

United States Court of Appeals for the Federal Circuit

FOR IMMEDIATE RELEASE

December 17, 2008

The United States Court of Appeals for the Federal Circuit proposes to amend its Rules. These amendments are subject to public notice and comment under 28 U.S.C. § 2071(b).

Attached for public comment are revisions to Federal Circuit Rules 35 and 40. New material is underlined; stricken material is in strikethrough text.

All suggested alternatives should be submitted according to the attached "Format for Proposing Changes to Federal Circuit Rules."

Comments should be sent to:

Office of the Clerk
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

**Comments must be received by the close of business on
January 16, 2009.**

Rule 35. En Banc Determination

(a) General.

- (1) **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.
- (2) **Frivolous Petition.** A petition for hearing or rehearing en banc that does not meet the standards of Federal Rule of Appellate Procedure 35(a) may be deemed frivolous and subject to sanctions.

(b) Statement of Counsel.

- (1) **Petition for Hearing En Banc.** 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).

/s/ _____
ATTORNEY OF RECORD FOR _____

- (2) **Petition for Rehearing En Banc.** 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).

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).

/s/ _____
ATTORNEY OF RECORD FOR _____

(c) Petition for Hearing or Rehearing En Banc; Response.

- (1) **Certificate of Interest.** A certificate of interest (see Federal Circuit Rule 47.4) must be included in a petition for a hearing or rehearing en banc or a response to such a petition. The certificate must appear immediately following the cover.
- (2) **Items Excluded from Page Limitation.** The following items do not count against the page limitation in Federal Rule of Appellate Procedure 35(b)(2):
 - (A) the certificate of interest;
 - (B) the table of contents;
 - (C) the table of citations; and
 - (D) any addendum containing statutes, rules, regulations, and similar matters.
- (3) **Rehearing En Banc; Time; Copy of Opinion or Judgment.**

(A) A petition for rehearing en banc must be filed within the time prescribed by Federal Circuit Rule 40(e) for filing a petition for rehearing.

(B) A petition for a rehearing must include a copy of the opinion or the judgment of affirmance without opinion. The copy must be bound with the petition as an addendum.

(4) **Number of Copies.** If only nonconfidential copies are filed, an original and eighteen copies of a petition for hearing or rehearing en banc must be filed with the court. Two copies must be served on each party separately represented. If confidential and nonconfidential copies are filed, an original and eighteen copies of the confidential petition and original and three copies of the nonconfidential petition must be filed with the court. Two copies of the confidential petition and one copy of the nonconfidential petition must be served on each party separately represented.

(d) Combined Petition for Panel Rehearing and Rehearing En Banc. If a party chooses to file both a petition for panel rehearing, see Federal Circuit Rule 40, and a petition for a rehearing en banc, then the two must not be filed separately, they must be combined. A combined petition for panel rehearing and rehearing en banc must comply with Federal Circuit Rule 35(c). The cover of a combined petition must indicate that it is a combined petition.

(e) Contents of Petition for Hearing En Banc, Rehearing En Banc, and Combined Petition; Response.

(1) **Petition for Hearing En Banc.** The preferred contents and organization for a petition for a hearing en banc are:

(A) white cover or first sheet with the information prescribed in Federal Rule of Appellate Procedure 32(a)(2);

(B) the certificate of interest (see Federal Circuit Rule 47.4);

(C) the table of contents;

(D) the table of authorities;

(E) the statement of counsel required in Federal Circuit Rule 35(b);

(F) the argument; and

(G) the proof of service (see Federal Rule of Appellate Procedure 25(d)).

(2) **Petition for Rehearing En Banc.** The preferred contents and organization for a petition for a rehearing en banc are:

(A) white cover or first sheet with the information prescribed in Federal Rule of Appellate Procedure 32(a)(2);

(B) the certificate of interest (see Federal Circuit Rule 47.4);

(C) the table of contents;

(D) the table of authorities;

(E) the statement of counsel required in Federal Circuit Rule 35(b);

(F) the argument;

