b. Initial Notice to Counsel. The clerk will notify counsel that rehearing en banc has been granted but that they should not prepare en banc briefs until they are advised of the issue(s) to be briefed and length limitations on briefs.

c. Notice of Issue(s) to be Briefed. The appeal managers prepare and circulate to the other members of the en banc court a proposed notice to the parties advising which issue(s) should be briefed to the en banc court, length limitations on briefs, and whether the appeal will be orally argued or submitted on briefs. The notice may also set the time limits for oral argument. In appeals with multiple appellants or appellees, the notice may direct parties to file a single joint appellants' or appellees' en banc brief. In such cases the side directed to file a single joint brief may be allotted some extension of the length limitations that would otherwise apply to the brief. Members of the en banc court thereafter advise the appeal managers of any suggested changes in the proposed notice. Provided that no member of the en banc court objects, counsel may be advised that the en banc court will decide only specified

issues, and after deciding them, remand other issues to the panel. Once the form of the notice has been approved by the court, the clerk issues the notice to counsel.

d. Oral Argument. Appeals to be reheard en banc will ordinarily be orally argued unless fewer than three of the judges of the en banc court determine that argument should be heard.

2. Return of Record. *The original record and any exhibits are returned to the clerk of the district court or agency with the mandate.*

3. Certified Records for Supreme Court of the United States. *Pursuant to Rule 12.7 of the Rules of the Supreme Court of the United States, the clerks of the courts of appeals are deemed to be the custodial agents of the record pending consideration of a petition for a writ of certiorari. Therefore, the clerk's office does not prepare a certified record unless specifically requested to do so by the Clerk of the Supreme Court. If certiorari is granted, the Clerk of the Supreme Court will request the clerk of the court of appeals to certify and transmit the record. See Rule 16.2 of the Rules of the Supreme Court of the United States.*

Cross-Reference: FRAP ~~35~~, 36, 40

FRAP 42. Voluntary Dismissal

- (a) **Dismissal in the District Court.** Before an appeal has been docketed by the circuit clerk, the district court may dismiss the appeal on the filing of a stipulation signed by all parties or on the appellant's motion with notice to all parties.
- (b) **Dismissal in the Court of Appeals.**
 - (1) **Stipulated Dismissal.** The circuit clerk must dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due.
 - (2) **Appellant's Motion to Dismiss.** An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.
 - (3) **Other Relief.** A court order is required for any relief under Rule 42(b)(1) or (2) beyond the dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.
- (c) **Court Approval.** This Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.
- (d) **Criminal Cases.** A court may, by local rule, impose requirements to confirm that a defendant has consented to the dismissal of an appeal in a criminal case.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 11, 2022, eff. Dec. 1, 2022.)

* * * *

11th Cir. R. 42-1 [Dismissal of Appeals](#).

(a) [Stipulated Dismissal Agreements and Motions to Dismiss by Appellants or Petitioners](#). If an appeal has been assigned to a panel on the merits, any stipulated dismissal agreement or motion to dismiss the appeal will be submitted to that panel. If an appeal has not been assigned to a panel on the merits, the clerk may clerically dismiss the appeal if the parties file a stipulated dismissal agreement or if the appellant or petitioner files an unopposed motion to dismiss the appeal. In such circumstances, the clerk will issue a copy of the order as and for the mandate. By issuing such a dismissal, the clerk expresses no opinion on the effect of that dismissal. If an appeal has not been assigned to a panel on the merits and an appellant's or petitioner's motion to dismiss is opposed, it will be submitted to the court. All motions to dismiss and stipulated dismissal agreements must contain a Certificate of Interested Persons and Corporate Disclosure Statement in compliance with FRAP 26.1 and the accompanying circuit rules. For motions to dismiss criminal appeals, see also 11th Cir. R. 27-1(a)(7) and 27-1(a)(8).

(b) [Dismissal for Failure to Prosecute](#). Except as otherwise provided for briefs and appendices in civil appeals in 11th Cir. R. 42-2 and 42-3, when [an](#) appellant fails to file a brief or

other required papers within the time permitted, or otherwise fails to comply with the applicable rules, the clerk shall ~~issue a notice to counsel, or to pro se~~ **notify the** appellant, that upon expiration of 14 days from the date ~~thereof~~ **of the notice** the appeal will be dismissed for ~~want of prosecution~~ **failure to prosecute** if the default has not been remedied by filing the brief or other required papers and a motion to file documents out of time. Within that 14-day notice period a party in default must seek leave of the court, by appropriate motion, to file documents out of time or otherwise remedy the default. Failure to timely file such motion will result in dismissal for want of prosecution. **If the default is remedied outside of the 14-day notice period, the appellant must also file a motion to reinstate if the appeal has been dismissed or a motion to file out of time or otherwise remedy the default if the appeal has not yet been dismissed.**