- (G) the addendum containing a copy of the court's opinion or judgment of affirmance without opinion sought to be reheard; and
 - (H) the proof of service (see Federal Rule of Appellate Procedure 25(d)).
- (3) **Combined Petition for Panel Rehearing and Rehearing En Banc.** The preferred contents and organization for a combined petition for panel rehearing and a rehearing en banc are:
- (A) white cover or first sheet with the information prescribed in Federal Rule of Appellate Procedure 32(a)(2);
 - (B) the certificate of interest (see Federal Circuit Rule 47.4);
 - (C) the table of contents;
 - (D) the table of authorities;
 - (E) the statement of counsel required in Federal Circuit Rule 35(b);
 - (F) the points of law or fact overlooked or misapprehended by the panel of the court;
 - (G) the argument in support of a rehearing;
 - (H) the argument in support of rehearing en banc;
 - (I) the addendum containing a copy of the court's opinion or judgment of affirmance without opinion sought to be reheard; and
 - (J) the proof of service (see Federal Rule of Appellate Procedure 25(d)).
- (4) **Response.** If the court requests a response, which must not exceed 15 pages unless otherwise ordered, the preferred contents and organization are:
- (A) white cover or first sheet with the information prescribed in Federal Rule of Appellate Procedure 32(a)(2);
 - (B) the certificate of interest (see Federal Circuit Rule 47.4);
 - (C) the table of contents;
 - (D) the table of authorities;
 - (E) argument against a rehearing, rehearing en banc, or both; and
 - (F) the proof of service (see Federal Rule of Appellate Procedure 25(d)).
- (f) **Additional Copies of Briefs in Cases to be Heard En Banc.** Within 7 days after the order granting a rehearing en banc, counsel must file 30 sets of the briefs that were before the panel that initially heard the appeal, unless the court directs otherwise.

- (g) **Length of Amicus Curiae Brief.** Except by the court's permission or direction, an amicus curiae brief submitted in connection with a petition for hearing en banc, a petition for rehearing en banc, or a combined petition for panel rehearing and rehearing en banc, must be accompanied by a motion for leave and must not exceed 10 pages. Except by the court's permission or direction, any brief amicus curiae or any motion for leave to file a brief amicus curiae must be filed within 14 calendar days of the date of filing of the petition or response that the amicus curiae supports. If the amicus curiae does not support either party, then the brief or motion for leave to file the brief must be filed within 14 calendar days of the date of filing of the petition.
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Practice Notes

HEARING OR REHEARING EN BANC. The court may sua sponte order that an appeal be initially heard or be reheard en banc. The panel or a judge on the panel that is considering a case may at any time request the active judges of the court to hear or rehear the case en banc with or without further briefs or argument by counsel.

REHEARING EN BANC; SENIOR JUDGES. If a senior judge participated in the original hearing and disposition of a case for which rehearing en banc is granted, that senior judge may participate fully in the rehearing.

COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC. When a combined petition for panel rehearing and petition for rehearing en banc is filed, the petition for panel rehearing is decided first in the same manner as a petition for panel rehearing without an accompanying petition for rehearing en banc. If the panel grants the requested relief, the petition for rehearing en banc is deemed moot.

PETITION FOR REHEARING EN BANC REFERRED TO PANEL. A petition for rehearing en banc is presumed to request relief that can be granted by the panel that heard the appeal, and action on the petition for rehearing en banc will be deferred until the panel has an opportunity to grant the relief requested.

TIMELINESS. A petition for hearing or rehearing en banc is filed when the court receives it, not on mailing. The clerk will return an untimely petition for hearing or rehearing en banc.

NONPRECEDENTIAL OPINIONS. A petition for rehearing en banc is rarely appropriate if the appeal was the subject of a nonprecedential opinion by the panel of judges that heard it.

WRIT OF CERTIORARI. Filing a petition for a panel rehearing or for rehearing en banc is not a prerequisite to filing a petition for a writ of certiorari in the Supreme Court.

Rule 40. Petition for Panel Rehearing

(a) Contents of Petition for Panel Rehearing. The preferred contents and organization for a petition for panel rehearing are:

- (1) white cover or first page with the information prescribed in Federal Rule of Appellate Procedure 32(a)(2);
- (2) the certificate of interest (see Federal Circuit Rule 47.4);
- (3) the table of contents;
- (4) the points of law or fact overlooked or misapprehended by the court;
- (5) the argument;
- (6) the addendum containing a copy of the court's opinion or judgment of affirmance without opinion sought to be reheard; and
- (7) the proof of service (see Federal Rule of Appellate Procedure 25(d)).

(b) Addendum. A copy of the opinion or judgment of affirmance without opinion sought to be reheard must be bound with the petition for panel rehearing as an addendum.

(c) Items Excluded from Page Limitation; Other Material.

- (1) **Items Excluded.** The following items do not count against the page limitation in Federal Rule of Appellate Procedure 40(b):
 - (A) the certificate of interest;
 - (B) the table of contents;
 - (C) the table of citations;
 - (D) the addendum containing a copy of the opinion or judgment of affirmance without opinion; and
 - (E) any addendum containing statutes, rules, regulations, and similar matters.
- (2) **Other Material.** Material not listed in this Federal Circuit Rule 40 may not be included in the addendum or in an appendix without leave of the court.

(d) Answer. If the court requests an answer, which must not exceed 15 pages unless otherwise ordered, the preferred contents and organization for the answer are:

- (1) white cover or first sheet with the information prescribed in Federal Rule of Appellate Procedure 32(a)(2);
- (2) the certificate of interest (see Federal Circuit Rule 47.4);
- (3) the table of contents;
- (4) the argument; and
- (5) the proof of service (see Federal Rule of Appellate Procedure 25(d)).

(e) Time. Except for a civil case in which the United States or its officer or agency is a party, a petition

for panel rehearing may be filed within 30 days after entry of judgment. If the United States or its officer or agency is a party, a petition for panel rehearing may be filed within 45 days after entry of judgment. The time limits set forth in this rule Federal Rule of Appellate Procedure 40(a)(1) also apply to a motion for panel reconsideration of a dispositive panel order.

(f) Informal Petition for Panel Rehearing; Answer.

- (1) **Informal Petition.** A pro se party may file an original and 3 copies of an informal petition for panel rehearing in letter form not to exceed 15 typewritten double-spaced pages, attaching to each a copy of the opinion or judgment sought to be reheard.
- (2) **Informal Answer.** If the court requests an answer to an informal petition for panel rehearing, or if the court requests a pro se party to answer a formal petition for panel rehearing, the answer may be informal, following the standards prescribed for informal briefs. The informal answer may not exceed 15 typewritten double-spaced pages and must be filed in an original and 3 copies.

- (g) ~~Length of Amicus Curiae Brief.~~** Except by the court's permission or direction, an amicus curiae brief submitted in connection with a petition for panel rehearing must be accompanied by a motion for leave to file and must not exceed 10 pages. Except by the court's permission or direction, any brief amicus curiae or any motion for leave to file a brief amicus curiae must be filed within 14 calendar days of the date of filing of the petition or response that the amicus curiae supports. If the amicus curiae does not support either party, then the brief or motion for leave to file the brief must be filed within 14 calendar days of the date of filing of the petition.

Practice Notes

PETITION FOR PANEL REHEARING NOT FILED WHEN MAILED. A petition for panel rehearing, unlike a brief, is not deemed filed when mailed; it must be received by the clerk within the time fixed for filing. The time provided in Federal Rule of Appellate Procedure 40(a)(1) Federal Circuit Rule 40(e) runs from the date the judgment is entered (see Federal Rule of Appellate Procedure 36), not from the date counsel receives the opinion or order. Therefore, Federal Rule of Appellate Procedure 26(c) does not apply. The clerk may return an untimely petition for panel rehearing.

ACTION BY THE COURT. When a petition for panel rehearing is filed, the clerk will transmit copies to the panel that decided the case. The clerk will enter an order denying the petition unless a majority of the panel agrees to rehear the case. Rehearing before the panel may take place with or without further briefing or oral argument by the parties as the court directs.

FORMAT FOR PROPOSING CHANGES TO FEDERAL CIRCUIT RULES

Current Rule	Proposed Rule	Rationale
If there is an existing rule or internal operating procedure, set it forth verbatim in this column.	When there is an existing rule, please put it verbatim in this column with the deletions lined out and the new material highlighted. If there is no pre-existing rule, simply set forth the proposed rule.	Provide as much background and rationale as you believe is necessary.

The Court would appreciate written submissions being accompanied by a diskette annotated with the word processing and virus scanning programs used.