If a motion for extension of time to remedy the default is filed within the 14-day notice period, ~~The the~~ clerk shall not dismiss ~~an the~~ appeal during the pendency of a ~~timely filed the~~ motion for an extension of time to file appellant's brief or appendix, but if the court denies such leave ~~the motion~~ after the expiration of the due date for filing the brief or appendix **applicable deadline has expired**, the clerk shall dismiss the appeal forthwith. ~~The clerk shall not dismiss an appeal during the pendency of a timely filed motion to file documents out of time or otherwise remedy the default which is accompanied by the brief or other required papers, but if the court denies such leave the clerk shall dismiss the appeal forthwith.~~

If an appellant is represented by appointed counsel, the clerk may refer the matter to the Chief Judge for consideration of possible disciplinary action against counsel in lieu of dismissal.

11th Cir. R. 42-2 Dismissal in a Civil Appeal for Appellant's Failure to File Brief or Appendix by Due Date.

(a) Applicability of Rule. The provisions of this rule apply to all civil appeals, including Tax Court appeals, bankruptcy appeals, appeals in cases brought pursuant to 28 U.S.C. §§ 2254 and 2255, review of agency orders, and petitions for extraordinary writs when briefing has been ordered, but not including appeals of orders revoking supervised release or of orders entered pursuant to Rule 35 of the Federal Rules of Criminal Procedure or 18 U.S.C. § 3582.

(b) Notice of Due Date for Filing Brief and Appendix. Eleventh Circuit Rules 30-1(c) and 31-1 establish the due dates for filing the brief and appendix. To facilitate compliance, the clerk will send counsel and pro se parties a notice confirming the due date for filing appellant's brief and appendix consistent with 11th Cir. R. 30-1(c) and 31-1. However, delay in or failure to receive such notice does not affect the obligation of counsel and pro se parties to file the brief and appendix within the time permitted by the rules.

(c) Dismissal Without Further Notice. When an appellant has failed to file the brief or appendix by the due date as established by 11th Cir. R. 30-1(c) and 31-1 and set forth in the clerk's notice, or, if the due date has been extended by the court, within the time so extended, an appeal shall be treated as dismissed for failure to prosecute on the first business day following the due date. The clerk thereafter will enter an order dismissing the appeal. If an appellant is represented by appointed counsel, the clerk may refer the matter to the Chief Judge for consideration of possible disciplinary action against counsel in lieu of dismissal.

(f) Duties of Appointed Counsel.

(1) In all cases appealed under the Act or in forma pauperis where trial counsel has been appointed by the district court under the Act, the appointed counsel shall file with the district court the appropriate CJA Form 24 for the court reporter's furnishing the transcript of testimony at the expense of the United States.

(2) Appointed counsel shall furnish the party represented, upon written request, with a copy of motion papers and briefs filed for the party on the appeal, and shall send the party a copy of the court's decision when issued.

(3) If oral argument is scheduled, appointed counsel shall appear unless otherwise directed by the court.

(4) Appointed counsel shall advise the party represented in each case covered by the Act that, if the party wishes to appeal to the court of appeals or file a petition for a writ of certiorari with the Supreme Court, the right exists under the Act to do so without prepayment of fees and costs or giving security therefor and without filing the affidavit of financial inability to pay such costs required by 28 U.S.C. § 1915(a).

(5) If the decision of this court is adverse to the client, counsel shall inform the client of the right to file a petition for panel rehearing or petition for rehearing en banc in this court, or to petition the Supreme Court of the United States for a writ of certiorari. Counsel shall file a petition for panel rehearing, a petition for rehearing en banc, or a petition for a writ of certiorari if requested to do so by the client in writing, but only if in counsel's considered judgment sufficient grounds exist. Sufficient grounds for requesting rehearing en banc do not exist unless the suggestion would satisfy the standards of FRAP ~~35(a)~~ 40(b)(2). See 11th Cir. R. ~~35-3~~ 40-6. Sufficient grounds for filing a petition for a writ of certiorari do not exist unless in counsel's considered judgment there are grounds that are not frivolous and are consistent with the standards for filing a petition under the Rules of the Supreme Court and applicable case law. If counsel concludes that there are *not* sufficient grounds to seek further review of a type requested by the client, counsel shall so inform the client in writing and shall advise the client that such review will not be sought by counsel. In such circumstances, counsel is not required to move to withdraw. If the client files a petition for panel rehearing or rehearing en banc, and this court grants the petition, counsel shall resume representation of the client without the need for a new order of appointment. If the client petitions the Supreme Court of the United States for a writ of certiorari, and the Supreme Court grants certiorari and remands the matter to this court for further consideration, counsel shall resume representation of the client in proceedings before this court without the need for a new order of appointment.

(6) No appointed representative under this plan shall accept any payment from or on behalf of the person represented in this court without prior authorization by a United States circuit judge. All such authorized payments shall be received subject to the directions contained in any such order and pursuant to the provisions of subsection (f) of the Act.